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VOLUME 73

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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

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¹ Resigned October 20, 1911.
² Appointed October 20, 1911.
³ Resigned January 15, 1912.
⁴ Qualified January 14, 1912.

⁵ Resigned January 9, 1912.
⁶ Elected Chief Justice January 10, 1912.
⁷ Elected January 12, 1912.

⁸ Ceased to be President January 9, 1912.
⁹ Became President January 9, 1912.

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CIRCUIT COURT OF SOUTH CAROLINA

Amended at Convention of Judges, December 19, 1906

RULE XI.¹

The first paragraph is stricken out and the following inserted in lieu thereof:

"Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard and the opinion of the court has been pronounced: Provided, no argument shall be had on any objection to the admissibility of evidence unless especially requested by the presiding judge; nor shall one attorney interrupt another in the course of his argument, without first obtaining the permission of the court."

RULE XXI.

Amended to read as follows:

"On the trial of issues of fact, one counsel only, on each side, shall examine or cross-examine a witness, and not more than one counsel, on each side, shall sum up or be heard in

any cause; and during such examination the examining counsel shall stand; and the testimony, if taken down in writing, shall be written by some other person than the examining counsel; and upon the trial of all causes, at law and in equity, and upon the hearing of all motions, arguments shall be limited to one hour for each side. Time for argument may be extended beyond one hour, but only on motion, and before any argument commences."

A new rule was adopted, to be known as:

RULE LXXVII.

The point that there is no evidence to support an alleged cause of action shall be first made, either by a motion for nonsuit or a motion to direct the verdict; and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict.

¹ For rule as previously amended, see 33 S. E. vii.



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THE SOUTHEASTERN REPORTER

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BLACKBURN v. LEE et al.
(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 142*)—QUESTION FOR JURY.

Where the question was whether a married woman conveyed land to her son so as to furnish him a basis of credit or to enable him by a conveyance of the land to secure the payment of his debts, or whether the transaction was merely colorable and a scheme, in which the creditors participated, to make her in fact, though not in name, a surety for the debt of her husband, it was error to direct a verdict, where it could not be properly declared that, under the evidence introduced, and all reasonable deductions or inferences therefrom, a particular verdict was demanded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

2. APPEAL AND ERROR (§ 657*)—RECORD—CORRECTION.

Where no motion for a new trial was made, but a brief of the evidence was approved and made a part of the record, as provided by Civil Code 1910, § 6141, and the bill of exceptions specified it as a part of the record to be sent to this court, and where the original brief of evidence was attached to the bill of exceptions and transmitted therewith, this court, upon having the fact brought to its attention, will order its clerk to send the original record to the clerk of the superior court and direct the latter to certify and transmit a transcript as required by law, and, upon receipt of it in due time, will decline to dismiss the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830-2833; Dec. Dig. § 657.*]

3. APPEAL AND ERROR (§ 588*)—RECORD—BRIEF OF EVIDENCE.

The brief of evidence was somewhat subject to criticism as to the manner in which it was prepared, but it did not constitute so gross a disregard of the statute as to authorize this court to refuse to consider it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 588.*]

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by Elizabeth Blackburn against Lee He Lee and others. Judgment for defendants, and plaintiff brings error. Reversed.

A. E. Cochran and Z. D. Harrison, for plaintiff in error. Wilson-Bennett & Lambdin, for defendants in error.

LUMPKIN, J. A married woman owned a lot of land. By deed dated September 30, 1904, she conveyed it to her son, reciting a consideration of a thousand dollars. On February 13, 1905, the grantee in this deed and his father, the husband of the grantor, executed a deed to a corporation, to secure certain promissory notes signed by the makers. This deed included certain turpentine leases, mules, horses, naval stores, etc., and also the land covered by the former deed. The land was described as the individual property of the son. This deed contained a power of sale upon default, and also authorized the grantee in it to purchase at any such sale. After default, the power was exercised, the land sold, and the creditor became the purchaser. Subsequently the woman who had conveyed to her son brought suit to recover the land. She alleged that the conveyance by her to her son and the making of the security deed constituted a mere scheme to avoid the statute, which prevented her from becoming surety, and that the agent of the defendant knew this and agreed that the defendant would make advances in connection therewith. On the trial the presiding judge directed a verdict for the defendants, and the plaintiff excepted.

[1] 1. Under our statute, a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, is void. Civil Code 1910, § 3007. A married woman may give land to her son. She may convey it to him in order that he may have a basis of credit, or for the purpose of enabling him, by a conveyance of the land, to secure the payment of his debts. If she does so, and does not herself become liable for the payment of the debt, she is bound by her deed, and must abide the loss of the land arising from her maternal generosity. But if the deed is not what it purports to be, but is a mere colorable transaction and part of a scheme, in which the creditor participates, to make her in fact a surety for the debt of

her son or husband, though not nominally bound for its payment, the transaction is contrary to law and void. *National Bank of Athens v. Carlton*, 96 Ga. 469, 23 S. E. 388.

A judge cannot properly direct a verdict because he may think that the strength or weight of the evidence is on one side, or because he might grant a new trial if a verdict should be returned against what he thinks is the preponderance of the evidence. Under the Code, this can be done only where there is no conflict in the material evidence, and where that introduced with all reasonable deductions or inferences therefrom demands a particular verdict. Civil Code (1910), § 5926.

Applying the principles above enunciated to the evidence in this case, the court erred in directing a verdict. The evidence was somewhat confused as to the existence of a former firm or corporation and the relation of it to the defendant company, and whether the agent who negotiated with the father and son represented the former or latter company when the negotiations began; but the same person represented the defendant company when the security deed was made, and it was made to the defendant, not to the other company. The evidence of the witnesses for the plaintiff was by no means clear on other points. Nevertheless there was enough to prevent the direction of a verdict. The plaintiff testified: "In signing the deed, my misunderstanding was that he [her son] mortgaged the property to West-Flynn-Harris Company [the defendant company] as security for my husband for some money that the West-Flynn-Harris Company had loaned him. That was the understanding." Referring to a preliminary conversation with the agent, the son testified: "He wanted to know what we could put up as security, and what I proposed to invest in the business; and I told him and my father told him. I just simply stated to him how it stood. I told him that it was my mother's property, and that she was willing to put it up to secure my father's interest." Again: "Yes, I told him I was putting in cash, and that my mother was putting in the home place to secure my father's interest." Still further, he stated that he first saw the deed to him when he and his father met the agent again; that his father then handed him the deed, saying, "Your mother has made the deed to you"; that the witness looked at it and passed it to the agent; that the latter took it and went out, and after about 30 minutes returned and said, "We will take you up." The husband testified similarly, and also stated that the preliminary interview was with "the representative of the West-Flynn-Harris Company."

It is unnecessary to go further into the evidence. We are not deciding how the jury should find, or what the judge should do on a motion for new trial. We merely hold that the case was not one for the direction of a verdict.

The defendant demurred to a certain paragraph of the petition. The presiding judge announced that he would sustain the demurrer unless the plaintiff would strike the paragraph. The plaintiff amended by striking the objectionable paragraph and making other allegations in lieu of it. She then excepted to the judge's announcement. There was no judgment striking the paragraph. The plaintiff herself struck it, and there was nothing to which exception could be taken.

[2] 2. A motion to dismiss the writ of error was made. The plaintiff had a brief of evidence approved by the court and ordered filed as a part of the record. This may be done, instead of incorporating the evidence in the bill of exceptions, although no motion for a new trial is made. Civil Code 1910, § 6141. In specifying the parts of the record which should be sent up to this court, the bill of exceptions named "the brief of evidence, incorporated herein and made a part of this bill of exceptions, and order of approval of same by the court, and the entry of filing." Attached to the bill of exceptions by a paper fastener, after the certificate of the judge, the acknowledgment of service by counsel, and the certificate of the clerk, appeared what was evidently the original brief of evidence, with the approval and order for filing, signed by the judge, and the entry of filing by the clerk. It was not made an exhibit or identified as such. This court ordered such original paper to be returned by the clerk to the clerk of the superior court, with direction to certify and send up a transcript of such record. This has been done. Civil Code 1910, §§ 6149, 6181. The motion to dismiss the writ of error because the evidence was not properly brought to this court is overruled.

[3] 3. It was also urged that there was no sufficient effort to comply with the law as to making a condensed and proper brief of the evidence, and that what purported to be a brief of the evidence ought not to be considered. The paper is not a model of brevity or lucidity. But we cannot say that it presented so gross a disregard of the statute as to be treated as no brief. This court has said that it looks to substantial, rather than to technically or literally exact, compliance with the law on that subject. *Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 196)

MEADOR, Ordinary, et al. v. CENTRAL GEORGIA POWER CO.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***1. NUISANCE (§ 83*)—PUBLIC NUISANCE—ABATEMENT—JURISDICTION.**

Where a dam was erected across a stream in a certain county for the purpose of generating electric power and producing lights, and water was backed up in the stream and its tributaries, so as to extend into another county, the ordinary of the latter had no jurisdiction to proceed summarily, under Civil Code 1910, § 5333, for the purpose of abating the alleged public nuisance so caused.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 83.*]

2. PROHIBITION (§ 10*)—WHEN GRANTED—EXCEEDING JURISDICTION.

Where such ordinary, upon affidavit of certain freeholders, was taking steps to cause a jury to be summoned and to try the question of the existence of the alleged public nuisance, there was no error in the granting by the superior court of a writ of prohibition to prevent him from proceeding further.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Error from Superior Court, Newton County; L. S. Roan, Judge.

Prohibition, on the relation of the Central Georgia Power Company, against A. D. Meador, Ordinary. Writ of prohibition granted, and defendant and certain residents of Newton county bring error. Affirmed.

Rogers & Knox, for plaintiffs in error. Walter T. Johnson and Greene F. Johnson, for defendant in error.

LUMPKIN, J. The Central Georgia Power Company built a dam across the Ocmulgee river in Jasper and Butts counties, for the purpose of generating electricity by water, to be used in lighting towns and cities, and supplying light, heat, and power to railroads and the public generally. Certain residents of Newton county instituted proceedings before the ordinary of that county, under Civil Code 1910, § 5333, providing for abating a public nuisance in certain cases, alleging that the dam caused water to back up in the Ocmulgee river and its tributaries in Newton county, and created a public nuisance. The ordinary was proceeding to summon a jury and have a trial of the question, when the superior court of the circuit granted a writ of prohibition, and he and the movants before him excepted.

[1] 1. The section of the Code under which action was sought to be taken declares that, "if the nuisance complained of is a grist or saw mill, or other water machinery of valuable consideration, the same shall not be destroyed or abated, except," etc. Evidently this contemplated abating or destroying the dam or machinery itself, in a proper case, as the cause of the injury, not merely seeking

to attempt to abate the backwater resulting from a dam in another county. Section 5340, touching the fees of the sheriff for summoning a jury and for removing "any nuisance, machinery, or milldam," sustains this view. The proceeding to abate a public nuisance in the manner provided is a summary remedy, and the law must be strictly construed. The ordinary of Newton county had no jurisdiction over abating or destroying as a nuisance a dam or machinery in another county, if it should be held to be a nuisance. Authorities cited as to the venue of an indictment for creating a nuisance by polluting a stream, or as to actions by individuals damaged by the casting of foul matter upon their property, are not applicable to the summary abatement of a public nuisance under the statute.

[2] 2. It follows, from what has been held above, that the writ of prohibition furnished a proper remedy to stay further action by the ordinary of Newton county. *South Carolina R. Co. v. Ellis*, 40 Ga. 87; *Doughty Pearson & Co. v. Walker*, 54 Ga. 595; *Flite v. Black*, 85 Ga. 413, 11 S. E. 782; *Strong v. La Grange Mills*, 112 Ga. 117, 37 S. E. 117; *Ormond v. Ball*, 120 Ga. 916 (12), 48 S. E. 383; *McGriff v. State*, 135 Ga. 259, 69 S. E. 115. In *Turner v. Mayor, etc., of Forsyth*, 78 Ga. 683, 3 S. E. 649, the attack was rather upon the validity of a municipal ordinance of a penal character than upon the jurisdiction of the court to pass upon it.

Other questions have been argued, such as whether the dam and machinery of the plaintiff in error fell within the description of the statute sought to be enforced, and whether, under the legislative authority to erect such structures for furnishing light and power to the public, it could be declared that they were nuisances per se, if properly constructed and operated, whatever might be the rights of persons suffering consequential damages therefrom. But, as we have held that the ordinary of Newton county had no jurisdiction to deal with the matter at all, we deem it unnecessary to discuss what should be the ruling of a court of competent jurisdiction.

Judgment affirmed. All the Justices concur.

(137 Ga. 242)

NAPIER v. LITTLE et al.

(Supreme Court of Georgia. Nov. 16, 1911.)

*(Syllabus by the Court.)***1. WILLS (§§ 487, 490*)—CONSTRUCTION—EVIDENCE—PAROL TESTIMONY.**

It is not competent to allow the scrivener who writes the will to testify what the intention of the testator was as to the devise of certain lands, or what the scrivener's intention was with reference to describing the boundaries of the lands devised.

(a) Where the boundaries of lands devised by

a will are fixed, and this fact is patent upon the face of the will itself, but the description of the land comprised within those boundaries is ambiguous, parol testimony is admissible to adjust the description to the boundaries so fixed, but not for the purpose of changing the boundaries.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1032, 1047-1057; Dec. Dig. §§ 487, 490.*]

2. ADVERSE POSSESSION (§ 80*)—LIMITATION OF ACTIONS (§ 70*)—APPEAL AND ERROR (§ 1066*)—HOSTILE CHARACTER OF POSSESSION—INSTRUCTIONS—HARMLESS ERROR.

For color of title to be the basis of prescription, the instrument under which it is asserted must purport to describe the land in controversy.

(a) In joint actions for the recovery of land, it is error for the court to charge the jury that "if you believe from the testimony in this case, and all these are questions of fact for you to pass upon, that this action was commenced by these plaintiffs at any time within the statute after the youngest became of age, they would not be barred," but, under the facts of this case, this error was harmless.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 463-467; Dec. Dig. § 80.* *Limitation of Actions*, Cent. Dig. §§ 382-386; Dec. Dig. § 70.* *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

3. EVIDENCE (§ 358*)—DOCUMENTARY EVIDENCE—MAP.

A map made by a surveyor, proven to be correct, of the premises sued for in an action for land and of other tracts adjacent thereto, is admissible to go to the jury to illustrate other testimony in the case, and for the purpose of throwing light on the location of the land in controversy.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by Mrs. L. A. Little and another against Mrs. I. R. Napier. Judgment for plaintiffs, and defendant brings error. Affirmed.

This was a suit for land brought in the statutory form in Baldwin superior court by Mrs. Laura A. Little and Miss Mary Lizzie Williams against Mrs. Isabella R. Napier for the recovery of a certain tract of land, together with mesne profits, in Baldwin county, containing 275 acres, more or less, and described in the petition as follows: "Bounded by lands of the said Mrs. I. R. Napier, known as the 'picket field,' by lands of James Dismukes, by lands belonging to the estate of Mrs. L. V. Farrar, and by lands of Samuel Evans estate. Said tract of land is a part of what constituted the John Williams estate, and is known as the 'chicken house field.'" The plaintiffs were granddaughters of John Williams, Sr., and claimed title to the above-described land under the sixth item of the will of their said grandfather, which was as follows (omitting the personal property devised): "Also the lands adjoining the lands willed to G. T. Dismukes and Mrs. Napier, and the lands of J. H. Lawrence to the public road from Eatonton

to Clinton, and the lands given to their mother, Mrs. Martha M. Williams, of the above lands given to said children which contains five hundred (500) acres more or less—I allow my grandson, John S. Williams and his wife, Essie Williams, to use the Clayton field and 'Sprout Spring Field' said to contain 225 acres for a support during the life of my wife, Frances Amanda Williams, at her death then to go into the possession of the said grandchildren, Laura Amanda and Mary Lizzie Williams, I give said lands as willed with all the rights, members and privileges in any wise appertaining or belonging forever." The defendant in her answer contended that she was not in possession of any lands belonging to the plaintiffs in the case, that the description of the lands sued for, as contained in the petition, did not in any wise fit the description of the real estate she is in possession of, and that belonged to her father's estate, and she was unable to decide whether the plaintiffs intended to allege that the land she is in possession of is that sought to be described by them, but admits she is in possession of a tract of land that belonged to her deceased father, and which was by him devised to her. She claimed title to this land under the fifth item of the will of her father, John Williams, Sr., and averred that the plaintiffs were not entitled to recover said land, or the mesne profits thereof. The fifth item of said will reads as follows: "I give, bequeath and devise to my daughter, Mrs. Isabella Rountree Napier, all the lands situated and lying in Baldwin county, Ga., adjoining the lands of Dr. Snead, the lands willed to G. T. Dismukes, and the lands of J. H. Lawrence, up the branch to where one hundred acres was surveyed off, said to contain (350) Three Hundred and Fifty acres more or less, with (160) acres one hundred and sixty acres of land also lying in Gilmer county, Ga. She is to have said lands with all the rights, members and privileges to said lands in any wise appertaining or belonging forever." Before the trial the defendant amended her plea, and alleged that in a bill filed in Jones superior court at the October term, 1900, in the case of L. H. Andrews, Administrator of the Estate of John Williams, Sr., v. John S. Williams et al., which was a bill for direction, etc., the terms and provisions of the will of John Williams, Sr., were fully adjudicated by the court, and that all the parties thereto were estopped by the decree rendered in said case, and that, under said decree, the defendant was entitled to all the land in Baldwin county devised to her under the will of said John Williams, deceased, etc. The decree referred to in the defendant's answer is as follows, so far as relates to Mrs. I. R. Napier, Mrs. Laura Amanda Williams, and Miss Mary Lizzie Williams, to wit: "(2)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

That Mrs. Isabella R. Napier takes under the will, and that the lands described in item 5 of said will do vest in her, the said I. R. Napier, subject only to the debts of the estate, in the event all the other property of said estate shall be insufficient to pay said debts. * * * (5) That Mr. M. M. Williams, Laura Amanda Williams, and Mary Lizzie Williams and the other legatees and devisees take under the will, and that the title to the property, real and personal, to them bequeathed and devised vest in them subject to the debts of the estate." The defendant also set up a prescriptive title to the above lands, contending that under the above decree (subdivision 2) she went into possession of said lands in dispute, and has since been in the open, notorious, adverse, exclusive, and uninterrupted possession of said land for over seven years. Upon the evidence submitted and the charge of the court the jury found the premises in dispute for the plaintiffs, with mesne profits, and judgment was entered accordingly. The defendant made a motion for a new trial on the various grounds therein stated, which motion was overruled by the court, and she accepted.

Allen & Pottle, for plaintiff in error. Johnson & Johnson, E. T. Dumas, and Hines & Vinson, for defendants in error.

HILL, J. (after stating the facts as above). [1] The decision of this case rests largely upon the proper construction of the testator's will. The plaintiffs and the defendant both claim title to the land sued for under a common source—the will of John Williams, Sr. Mrs. Napier, his daughter, claims under item 5 of said will, and Mrs. Little and Miss Williams, his granddaughters, under item 6. As item 4 has some bearing upon the case, we give here each of these items:

"4th Item. I give, bequeath and devise to my step-son, G. T. Dismukes, (125) One Hundred and Twenty-five acres of land situated and lying in Baldwin County adjoining Dr. Snead and Mrs. Farrar with all the rights, members and privileges to said land in any wise appertaining or belonging forever.

"5th Item. I give, bequeath and devise to my daughter, Mrs. Isabella Rountree Napier, all the lands situated and lying in Baldwin County, Ga., adjoining the lands of Dr. Snead, the lands willed to G. T. Dismukes, and the lands of J. H. Lawrence, up the branch to where one hundred acres was surveyed off, said to contain (350) Three Hundred and Fifty acres more or less, with (160) acres one hundred and sixty acres of land also lying in Gilmer County, Ga. She is to have said lands with all the rights, members and privileges to said lands in any wise appertaining or belonging forever.

"6th Item. I give, bequeath and devise to

my granddaughters, Laura Amanda and Mary Lizzie Williams [here follows a bequest of personal property], also the lands adjoining the lands willed to G. T. Dismukes and Mrs. Napier, and the lands of J. H. Lawrence to the public road from Eatonton to Clinton, and the lands given to their mother, Mrs. Martha M. Williams, of the above lands given to said children which contains (500) five hundred acres, more or less. I allow my grandson, John S. Williams and his wife, Essie Williams, to use the Clayton field and Sprout Spring field said to contain (225) two hundred and twenty-five acres for a support during the life of my wife, Frances Amanda Williams, at her death then to go in the possession of the said grandchildren, Laura Amanda and Mary Lizzie Williams, I give said lands as willed with all the rights, members and privileges in any wise appertaining or belonging forever."

It is insisted by the plaintiffs in error that the language in the fifth item devising "all the lands situated and lying in Baldwin County, Ga., adjoining the lands of Dr. Snead, the lands willed to G. T. Dismukes, and the lands of J. H. Lawrence, up the branch to where one hundred acres was surveyed off, said to contain (350) Three Hundred and Fifty acres more or less," conveys all the land that testator had in Baldwin county to her, except that devised in the fourth item of said will to G. T. Dismukes. In support of this view, and on the theory that this clause of the will was ambiguous, the defendant offered on the trial of the case in the court below to show by the scrivener who wrote the will that it was the intention of the testator to devise to his daughter, Mrs. Napier, all the lands belonging to the testator in Baldwin county, except those devised to G. T. Dismukes. This the court declined to allow, and we think properly. Able counsel insisted that the witness should have been allowed to testify "by declaring what the intention of the testator was, and what his [the scrivener's] intention was," namely, that the testator intended by said devise to convey all his land in Baldwin county, except that devised to Dismukes, to his daughter, Mrs. Napier, and also what instructions were given by the testator to the scrivener at the time he drew the will of the testator as to the devise of the property to his daughter, Mrs. I. R. Napier.

The plaintiffs claimed a tract of land which extended from the line between Jones and Baldwin counties to the line of what was known as the "Dismukes tract." The defendant contended that under the sixth item of the will the plaintiffs were not entitled to any land in Baldwin county. The sixth item of the will declares that the land devised to the testator's grandchildren is bounded by the lands given to Dismukes

and Mrs. Napier. One leading question in the case is whether the description in the sixth item of the will calls for the land of Dismukes as one of its boundaries. The land given to Dismukes in the fourth item of the will was in Baldwin county, and some distance from the Jones county line. If, therefore, the Dismukes land formed one boundary of the lands devised in the sixth item of the will, it was impossible for such lands to lie wholly in Jones county, and not to extend into Baldwin county. It was contended that the will was so ambiguous that this could be shown by parol to be the fact. We hold, however, that upon the face of the will itself one of the boundaries of the lands devised to the testator's grandchildren was the land given to Dismukes, and another boundary was the land given to Mrs. Napier. We think unequivocally this was the meaning of the will. This being so, it follows that it was not competent to introduce parol testimony of the scrivener of the will to show that the testator instructed him to devise to the grandchildren lands lying only in Jones county. Still less would it be competent to permit him to testify in round terms what the testator meant, and what he himself meant. To allow the scrivener to change the boundaries of the land devised when they are patent upon the face of the will itself would put it in the power of the scrivener to make the testator's will. If, then, this boundary is fixed, it is competent to adjust by parol testimony the description of the land to the boundary, or boundaries, but it is not competent to disprove by parol testimony the boundary or boundaries fixed by the will itself. See *Gillespie v. Schuman*, 62 Ga. 252, 257; *Donehoo v. Johnson*, 120 Ala. 438, 24 South. 888. The defendant insists that all of the land devised to the plaintiffs lies in Jones, and not in Baldwin, county. But the language of the sixth item is "also the lands adjoining the lands willed to G. T. Dismukes, and Mrs. Napier, and the lands of J. H. Lawrence to the public road from Eatonton to Clinton," etc. The land willed to G. T. Dismukes was in Baldwin, and not in Jones, and the Dismukes boundary could not touch the land devised to the plaintiffs if it were all located in Jones county. It appears that the testator devised by the sixth item of his will to the plaintiffs the tract of land known as the "Clayton field," which the testimony shows included what was known as the "Sprout Spring field." This he sold before his death. If the insistence of the defendant is correct, the devise of lands to the plaintiffs under the will would fail in toto. This hardly seems consistent with the evident purpose and general scope of the will of the testator. He was providing by these items for his child and his grandchildren, and it would be unnatural indeed, after providing for the one, he did not provide for the

others also. We think he did; and a careful reading and study of the will and the testimony convinces us that the land in dispute was devised by the sixth item of the testator's will to his granddaughters, Mrs. Little and Miss Williams, the plaintiffs in this case. To allow the construction of the will contended for by the plaintiff in error would be to materially add to the amount of the land estimated by the testator as being devised to his daughter Mrs. Napier, and to materially decrease the amount which according to his estimate he devised to his granddaughters, Mrs. Little and Miss Williams. In fact, there is testimony going to show that it would leave them without any land at all; the devise to them of other lands which are not in dispute have failed by reason of their disposition by the testator prior to his death. The jury trying the case found that the premises in dispute were devised by item 6 of the will to the plaintiffs, the presiding judge refused to disturb their verdict, and, as we find no errors requiring a reversal, we think the judgment of the court below should be affirmed.

[2] 2. The defendant also relied upon prescriptive title to prevent a recovery of the land in dispute. She avers that she had been in possession of the same under color of title for over seven years; that under a decree rendered in Jones superior court at the October term, 1900, to which both of the plaintiffs and the defendant were parties, she was put in possession of the lands and has continued in possession of same until this suit was brought. The record discloses that said decree provided "that Mrs. Isabella R. Napier takes under the will, and that the lands described in item 5 of said will do vest in her the said I. R. Napier." So that it appears from the language of the decree that it describes the land in dispute no more accurately than the will itself. We do not think that it describes it at all. For color to be the basis of prescription, the instrument by which it is asserted must purport to cover the land in dispute. *Powell on Actions for Land*, § 295, p. 382, and authorities cited in note 4. The decree, in order to be a color for prescription to run, must on its face cover a description of the property in dispute. But the land is not so described either in that part of the decree or that item of the will under which the defendant asserts color of title.

In this connection, we consider, also, the ground of the motion for a new trial complaining that the trial judge committed error in charging the jury that "if you believe from the testimony in the case, and all these are questions of fact for you to pass upon, that this action was commenced by these plaintiffs at any time within the statute after the youngest became of age, they would not be barred." We think this charge of the court was error, and that the reverse of the

rule charged is the law. The statute began to run against each of the plaintiffs, respectively, at the time she became of age, and the one whose right of action had become barred, had it been barred, could not avail herself of the rights of the other against whom the statute had not operated a sufficient length of time to become a bar. The action, being a joint one, was not maintainable as such where the defendant showed a prescriptive title against one of the plaintiffs. *Powell on Actions for Land*, § 29; *Williamson v. Youmans*, 71 S. E. 138. While the charge referred to would have been reversible error had it appeared that there was a sufficient foundation for the prescriptive title asserted by the defendant, it could not harm her under the facts of this case, for the reason that she did not show any color of title which could be the basis of prescription so as to put the statute in operation against either of the plaintiffs.

[3] 3. Another ground of the motion for a new trial was the admission in evidence of a certain plat or drawing of the premises in dispute and other property owned by the testator at the time of his death, made by H. P. Cowan, a surveyor, which was objected to on the ground that it was a private drawing, not made according to the provisions of law, and that, with the entries thereon, it contained an expression of opinion as to what constituted the premises in dispute and other parcels of land, etc. This plat was not offered under the rule of court requiring certain surveys to be made under order of court on notice, and which would import verity on its face, but was a plat or drawing made by a surveyor, and was accompanied by other testimony showing its correctness; and was allowed by the court, we take it, for the purpose of illustrating the other testimony in the case and throwing light on the location of the land in dispute. We do not think the court erred in so doing. *Georgia Railroad Co. v. City of Atlanta*, 134 Ga. 871 (2) 68 S. E. 708. Especially, as the court instructed the jury to entirely disregard all statements on this plat, if any, as to what land was left to either party in the case, or the processions' line appearing thereon, and they were to consider from all of the testimony in the case whether the map was correct or not. The map of a county surveyor, while not evidence, under the circumstances of this case, is admissible to go to the jury as a mere diagram to illustrate other testimony in the case. See *Brantley v. Huff*, 62 Ga. 532 (1), 534. There were no errors in the other grounds of the motion which require a new trial in this case, and the evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 154)

MYRICK v. LIQUID CARBONIC CO.

(Supreme Court of Georgia. Dec. 12, 1911.)

(Syllabus by the Court.)

SALES (§ 480*)—CONDITIONAL SALES—REMEDIES OF VENDOR.

The vendor in a conditional sale, having reserved title to the property so sold in the bill of sale, which is duly recorded, may, where the conditions of the sale have not been fulfilled so as to pass title to the vendee, assert title in an action of trover against a purchaser of the property at a bankruptcy sale, where the trustee sells the property of the bankrupt free from liens and incumbrances; it not appearing that the vendor has done any act which would estop it from such assertion of its title.

(a) Mere failure by the vendee to claim the property or assert its title thereto would not operate as such estoppel.

(b) Nor would the proof of an unsecured claim founded upon an open account operate as an estoppel; it not appearing that the vendor participated in the proceeds arising from the sale of the property which it sold to the bankrupt with a reservation of title in the vendor, the conditions of the sale not having been fulfilled.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by the Liquid Carbonic Company against D. P. Myrick. Judgment for plaintiff, and defendant brings error. Affirmed.

Hines & Vinson, for plaintiff in error. R. S. Wimberly, for defendant in error.

BECK, J. The record in this case discloses the following facts: The Liquid Carbonic Company sold to the Winebrew Company the personal property in dispute, consisting of a carbonator, wash, and shafting, under a written contract whereby the Carbonic Company retained title until the property was paid for. This contract of purchase and sale was duly recorded. Later the creditors of the Winebrew Company forced that company into bankruptcy. The trustee in bankruptcy petitioned the court for leave to sell the entire estate of the bankrupt, free of liens. The referee in bankruptcy accordingly granted such order, and mailed to each of the creditors scheduled by the Winebrew Company a notice of the intention to sell all the assets of the estate free of liens. In addition to the property sold to the Winebrew Company on the terms above stated, the Carbonic Company was a creditor of the bankrupt company for supplies. After advertising as required by law, the trustee sold at public outcry all of the estate of the bankrupt, including the property above mentioned, title to which was retained by the Carbonic Company. The Carbonic Company interposed no objection to the sale. After this sale had been made, the Carbonic Company proved to the bankrupt court its unsecured claim for supplies, and sought to participate to that extent in any dividend

to be declared from the proceeds of the sale. The Carbonic Company also proceeded by an action in trover against Myrick, who had purchased the carbonator, wash, and shafting from the trustee in bankruptcy, to recover said property, as being the property title to which was retained by the plaintiff in its contract of sale made with the Winebrew Company. Upon the trial of the trover suit the jury returned a verdict in favor of the Carbonic Company for \$100 principal, and \$49 as hire. Myrick made a motion for a new trial; and, this being overruled, he excepted.

Without reference to the amount recovered by the plaintiff against the defendant, of which no complaint is made, it seems to us that no other verdict than the one returned by the jury on the trial could have been rendered under the facts of the case. The plaintiff sold the personal property in controversy to the bankrupt and reserved the title thereto until compliance with the conditions of the sale. Those conditions had not been complied with. One of the conditions was complete payment for the property, and there were installments of the purchase-price still due. Under these circumstances, the property never became the property of the bankrupt, but the title to the same was in the bankrupt's vendor, and consequently the trustee in bankruptcy did not acquire a title thereto. The vendor in a conditional sale evidenced by a writing, and followed by timely and proper recordation, is not a mere lienor. The order authorizing the trustee to sell the bankrupt's property free from liens and incumbrances could not affect the property to recover which this suit was brought. The plaintiff was not seeking to enforce a lien or incumbrance in his favor, but to reach property which had belonged to it, and with the title to which it had never parted. The citation of authorities relating to the consignor of goods, or to the holder of a lien on the goods, which may be in the possession of a bankrupt at the time of the filing of a petition in bankruptcy and the adjudication of bankruptcy, was beside the purpose when the question is one of the right of the trustee in bankruptcy to sell property which had come into the bankrupt's hands under a conditional sale. So far as the rights of the vendor are concerned in the case of a conditional sale, he stands in the position of any absolute owner of property which happened to be in the bankrupt's hands at the time of the filing of the petition against the latter. The trustee in the present case possessed no greater interest in the property, nor had any better title thereto, than the bankrupt had, and the rule of caveat emptor obtains in this case as in other judicial sales. 2 Remington on Bankruptcy, § 1959.

While it is clear that the plaintiff might

have asserted its title to the property while it was in the hands of the bankrupt or its trustee before the sale, it may also assert it against the purchaser at the bankruptcy sale, unless it had estopped itself by its conduct from so doing. And we do not find in the record in this case, either in the evidence admitted or in that which was excluded, anything which would authorize the application of the doctrine of estoppel. The fact that after notice that the property of the bankrupt would be sold free from liens and incumbrances the plaintiff filed no objection to the sale of this property, and that it did not assert title to it before the sale, would not work an estoppel against the right to assert title against the purchaser, inasmuch as nothing in the notice indicated that this particular property would be sold; the notice in effect being that the property of the bankrupt would be sold free from liens and incumbrances, and no adequate description of this property being given in the notice referred to. The vendor had already, in the registry of its bill of conditional sale, given to the world all the notice which it was required to give that the property belonged to it. In this connection see Collier on Bankruptcy (7th Ed.) 825.

Again, the plaintiff was not estopped by the fact that it, as a creditor of the bankrupt, had proved in bankruptcy, after the sale was made, an unsecured claim based upon an open account. There was no proof in the evidence either admitted or rejected that the plaintiff had participated in any division of the proceeds arising from the sale of the property to which it now asserts title; and the question as to what would have been the effect of its sharing in such proceeds does not arise.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 233)

**ETNA STEEL & IRON CO. et al. v.
HAMILTON.**

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

1. MORTGAGES (§ 468*)—FORECLOSURE BY ACTION—RECEIVERS—PLEADING.

An equitable petition by a bondholder to foreclose in his own name the trust deed, wherein is alleged that permission for him so to do is given in the trust deed upon the trustee's refusal to bring the action on demand, and that the trustee has refused to foreclose on demand made upon him, and that there exists an emergent condition requiring the immediate interposition of a court of equity to prevent serious loss from an impending tax sale of a part of the mortgaged property, does not show on its face that the plaintiff is not entitled to a pendente lite receiver in aid of the relief sought.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

2. MORTGAGES (§ 468*)—FORECLOSURE BY ACTION—RECEIVERS.

Where a bondholder files an equitable petition for the foreclosure of a trust deed, and to protect the mortgage property from an impending tax sale, and a temporary receiver is appointed, who procures a bank to pay the executions, which are assigned to the bank, and where, on the interlocutory hearing for a permanent receiver, it appears that the bondholder is not entitled to foreclose the mortgage (the right to foreclose being in the trustee, and there being no refusal on his part to act), and the mortgagor offers to pay the tax executions which were proceeding against the property, it is error to refuse such offer, and appoint a permanent receiver.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by Harper Hamilton against the Etna Steel & Iron Company and others. From a judgment for plaintiff, defendants bring error. Reversed.

The Etna Steel & Iron Company, a domestic corporation, on January 1, 1907, executed to the Empire Trust Company of New York, as trustee, a deed of trust to secure the issue of \$600,000 of bonds. The bonds were of the denomination of \$1,000 each, due at 20 years, with interest payable semiannually. It was covenanted in the deed of trust: That the Etna Steel & Iron Company would promptly pay the bonds and interest coupons as they severally matured. That it would pay all taxes assessed against the mortgaged property, take care of and preserve the same, keep the property liable to be destroyed by fire insured in some good company, and, in case of loss before the maturity of the bonds, the money received from the insurance company by the trustee at the written request of the Etna Company shall be paid over to it and by it used in payment of expenses of repairing, rebuilding, or replacing the property burned or damaged by fire. That the board of directors of the Etna Company shall have the right to sell property which may become worn, damaged, or otherwise unsuitable to be used in the operation of its property, provided an equivalent in value be substituted in lieu thereof, without liability or responsibility of the trustee for the acts of the Etna Company in this respect. The deed conferred upon the trustee a power of sale in case of default by the Etna Company in any condition or covenant in the trust deed, or in the payment of any bond at maturity or interest coupon when due, or any other default which should continue for a year thereafter. It was further provided, in case of default in any of the covenants of conditions, that the trustee, instead of exercising the power of sale, should be entitled in its discretion to proceed by bill in equity and other appropriate proceedings in any court of competent jurisdiction to foreclose the mortgage or trust deed,

and enforce the rights, liens, and securities of the trustee and bondholders; provided that no foreclosure proceedings should be commenced, by reason of the nonpayment of the interest, until one year after default in the payment of the interest. It was stipulated that it was no part of the duty of the trustee to see to or effect insurance against fire, to keep itself advised or informed as to the payment of taxes, or to require such payment to be made, or to see that the Etna Company fulfilled any of its covenants. The deed also contained these stipulations: "The trustee shall be under no obligation or duty to perform any act hereunder, or to defend any suit in respect hereof, except upon the request of the company, or of the bondholders of a majority in value of the bonds outstanding hereunder, and unless fully indemnified to its satisfaction, and the trustee shall not be bound to recognize any person as a bondholder unless and until his bonds are submitted to the trustee for inspection if required, and his title thereto satisfactorily established, if disputed. * * * The exclusive right of action hereunder shall be vested in the trustee until the refusal on its part to act, and no bondholder or bondholders shall be entitled to enforce performance of these presents until after demand made on the trustee accompanied by a tender of indemnity satisfactory to the trustee as aforesaid, and the refusal of the trustee to act in accordance with such demand as hereinafter provided."

On February 28, 1910, Harper Hamilton filed an equitable petition against the Etna Company and the Empire Trust Company, praying for a foreclosure of the trust deed and the appointment of a receiver in aid thereof. He alleged that he was the owner of 33 bonds, and brought the petition in behalf of himself and all the bondholders of the Etna Company; that the Etna Company had defaulted in the payment of interest coupons for more than a year; that it had broken its covenant in respect to effecting insurance; that it had failed to keep the property in repair, and had allowed the same to be wasted; that it had sold off property, and had not replaced the same as it covenanted to do; that it had failed to pay the taxes upon the property to the extent of \$1,600; that it had collected approximately \$6,000 from loss on fire insurance policies, and had not reinvested same according to the terms of the trust deed; that in writing he had called the attention of the trustee, the Empire Trust Company, to the default in the payment of interest and of taxes, and to the fact that default in the payment of interest had continued for more than a year, and also advised it that default had been made in the keeping up of the insurance, and had demanded of the trustee that it proceed to enforce the mortgage or trust

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

deed according to its terms for the protection of the bondholders, and had offered to furnish to the trustee such indemnity as it required under the terms of the trust deed; and that he had especially called the attention of the trustee to a threatened sale of the mortgaged property for taxes on the first Tuesday in March, and demanded of the trustee that it take legal proceedings to foreclose the mortgage and have a receiver appointed in time to prevent the sale of the property for taxes, but that the trustee had refused to institute such proceedings. The prayers were for the appointment of a receiver, the foreclosure of the mortgage, and a distribution of the proceeds of the foreclosure sale among the bondholders. A temporary receiver was appointed, and he was authorized to borrow sufficient money with which to pay off the *fi. fas.*, and a rule nisi was granted, fixing a date for a hearing of the application for the appointment of a permanent receiver.

Certain holders of 61 bonds were allowed to intervene, and in their intervention they alleged that T. N. Barnsdall, the president of the Etna Company, was the owner of a majority of its common stock, and also owned or controlled a majority of its bonds; that at the request of Barnsdall the trustee had instituted in the United States court a suit to foreclose the trust deed, wherein it was alleged that there were \$500,000 bonds outstanding, whereas there were not so many bonds issued, and that Barnsdall had not applied the proceeds of the bonds which he claimed to have sold to himself to any beneficial use of the Etna Company; that the trustee has recognized Barnsdall as the holder or representative of the holders of the bonds, and will not attack the right of any holder to collect the same. These interveners alleged the property to be of much less value than the amount of the bonds secured by the trust deed, and prayed for an accounting of the bonds issued and that such as were illegally issued be declared null and void. On September 20th the court passed an order providing for the service of the Empire Trust Company by publication agreeably to the statute. On September 24th the Etna Company interposed their demurrers, general and special. The application for permanent receiver came on to be heard on December 13, 1910, and on that day the Empire Trust Company entered its special appearance for the purpose of objecting to the jurisdiction of the court on the ground that it had not been properly served. This motion was overruled. The Etna Company filed its answer, denying the right of the plaintiff to sue, because of the failure to comply with the stipulations of the trust deed. It admitted its default in the payment of interest, and the right of the Empire Trust Company to have a foreclosure of the trust deed. It admitted that the taxes were not fully paid, but alleged that the greater part of the 1908 taxes

had been paid and the execution representing the balance had been transferred to and was held by the Commercial Bank, and at the time the 1909 taxes matured all the property was in the charge of A. T. Hamilton, a brother of the plaintiff, and who is now temporary receiver. It admitted that all of its property was not insured, but denied that it was necessary to insure all the property; and alleged that the property was under the management of A. T. Hamilton for nearly 12 months, and all the defaults as to the failure to keep the property insured had been known to the plaintiff for some time, without any objection on his part. While admitting its default in the payment of interest, and keeping up the insurance, and not operating the property, because it did not believe it could be profitably operated as it had been done, the Etna Company denied that there had been any waste to the property, and alleged that the money collected from fire insurance was properly applied to the obligations of the company. It further answered that it was on March 1, 1910, and is now, ready, able, and willing to take over and control the tax executions, and does now repeat this offer and willingness, and makes a continuing offer and tender to take up the executions and relieve the temporary receiver thereof at any time by permission of the court, and permission to do so was applied for; that the tax executions had not been paid by the temporary receiver, but were held by the Commercial Bank under a transfer made to the bank; that the bank holds no other security for the payment of the taxes except the property of the company, which is subject to the lien of the tax execution independent of the receivership; that the company would have taken up the tax executions on March 1, 1910, if its representative had not been informed early in the morning that a temporary receiver had been appointed. It was further alleged that the trust company had filed its original bill of foreclosure in behalf of all the bondholders under and in pursuance of the terms and conditions of the trust deed against the Etna Company in the Circuit Court of the United States for the Northern District of Georgia, and that the mortgage had been foreclosed and a receiver appointed. The Etna Company pleaded the pendency of the foreclosure proceedings in the Circuit Court of the United States as a bar to the alleged right of the plaintiff to maintain this action in this court, which depends upon and must be determined by the terms of the trust deed, which the plaintiff is seeking to foreclose. The Etna Company, in answer to the intervention, admitted that T. N. Barnsdall owned a majority of the stock, and also owned or controlled a majority of the bonds of the company. It denied that the board of directors or the individual members thereof were under the control of Barnsdall, and alleged that the plaintiff in this case could

obtain adequate and complete relief regardless of the board of directors in the pending suit brought by the trustee to foreclose the mortgage. It denied that its bonds had been disposed of unlawfully and without authority, or that par value had not been paid for them, and alleged that the proceeds thereof had been used in the acquisition of property, both real and personal, for the equipment and maintenance thereof. The trust company filed its answer, in which it averred that only \$450,000 par value of bonds had ever been certified and issued. It admitted that the Etna Company had made default in the performance of some of the covenants and conditions in the trust mortgage, and that the right accrued to the trustee to have a foreclosure of the trust mortgage according to the terms of its provisions, but denied that any such right accrued and existed in favor of the plaintiff, either at the time of filing his petition or since. It denied that either the plaintiff or any one for him had ever made demand upon it as trustee to foreclose the mortgage in accordance with the terms and provisions of the mortgage. It alleged that all the communications between the parties relative to this subject are in writing, and it submitted that the writings affirmatively showed that no such demand and refusal thereof, such as would entitle the plaintiff to foreclose the mortgage, had ever been made. It denied that it ever refused after demand to proceed to foreclose the mortgage. It set up that on the 4th day of April, 1910, as trustee under the trust mortgage, it filed its bill in the Circuit Court of the United States for the Northern District of Georgia against the Etna Steel & Iron Company, alleging default under the terms and conditions of the trust mortgage, and prayed for the foreclosure of the mortgage and for a receiver in aid thereof, being thereto duly requested by a majority in number of the outstanding bonds of the company, and being furnished indemnity in compliance with the provisions of the mortgage in that regard; that on the hearing a receiver was duly appointed, who had duly qualified, and that subsequently the Etna Company had made an appearance by answer, admitting its defaults and insolvency, and consenting, in so far as with propriety it might do so, to the appointment of a receiver; and that on June 20, 1910, a decree of foreclosure was granted by the court, and citation was duly issued and published to all creditors claiming under the mortgage to appear and submit their claims to the court, an exemplified copy of the suit being attached. The trustee further alleged that it was effectively proceeding to exercise its discretion and discharge its duties under the trust deed for the benefit of all bondholders, and pleaded the pendency of the suit in the United States court in bar of the plaintiff's action. On the last-named day the court overruled the de-

murrer of the Etna Company and the motion to dismiss made by the Empire Trust Company, and, after hearing evidence, appointed a permanent receiver. The exceptions are to the interlocutory grant of a receiver, to the overruling of the demurrers and motion to dismiss, and to certain rulings on evidence.

W. W. Mundy and W. A. Wimbish, for plaintiffs in error. King, Spalding & Underwood and Bunn & Bunn, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The petition alleged the maturity of the bonds by default in the payment of interest for more than a year and the right of a bondholder under the terms of the trust deed to foreclose it, and also an emergent condition requiring the immediate interposition of a court of equity to prevent serious loss from an impending tax sale, and it cannot be said that on its face it did not present a case for the appointment of an interlocutory receiver in aid of the relief sought.

[2] 2. On the hearing the plaintiffs submitted the correspondence between themselves and their attorneys, and the trustee and its attorneys, upon which they relied to establish their right to foreclose the mortgage under the terms of the trust deed. This correspondence began 18 days before the plaintiff filed his petition. The initial letter was from the plaintiff to the trustee, dated February 10, 1910, to the effect that the plaintiff was the holder of 33 bonds; that the interest was in default for more than a year, and requested the trustee to proceed to foreclose the mortgage, offering such indemnity as the trustee might require under the terms of the deed of trust. The receipt of this letter was acknowledged on the 16th of February by the secretary of the trustee, who stated therein that the trustee would be glad to do anything it should do under the mortgage, and had referred the matter to its counsel, and would communicate with the plaintiff as soon as advised; and that the trustee would require, in case it instituted proceedings, a deposit of such sum in money as might be agreed upon to indemnify against expenses. On February 24th the plaintiff telegraphed the trustee: "Property Etna Steel and Iron Company advertised for taxes. Be sold March first. Authorize me to file bill in your name, or shall I proceed in my name for bondholders." On the same day counsel for the trustee wrote to plaintiff that it would be glad to foreclose the mortgage, but they would like to have the plaintiff to do certain things; that the trustee would require indemnity before instituting such proceedings, and he thought that this should be in the sum of at least \$1,500, to cover possible costs and expenses, and would prefer that the in-

dennity be provided by deposit in cash, but, if this was not convenient, to inform him what other form of indemnity plaintiff would like to offer. He requested detailed information as to the nonpayment of taxes and noninsurance of the property, and referred them to the provision in the mortgage permitting a bondholder to pay the taxes and insure the property, and offered to advise the trustee to attend to this if the plaintiff would furnish it with funds necessary for the purpose. Reference was made to the provision in the trust deed relative to the default in the payment of the interest for one year after due demand for payment, and full information was asked as to whether demand for payment of the coupons alleged to be overdue had been made. It was further stated that the trustee, before beginning foreclosure proceedings, would require some proof as to the fact of the plaintiff's ownership of the bonds, either by the deposit of the bonds or by some way satisfactory to it; that the mortgage provided that the trustee was under no duty or obligation to act thereunder unless requested by a majority of the holders of bonds outstanding, but the writer did not believe that this interfered with the trustee's right to act upon the plaintiff's request, although he suggested it would be better to have a larger number of bondholders making the request. On the next day counsel for the trustee wrote to counsel for the plaintiff a similar letter. The foregoing epitomizes the correspondence between the trustee and the plaintiff prior to the institution of the suit. We do not think, under these circumstances, that the plaintiff brought himself within the terms of the mortgage, so as to give him the right of foreclosure under the contract because of a failure of the trustee to institute proceedings. The trust deed expressly stipulated that the exclusive right of action was vested in the trustee until refusal on its part to act, and no bondholder should be entitled to enforce performance of its covenants until after demand had been made on the trustee, accompanied by a tender of indemnity satisfactory to the trustee, and the refusal of the trustee to act in accordance with such demand. It appeared in the evidence that there was a prior mortgage of \$100,000 upon the property, and the trustee was apprehensive that the proceeds arising from the sale of the property would not exceed this sum. Prior to the filing of his petition, the plaintiff did not intimate that the indemnity required by the trust company was exorbitant in amount, or in any wise oppressive. The plaintiff failed to offer the indemnity required, and there was no refusal on the part of the trustee to proceed to enforce the trust deed. Under the undisputed facts, the plaintiff had no right as a bondholder to institute the suit in opposition to the right of the trustee.

But it is contended that, inasmuch as the

property was about to be sold for taxes, the conditions were emergent and justified the plaintiff for the protection of himself and other bondholders to protect himself against serious loss resulting from a sale of the property. On the hearing it was made to appear that in 1908 an execution for taxes for the sum of \$525 had been issued against the Etna Company, and that this tax *fi. fa.* had been transferred to the Commercial Bank; that in 1909 a special *fi. fa.* and a general *fi. fa.*, aggregating \$1,025, had been issued, and, at the instance of the county attorney, were placed in the hands of the sheriff for enforcement. The sheriff levied upon certain personal property, when a brother of the plaintiff, who was the manager of the Etna Company, suggested that the levy on the personalty be dismissed, and that the land embracing the pumping station be levied upon. Accordingly the sheriff levied upon certain described realty and a pumping outfit located thereon. This land embraced the water supply, which furnished the chief value to the other mining property. Immediately after his appointment the temporary receiver procured a bank to take up the executions upon an assignment of the *fi. fas.* to the bank. The Etna Company offered to pay these taxes, provided the receivership was dismissed; and this offer was declined. Under the terms of the trust deed, the trustee was under no obligation to look after the payment of taxes. The Etna Company covenanted to pay the taxes; and its default, not that of the trustee, produced the emergent condition, to relieve which the bondholder filed his action. Where there is a duty on a trustee to act promptly to protect the mortgage property, and he fails or neglects to perform this duty upon demand, a bondholder may institute a suit in his stead for the preservation of the property. 3 Cook on Corporations, § 830. But it does not follow that a right to file a proceeding to protect the property from an impending peril will justify a bondholder to institute proceedings to foreclose the mortgage contrary to its terms. The Etna Company pleaded that, after the appointment of the temporary receiver, it had been ready, willing, and able to take up the tax executions, and would have done so on the day of sale but for the appointment of a temporary receiver and the grant of an order restraining it from interfering with its property or rights, and in its answer it made an offer to take up such executions and asked the permission of the court to do so. The court should have allowed the taxes to be paid, for, if they were paid, there would be no longer any necessity for the receivership to preserve the property. It did not appear what particular property was insured, and what was not insured, but the failure of the Etna's Company's covenant to insure would not be sufficient ground to deprive the trustee of his exclusive right

under the contract to foreclose the mortgage.

The facts pleaded in the intervention do not affect the right of the trustee to bring the suit. The trustee has the right to foreclose the mortgage, and in that foreclosure suit the plaintiffs would have the right to intervene for the purpose of showing that any bonds presented to the trustee for payment had been illegally issued, or were otherwise not entitled to share with the plaintiffs in the distribution of the proceeds of the sale of the property. 3 Cook on Corp. § 848b.

There is no dispute that the mortgage is ripe for foreclosure, the Etna Company admits its defaults, and the contest is between the trustee and minority bondholders as to the right to maintain a foreclosure suit. We do not undertake to pass upon the propriety of the trustee to bring a foreclosure suit in the United States courts after the present suit by the bondholder was begun. That court is the proper tribunal to adjudicate its own jurisdiction. What we decide is that on the hearing the proof failed to support the plaintiff's allegations entitling him to foreclose the mortgage, and that upon the Etna Company's providing for the tax executions the receiver should be discharged and the property turned over to its owner.

Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 174)

HILL & MERRY v. JACKSON STORES
et al.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§§ 351, 357*)—ACTION (§ 50*)—OFFICERS—LIABILITY FOR CORPORATE DEBTS—REMEDIES.

Civil Code 1910, § 2220, declares that "persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock with interest." *Held*: (1) That the liability imposed by this statute constitutes a fund for the benefit of all creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts. (2) That an action at law cannot be maintained by one creditor among many for the appropriation of the whole or any part of such liability to his own benefit, to the possible exclusion of all or any of the other creditors, but that the remedy is in equity by a petition brought at the instance of one or more creditors and in behalf of all other creditors who may come in and be made parties plaintiff to the action. *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879, and cases cited; also 8 Rose's Notes U. S. Rep. 947, and 1 Supp. Rose's Notes U. S. Rep. 1207; *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393. See *Schley v. Dixon*, 24 Ga. 273 (4), 71 Am. Dec. 121.

(a) The decisions of this court to the effect that, under charters making each stockholder in banking corporations liable to redeem his proportionate share of the outstanding bills or

indebtedness of the bank, a single creditor may sue at law any individual stockholder, are not in conflict with the ruling above announced; for there the liability of the stockholder is several, and is limited to the amount of his stock, a fixed sum easily ascertained. See *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1500, 1501; Dec. Dig. §§ 351, 357;* *Action*, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

2. CORPORATIONS (§ 351*)—OFFICERS—LIABILITY FOR CORPORATE DEBTS—REMEDIES.

Accordingly, the court properly sustained a general demurrer to a petition brought by a copartnership for its sole benefit to enforce the liability imposed by the statute quoted in the first headnote, to the extent of the plaintiff's claim against the company; it appearing from the petition that there were other creditors of the company.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1492, 1493; Dec. Dig. § 351.*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action by Hill & Merry against the Jackson Stores and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Hardeman, Jones, Callaway & Johnston, P. L. Wade, and Jno. R. L. Smith, for plaintiffs in error. G. H. Williams and Hines & Jordan, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 174)

JOHN V. FARWELL CO. et al. v. JACKSON STORES et al.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 351*)—OFFICERS—LIABILITIES FOR CORPORATE DEBTS—REMEDIES.

An equitable petition was brought by a number of creditors of an insolvent corporation, in behalf of themselves and all other creditors of the corporation who might intervene as plaintiffs in the case, against the corporation and several individuals, who, as alleged, organized the company and transacted business in its name before the minimum capital stock had been subscribed for, praying for judgments against all the defendants, and seeking to require the individual defendants, who, it was alleged, organized the defendant corporation and transacted business in its name before the minimum capital stock had been subscribed for, to jointly and severally make good the minimum capital stock, with interest (under the provisions of Civil Code, § 2220), to the extent of the total sum of all of the indebtedness due the creditors of the company; it appearing from the petition that such indebtedness was less than the difference between the amount of stock actually subscribed for and the minimum capital stock of the company. *Held*, that the petition was not subject to general demurrer, nor to special demurrers on the ground of misjoinder of parties plaintiff and defendant, and of misjoinder of causes of ac-

tion, in that it sought to recover of defendants distinct and independent claims of separate and distinct plaintiffs. *Hill & Merry v. Jackson Stores*, 73 S. E. 13, this day decided; *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879, and cases cited thereon in 8 *Rose's Notes U. S. R.* 947, and 1 *Supp. Rose's Notes U. S. R.* 1207; *Burns v. Beck*, 83 Ga. 471 (1), 10 S. E. 121. See, also, *Ellis v. Pullman*, 95 Ga. 445, 22 S. E. 568; *Commercial Bank v. Warthen*, 119 Ga. 990 (2), 47 S. E. 536.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1492, 1493; Dec. Dig. § 351.*]

2. BANKRUPTCY (§ 145*) — ADMINISTRATION OF ESTATE—ASSETS PASSING TO TRUSTEE—RIGHTS OF ACTION.

Where the corporation had been adjudged a bankrupt and proceedings in bankruptcy were pending, the right of action referred to in the preceding note was not in the trustee in bankruptcy. *Bankr. Act July 1, 1898, c. 541, § 70 (a)*, 30 Stat. 565, 1 Fed. Stat. Ann. 697 (U. S. Comp. St. 1901, p. 3451). The liability imposed by the statute constituted no part of the assets of the corporation. See *Lane v. Morris*, 8 Ga. 468 (7); *In re Crystal Bottling Co. (D. C.)* 3 Am. Bankr. Rep. 194, 96 Fed. 945; *In re Beachy Co. (D. C.)* 22 Am. Bankr. Rep. 538, 170 Fed. 825; *In re Jassoy Co.*, 23 Am. Bankr. Rep. 622, 178 Fed. 515, 101 C. C. A. 641. Section 2249 of the Civil Code, making the individual liability of a stockholder under the charter of the corporation an asset of such corporation, applies to those who have subscribed for stock, and not to the liability prescribed by section 2220, which is a liability to creditors imposed upon organizers of a company who transact business in its name, whether they be actual stockholders or not. This distinction is recognized in *Commercial Bank v. Warthen*, 119 Ga. 990, 994, 47 S. E. 536, in commenting on the case of *Dutcher v. Marine Bank*, 12 Blatchf. 435, Fed. Cas. No. 4,203.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 205, 230-232, 234; Dec. Dig. § 145.*]

3. CORPORATIONS (§ 342*) — OFFICERS — LIABILITY FOR CORPORATE DEBTS—TRANSFER OF STOCK.

Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for, but who afterwards sell and transfer their stock and interest in the company, are nevertheless subject to the liability prescribed by the statute (Civil Code, § 2220) for the satisfaction of debts subsequently contracted by the corporation. See *Walters v. Porter*, 3 Ga. App. 73 (3), 59 S. E. 452. The capital stock of a corporation is deemed a trust fund for the payment of its debts. See *Fitzpatrick v. McGregor*, 133 Ga. 332, and cases cited on page 342, 85 S. E. 859, 25 L. R. A. (N. S.) 50. The requirement of the statute that the minimum capital stock of a corporation shall be subscribed for before the organizers thereof shall transact business in its name is obviously for the purpose of creating a fund, when the subscriptions to the amount of the minimum capital stock shall have been paid, for the ultimate benefit of those who may extend credit to the corporation; and such persons have the right to presume that the statute has been complied with, and to rely, if necessary, upon the statutory liability of those failing to observe the law. Organizers of a company who transact business in its name before the minimum capital stock has been subscribed for are considered as committing a fraud upon those who may extend credit to the company, and the

statute imposes a liability upon them for engaging in such fraudulent transaction, and they should not be allowed to escape the statutory penalty for such fraud by disposing of their stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1486-1488; Dec. Dig. § 342.*]

4. CORPORATIONS (§ 342*) — OFFICERS — LIABILITY FOR CORPORATE DEBTS—TRANSFER OF STOCK.

The liability imposed by the statute above cited is so far penal in its nature as to require a strict construction. *Banks v. Darden*, 18 Ga. 318 (3); *Wheatley v. Glover*, 125 Ga. 710 (5), 54 S. E. 626; 8 *Clark & Marshall, Priv. Corp.* § 833(d); 1 *Cook Corp.* § 214; *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; *Park Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008; *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 24 Sup. Ct. 314, 48 L. Ed. 491.

(a) Accordingly, one who purchases stock in a corporation from one who aided in organizing the same, and who transacted business in its name before the minimum capital stock had been subscribed for, is not liable to creditors of the corporation for the statutory penalty in order to satisfy debts contracted in the name of the corporation, either prior or subsequently to the purchase of the stock. This is true for the reason that, to be liable under a strict construction of the statute, one must both participate in the organization of the corporation, and also transact business in its name before the minimum capital stock has been subscribed for. See, in this connection, *Schley v. Dixon*, 24 Ga. 273 (7), 71 Am. Dec. 121; *Fuller v. Rowe*, 57 N. Y. 23; *Windham Prov. Inst., etc., v. Sprague*, 43 Vt. 502; *Stafford Nat. Bank v. Palmer*, 47 Conn. 447; *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1486-1488; Dec. Dig. § 342.*]

5. CORPORATIONS (§ 367*) — OFFICERS — LIABILITY FOR CORPORATE DEBTS—COSTS.

In an action brought by the creditors of a corporation to recover on the liability fixed by the statute in question (Civil Code, § 2220), expenses and attorney's fees for the bringing of the suit are not recoverable as against the defendants. If a fund should be brought into court in such an action, in which creditors other than those bringing the action should participate, then whether such other creditors should be required to pay their proportionate share of the expenses and attorney's fees for bringing in the fund is another question, and one not made in this case.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1508; Dec. Dig. § 367.*]

6. PLEADING (§ 216*) — DEMURRER — DETERMINATION—MATTERS CONSIDERED.

The petition for a charter for the defendant corporation and the order granting the same are not made parts of the petition in the present case, and therefore, in passing upon the demurrers to the petition, cannot be considered.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action by the John V. Farwell Company and others against the Jackson Stores and

others. Judgment for defendants, and plaintiffs bring error. Reversed.

Hardeman, Jones, Callaway & Johnston, I. S. Chappell, Peyton L. Wade, and Jno. R. L. Smith, for plaintiffs in error. G. H. Williams and Hines & Jordan, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 179)

PETERSON v. LOTT.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

EQUITY (§ 195*)—PLEADING—CROSS-BILL.

Peterson conveyed a described parcel of land to Lott. The conveyance contained a condition subsequent to the effect that, if Lott should "offer [the land] for sale during his lifetime," then Peterson should have the right to have the land reconveyed to him upon his paying Lott a given sum (which was the purchase price Lott had paid Peterson), and in addition the value of whatever improvements Lott should make upon the land, to be ascertained in a prescribed manner. The conveyance was construed by this court in *Wadley Lumber Co. v. Lott*, 130 Ga. 135, 60 S. E. 836, where it was held that the instrument conveyed a fee in the land to Lott, subject to the right of Peterson to have it reconveyed to him if the condition subsequent should be broken by Lott, and upon Peterson repaying the original purchase money and the value of the improvements as above stated. See, also, *Peterson v. Lott*, 132 Ga. 366, 64 S. E. 263. Lott brought an action against Peterson for damages for the trespass of the Wadley Lumber Company in cutting the timber from the land under a lease made by Peterson to the lumber company subsequently to the conveyance made by Peterson to Lott. The cross-bill set up that there had been a breach of the condition subsequent contained in the conveyance made by Peterson to Lott, by reason of the fact that Lott had offered the land for sale. He further alleged that after such breach the value of the improvements placed upon the land by Lott had been ascertained in the manner prescribed in such conveyance, and that he had tendered the original purchase price, with interest thereon, and the value of such improvements to Lott, and requested him to reconvey the land to Peterson, and that Lott had refused to accept the tender and to reconvey the premises. It appeared from the cross-bill that the alleged breach of the condition by Lott was subsequent to the alleged trespass. The prayer of the cross-bill was that, upon the payment by Peterson to Lott of the original purchase price, with interest, and of the value of the improvements placed by him on the land, he be decreed to reconvey the land to Peterson. *Held*, that the cross-bill was properly stricken on demurrer, as it sought to introduce new and distinct matter not embraced in the original action. *Josey v. Rogers*, 13 Ga. 478; *McDougald v. Dougherty*, 14 Ga. 674; *Johnson v. Stancliff*, 113 Ga. 886, 39 S. E. 296; 2 Dan. Ch. Fr. 1548; *Story's Eq. Pl.* § 399. See, also, *Carlton v. Southern Mutual Co.*, 72 Ga. 371, 392; *Brownlee v. Warmack*, 90 Ga. 775, 17 S. E. 102. At the time the timber was alleged to have been cut the fee to the land was in Lott, and the case set out in his petition was for the recovery

of damages for the cutting of the timber at that time, the question thus raised being whether Peterson was liable for such trespass; while the question presented by the cross-petition of Peterson was whether Lott had, subsequently to such alleged trespass by Peterson, forfeited his right to the fee in the land by breaking the condition in the conveyance Peterson had made to him. The subject-matter of the cross-petition did not grow out of the original suit, and was therefore not germane.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 195.*]

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by J. S. Lott against B. Peterson. Judgment for plaintiff, and defendant brings error. Affirmed.

C. T. Roan and F. Willis Dart, for plaintiff in error. Graham & Graham, Levi O'Steen, and Lankford & Dickerson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 189)

CLARK, County Treasurer, v. CLARK, Sheriff.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 76*) — LOCAL AND SPECIAL ACTS—CITY COURT.

An act of the General Assembly, approved September 22, 1881 (Acts 1880-1, p. 574), to establish a city court in the county of Richmond, in the fifth section thereof provided as follows: "The clerk and sheriff and their deputies of the superior court of Richmond county shall be ex officio clerk, sheriff, and deputies of said city court, and for services rendered in said city court shall be entitled to the same fees as are allowed them by law in the superior court, and shall discharge the same duties and be subject to the same obligations and penalties; and for services rendered where no compensation is provided by law, they shall receive such compensation as the judge of said court shall in his discretion grant." This act was amended by an act approved September 14, 1883 (Acts 1882-1883, p. 527), providing for the payment of the insolvent costs of the clerk and sheriff of the city court of Richmond county in the same manner as the payment of the insolvent costs that may become due said clerk, sheriff, and deputies for services rendered in said court, when examined and approved by the judge of said city court, and that such costs shall, upon presentation, be paid by the treasurer of the county out of any funds which may be in the treasury. On December 21, 1898, an act was approved (Acts 1898, p. 374) declaring that after its passage "the treasurer of Richmond county shall pay the sheriff of Richmond county, for insolvent costs in criminal cases in the city court of said county, upon presentation of itemized bills, when audited and approved by the presiding judge; provided, the sum so paid shall not exceed in any one year twelve hundred dollars." All laws and parts of laws in conflict with this act were repealed. None of these acts is in violation of the provisions of the Constitution of 1877 (article 1, § 4, par. 1), to the effect that "no special law shall be enacted in any case for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which provision has been made by an existing general law."

Nor is there any restriction in the Constitution upon the Legislature in fixing the compensation of the officers of other city courts in a manner different from that prescribed for the officers of the city courts of Atlanta and Savannah, so as to render any of the acts above referred to unconstitutional. *Clark v. Black*, 136 Ga. 812 (2), 72 S. E. 251.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78½; Dec. Dig. § 76.*]

2. SHERIFFS AND CONSTABLES (§ 29*)—COMPENSATION—"INSOLVENT CRIMINAL COSTS."

A sheriff is not entitled to pay for any services as costs unless payment for the same be expressly and specifically provided for by statute. *Civ. Code* 1910, § 4919; *Peters v. State*, 9 Ga. 109; *Stamper v. State*, 11 Ga. 643; *Thomas v. Thomas*, 61 Ga. 70, 72; *Board of Commissioners v. Cox*, 65 Ga. 80; *Ward v. Barnes*, 95 Ga. 103, 107, 22 S. E. 133; *Floyd County v. Foster*, 112 Ga. 133, 37 S. E. 90. See, also, 82 Cyc. 700 (5). The statutes have expressly provided for the amounts to which sheriffs are entitled as costs in criminal cases. *Pen. Code* 1895, § 1107; *Pen. Code* 1910, § 1134. Such fee bill, providing for the fees of sheriffs in criminal cases, does not include any fee or any cost as jury fees, nor for bringing convict witnesses to court, nor for serving sci. fas., nor for serving rules. It follows, therefore, that sheriffs cannot collect any amounts for services rendered in these respects as costs. Insolvent criminal costs are costs in criminal cases which the statute provides shall be due sheriffs as fees for services rendered in criminal cases, and which are expressly and specifically provided for as to the services rendered, and the amount to be paid therefor, and which are insolvent for the reason that they cannot be collected either on account of the insolvency of the party liable therefor or otherwise.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 46; Dec. Dig. § 29.*]

3. SHERIFFS AND CONSTABLES (§ 40*)—COMPENSATION—STATUTORY PROVISION.

Pen. Code 1895, § 1107 (*Pen. Code* 1910, § 1134), in setting forth in the fee bill the fees or costs to be paid sheriffs for specified services in criminal cases, and fixing the amounts to be paid in each case, provides that "the sheriffs are entitled to the following fees, to wit: * * * For conducting a prisoner before a judge or court to and from jail, \$1.25." This provision of the statute means that the sheriff shall be entitled to \$1.25 "for conducting a prisoner before a judge or court to and from jail" one time; that is, for conducting a prisoner from jail before a judge or court and returning him to jail, a sheriff is only entitled to \$1.25 for the whole service. The ruling in *Sapp v. Rozar*, 70 Ga. 722, holds nothing to the contrary. The record in that case on file in the clerk's office of this court shows that in that case the sheriff was endeavoring by mandamus to collect the sum of 60 cents for each time he turned the key of the jail on the prisoner. The holding in that case was to the effect that the sheriff could only charge 60 cents for turning the key on the prisoner when he was received, and 60 cents for turning the key when he was finally discharged. In this connection see an act of the General Assembly approved March 2, 1875 (*Acts* 1875, p. 22).

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 64; Dec. Dig. § 40.*]

4. APPEAL AND ERROR (§ 936*)—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

One of the items of insolvent criminal costs which the sheriff of the city court of

Richmond county was endeavoring to collect by mandamus against the treasurer of that county in the present suit was for the sum of \$183 for serving subpoenas where "it does not appear from whom issued or whether the witnesses were examined" at 50 cents each. The fee bills in the *Penal Code* (1895 and 1910), above referred to, provide that in criminal cases the sheriff shall be entitled "for summoning each witness, 50 cents." It appears from the record in this case that the judge of the city court of Richmond county examined the item, approved it, and ordered it paid in accordance with the statutes providing for the collection by the sheriff of such court of his insolvent criminal costs. It does not appear from the record that the sheriff was not entitled to the full sum of \$183 for subpoenaing witnesses as stated, and we assume that the judge of the city court had before him the evidence necessary to authorize him, after examination of the items, to approve the same and order it paid by the treasurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3782, 3787; Dec. Dig. § 936.*]

5. COMPENSATION OF SHERIFF—MAKING MANDAMUS ABSOLUTE.

It follows from the foregoing that the court erred in making the mandamus absolute against the county treasurer for jury fees, for bringing convict witnesses to court, for serving sci. fas., and for serving rules, and he also erred in making the mandamus absolute for the sum of \$2.50 for conducting each prisoner before the court to and from jail. The sheriff being entitled, as above stated, to \$1.25 only in each case for such services.

Error from Superior Court, Richmond County; B. F. Walker, Judge.

Application by John W. Clark, sheriff of the city court in the county of Richmond, for mandamus to W. A. Clark, county treasurer. From a judgment making the mandamus absolute, the treasurer brings error. Affirmed, with directions.

Salem Dutcher and W. K. Miller, for plaintiff in error. Wm. H. Barrett and E. H. Callaway, for defendant in error.

FISH, C. J. Judgment affirmed, with direction. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 186)

CLARK, County Treasurer, v. CLARK, Sheriff. (Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 76*) — SPECIAL LAWS—COMPENSATION OF OFFICERS.

The act approved September 16, 1881 (*Acts* 1880-81, p. 533), in so far as it prescribes that the insolvent criminal costs of the sheriff of Richmond county may, upon recommendation of the grand jury, be paid out of any money in the treasury, is violative of article 1, § 4, par. 1, of the Constitution of this state (*Civ. Code* 1910, § 6391), which among other things declares that "no special law shall be enacted in any case for which provision has been made by an existing general law."

(a) The cases of *Clark v. Reynolds*, 136 Ga. 817, 72 S. E. 254, and *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893, distinguished.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78½; Dec. Dig. § 76.*]

2. SHERIFFS AND CONSTABLES (§ 29*)—COMPENSATION—PAYMENT.

The act approved March 2, 1874 (Acts 1874, p. 365), construed in connection with existing laws, as prescribed in sections 3696, 3675 and 4631 of the Code of 1873, does not authorize the payment of "insolvent criminal costs" to sheriffs from funds in the county treasury derived from taxation.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 46; Dec. Dig. § 29.*]

3. GRANTING WRIT OF MANDAMUS ABSOLUTE—ERROR.

Under the pleadings and evidence, the judgment granting a writ of mandamus absolute, compelling the county treasurer to pay insolvent criminal cost bills to the sheriff, was erroneous.

Error from Superior Court, Richmond County; B. F. Walker, Judge.

Application by John W. Clark, as Sheriff, for writ of mandamus to Walter A. Clark, as Treasurer of Richmond County. Judgment for plaintiff, and defendant brings error. Reversed.

W. K. Miller and Salem Dutcher, for plaintiff in error. Wm. H. Barrett and E. H. Callaway, for defendant in error.

ATKINSON, J. John W. Clark, as sheriff, applied for a writ of mandamus to compel Walter A. Clark, as treasurer of Richmond county, to pay him out of the county funds raised by taxation the sum of \$1,141.40 for "insolvent criminal costs" recommended to be paid by a majority of the grand jury of Richmond county. The treasurer resisted the application on the ground, among others, that the plaintiff was not entitled to the relief sought. In support of his position, it was insisted that a special act approved September 16, 1881 (Acts 1880-81, p. 533), under which the plaintiff relied, was unconstitutional for a number of specified reasons, among them being that it violated article 1, § 4, par. 1, of the Constitution, which inhibits the adoption of special laws for which there is provision by an existing general law, as set forth in section 4631 of the Code of 1873 (now embodied, in substance, in Pen. Code 1910, §§ 1113, 1114); also, that another special act, approved March 2, 1874 (Acts 1874, p. 365), under which the plaintiff relied, was not to be construed within itself, or in connection with any other statute on the subject, as furnishing grounds for the payment of the plaintiff's insolvent criminal costs out of the general fund of the county. This act also was attacked as unconstitutional. The case was heard by the judge under the pleadings and an agreed statement of facts; and the writ was granted. The defendant excepted.

[1] 1. The act of 1881 (Acts 1880-81, p. 533), which was attacked as unconstitutional, provided: "Whenever at any term of the superior court of Richmond county a majority of the grand jury shall so recommend, the judge of the superior court shall grant

to the clerk of said court and the sheriff of said county an order upon the county treasurer for the payment of any account for insolvent criminal costs so recommended to be paid, and it shall be the duty of the county treasurer of said county to pay the same out of any money in the treasury thereof; provided, nothing in this act shall be deemed or considered mandatory to the grand jury, but they shall have full discretion to recommend or not, as they see proper, the payment of said criminal insolvent costs." This act relates to the sheriff of one county only, and purports to make provision for payment of his "insolvent criminal costs" in a particular way. At the time of its adoption there was an existing general law which provided: "A person against whom a bill of indictment shall be preferred, and not found true by the grand jury, or who shall be acquitted by the petit jury of the offense charged against him or her, shall not be liable to the payment of the costs; and in all such cases, as also where persons liable by law for the payment of the costs shall be unable to pay the same, it shall and may be lawful for the officers severally entitled to such costs to present an account therefor to the judge of the court in which the said prosecutions were depending, which account being examined and allowed by him, it shall and may be lawful for said judge, by an order of said court, to authorize and direct the sheriff or clerk to retain for his own use, and to pay to the attorney or Solicitor General, and other officers of the court, the amount of their respective accounts, out of any moneys by him received for fines inflicted by the said court, or collected on forfeited recognizances." Code 1873, § 4631. This general law comprehended a plan for collection of "insolvent criminal costs" applicable to all the sheriffs in the state. Accordingly, the special act attempting to make provision for the collection of "insolvent criminal costs" applicable only to the sheriff of Richmond county, differing from that specified in the general law, was obnoxious to the Constitution, which inhibits the passage of special laws for which provision has been made by an existing general law. A case much in point is *Atkinson v. Bailey*, 135 Ga. 336, 69 S. E. 540. In the cases of *Clark v. Reynolds*, 136 Ga. 817, 72 S. E. 254, and *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893, the acts assailed were held not to be in violation of the provision of the Constitution above mentioned; but each of the acts under consideration was adopted prior to the Constitution of 1877, and at a time when the Constitution did not contain such an inhibition.

[2] 2. Independently of the special act of 1881, it was contended on behalf of the sheriff that under authority of a special act approved March 2, 1874 (Acts 1874, p. 365), and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other laws not designated, he was entitled to have his insolvent criminal costs paid out of funds in the hands of the treasurer. The act last mentioned was also attacked as unconstitutional; but, under a proper construction of the act, it does not apply to the case at hand, and accordingly the objection to the constitutionality of the act will not be considered. The act in full is as follows:

"An act to provide the mode of fixing the pay of the sheriff, clerk of the superior court, and bailiffs, for services in said court, so far as refers to the county of Richmond, and for other purposes.

"Section 1. Be it enacted, etc., that from and after the passage of this act, the compensation of the sheriff, clerk, and bailiffs, for services rendered in the superior court of Richmond county, shall be fixed by the judge of said court."

Section 2 repeals conflicting laws.

By its terms the act does no more than authorize the judge to "fix" the "pay" or "compensation" of the sheriff for services rendered in the superior court. Other existing laws, applicable alike to the sheriff of Richmond county and all other sheriffs of the state, provided fee bills in civil and criminal cases. Code 1873, § 3696. The fees specified were thus "fixed" by law, not by the judge. In civil cases they were payable by the parties cast in the suit. Code 1873, § 3675. In criminal cases they were payable as costs by the party convicted (Code 1873, § 4699), or, in other instances, out of the fines and forfeitures (Code 1873, § 4631), but in no case out of the general funds of the county raised by taxation. The special act of 1874 is to be construed in connection with these general laws. When so construed, whatever else might be said as to what "services rendered in the superior court," the act contemplated that compensation therefor should be "fixed" by the judge, and, from what source they should be paid after being so fixed, the act is not to be construed as authorizing the judge to fix the fees to which the sheriff might be entitled as his costs, provided for in the statutory fee bill, or to order that they be paid out of the county funds. The act approved December 12, 1862 (Acts 1862-63, p. 24), authorized payment to the sheriff out of any money in the treasury for summoning grand and petit jurors, and other extra services in attending upon the courts, as in the opinion of the judge might be reasonable and just; and the subsequent act approved December 13, 1871 (Acts 1871-72, p. 51), authorized payment to the sheriff out of special taxes to be levied by the county authorities for "services in relation to which existing laws provide no adequate compensation, or no compensation at all, and in all cases in which compensation is provided to be given by

order of the judge of this state," on recommendation of the grand jury, such allowance to be in lieu of all other provisions for such officer, except his "regular fees prescribed by law." This latter act was repealed by another act approved March 2, 1874 (Acts 1874, p. 365). It was contended on the one hand that the act of 1871, referred to above, repealed the act of 1862, which was mentioned; and by the opposing side that, if such was the effect, the repeal of the act of 1871 by the act of 1874, last mentioned, restored the act of 1862. Whether it did or not is immaterial, and need not be considered, for the reason that neither the act of 1862 nor that of 1871 is to be construed as relating to payment of the sheriff's "insolvent criminal costs." They related to "extra services" and duties to be performed connected with the holding of the court, and are not to be construed as displacing the other statutes which prescribed fee bills for costs payable to the sheriff and the sources from which such costs were payable. Under such construction, neither the act of 1874, upon which the plaintiff relies as authority for collecting his bills, nor the other statutes on the subject, furnish authority for the collection of his insolvent criminal costs out of funds in the county treasury derived from taxation.

[3] 3. The bills which the sheriff sought to collect were for his "insolvent criminal costs," and for the reasons stated in the foregoing divisions of the opinion his claim of right to have them paid from the funds in the county treasury derived from taxation was unfounded. Accordingly, irrespective of any other question made in the case, the judge erred in granting the writ of mandamus.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 191)

SAMS v. COVINGTON BUGGY CO.

(No. 3,353.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

INFANTS (§§ 87, 89*)—ACTIONS—SERVICE OF PROCESS—GUARDIAN AD LITEM.

The statute prescribing the character of service in suits where minors are interested or are parties does not strictly apply, where there is a seizure of property under foreclosure proceedings, and the minor whose property is seized makes the process in rem (otherwise final) mesne, by making the counter affidavit. The issue before the court is not made by service, but is made by seizure and the filing of the counter affidavit. In such case the absence of a prochein ami or guardian ad litem as a party is an irregularity, amendable before, and cured by, the verdict.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 252, 255-272; Dec. Dig. §§ 87, 89.*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action by the Covington Buggy Company against L. R. Sams. Judgment for plaintiff, and defendant brings error. Affirmed.

Rogers & Knox, for plaintiff in error. C. C. King, for defendant in error.

HILL, C. J. The plaintiff in error was the owner of an automobile, which he had repaired by defendant in error. He did not pay for the repairs, and the defendant in error foreclosed its lien as a mechanic against him for the sum of \$30 for materials furnished and repair work on the automobile. He filed a counter affidavit, setting up that the amount sworn to be due was not due, and alleging that the plaintiff did not complete and perform its contract according to the agreement, and he had been thereby damaged in the sum of \$50, and he also executed a replevy bond. When the issue thus made was called for trial, he was absent and not represented by attorney, and the jury found a verdict against him for \$30, upon which a judgment was entered. During the same term he presented to the court a petition to set aside the verdict and judgment, alleging that he was a minor when the verdict and judgment were rendered, and had a statutory guardian (giving his name), and that this guardian was not served in the case or made a party thereto, and no guardian ad litem was appointed by the court. The judge's refusal to set aside the judgment is the error assigned.

Section 5565 of the Civil Code of 1910, requires that service upon minors under the age of 14 years shall be perfected personally on the minor, and, in cases where there is a statutory or testamentary guardian or trustee representing the interest of the minor to be affected by the legal proceedings, service must also be made upon such guardian or trustee; and if the minor is over 14 years of age, service may be made by delivering to him personally a copy of the writ. And it is further provided that, in the absence of guardian or trustee, it shall be the duty of the court to appoint for the minor a guardian ad litem, who must be made a party to the proceedings before the minor shall be considered a party. In the case of *Miller v. Luckey*, 132 Ga. 581, 64 S. E. 658, it was held that where suit is brought against a minor, and he is not personally served, a plea in abatement setting up the want of personal service should be sustained.

In this case it does not appear how old the minor was, whether over the age of 14 or not; but there is no allegation that he was not personally served with process. The con-

tention is that his statutory guardian was not served, and not made a party to the suit, and no guardian ad litem was appointed by the court for him and made a party to the proceeding. In suits in personam the law as thus claimed would be applicable; but we do not think it applicable to a case such as the one now under consideration. Here was a proceeding in rem, to foreclose a mechanic's lien. It did not become a suit, in the technical sense of that word, until the defendant had made a counter affidavit; and until the counter affidavit was made and filed there was no case or suit pending in the court, no issue to be tried. There are two ways by which parties are brought before the court. One is, in suits in personam, by personal process, or in the case of minors by such process as the statute requires; and the other is where property is seized by process of court, and the proceeding is resisted by a claim to the property, or some issue in reference to the process by which the property is seized. Now, in this case the minor voluntarily made a counter affidavit. He made the proceeding, which otherwise would have been final, a *meane* process, on the suit pending, in which he was the substantial plaintiff, though not nominally so, for his counter affidavit was the beginning of the suit, in so far as the issue to be tried by the court was concerned. *Giddens v. Gaskins*, 7 Ga. App. 221, 66 S. E. 560. In other words, the issue was made and brought into the court by the minor by the filing of his counter affidavit. Now, the law in this state is well settled that a minor can bring suit or voluntarily intervene in a suit without any prochein ami or guardian ad litem, and a failure to have such a representative as a party is a mere irregularity, which, before verdict, is amendable, and is cured by the verdict. Civil Code 1910, § 5524, and decisions of the Supreme Court cited in *Michie's Enc. Digest*, p. 312.

The minor having brought or filed the suit by his counter affidavit and made the issue to be decided by the court, strictly speaking, should have been represented therein by his statutory guardian or guardian ad litem; and if the matter had been called to the court's attention, or to the attention of the other party, this formal requirement of the statute would doubtless have been complied with by proper amendment. But the minor, in his defense to the suit originally, did not disclose his minority. He silently permitted a judgment to be entered against him without disclosing the fact, and therefore the irregularity was cured by the verdict. For this reason we think the court very properly refused to set aside the judgment.

Judgment affirmed.

(10 Ga. App. 175)

CUNNARD v. CHILDS. (No. 3,255.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***EXECUTION (§ 166*)—AFFIDAVIT OF ILLEGALITY.**

A defendant, who has been served, and who has had her day in court, cannot go behind the judgment by affidavit of illegality, for the purpose of showing that she was surety on the note which is the basis of the judgment, and that she is released because of conduct of the creditor prior to the rendition of the judgment. Civil Code 1910, § 5311; Bird v. Burgsteiner, 108 Ga. 654, 34 S. E. 183; Steele v. Atlanta Co., 91 Ga. 64, 16 S. E. 257.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 485, 486; Dec. Dig. § 166.*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action by W. W. Childs against L. Cunnard. Judgment for plaintiff, and defendant brings error. Affirmed.

A. S. Thurman, for plaintiff in error. R. W. Milner, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 211)

OUTCAULT ADVERTISING CO. v. AMERICAN FURNITURE CO. (No. 3,569.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 373*)—CONTRACTS.**

The execution of a contract for advertising, on behalf of an ordinary mercantile corporation, purporting to be signed by one as general manager, is sufficiently proved to authorize its introduction in evidence, when it is shown that it was signed by the person purporting to have signed it, and that he was in fact the general manager of the corporation. Further, if the person so signing was not the general manager, but signed as such in the presence of the president of the corporation and with his knowledge and consent, the corporation is prima facie bound.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1581-1593; Dec. Dig. § 373.*]

2. TRIAL (§ 143*)—NONSUIT—CONFLICTING EVIDENCE.

Conflict in the testimony of the plaintiff's witnesses is not to be solved by nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Outcault Advertising Company against the American Furniture Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

Dorsey, Brewster, Howell & Heyman and Jos. D. Greene, for plaintiff in error. Thomas & King, for defendant in error.

POWELL, J. The plaintiff (a corporation) sued another corporation upon an account for the furnishing of certain advertising service. In support of its case the plaintiff

offered in evidence a written contract, purporting to be signed by one Satterwhite, as manager of the defendant corporation. A witness for the plaintiff swore that Satterwhite was manager, that he, in fact, signed the paper, and that one Mr. Reid was present and directed the signing. It was shown by aliunde testimony that Mr. Reid was the president of the defendant corporation. One of the defendant company's letter heads was in evidence, and on this letter head Reid appeared as president and secretary and Satterwhite as general manager.

[1] Upon proof, direct or circumstantial, that Satterwhite was general manager, and that he signed the contract, its execution as the act and deed of the corporation was at least prima facie proved. Raleigh & Gaston R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008. If Satterwhite was not manager, but signed the contract on behalf of the corporation as such, and signed it in the presence of the president and under his direction, it would likewise have been, prima facie, the company's act. Phillips v. Hudson, 9 Ga. App. 779, 72 S. E. 178. It is true that Satterwhite and Reid were afterward put upon the stand by the plaintiff, and testified that Satterwhite was only a salesman in the defendant's place of business, and that he had signed the contract without any authority from the corporation, and that Reid was not present or consenting thereto. The fact that there is a conflict in the testimony of the witnesses introduced by the plaintiff is no reason for granting a nonsuit. The issue of fact, nevertheless, goes to the jury. This proposition has been so repeatedly stated by this court and the Supreme Court as to need no further elaboration here.

[2] The court erred in excluding the written contract, and, having erred in this respect, the judgment awarding a nonsuit must be reversed. Proctor & Gamble Co. v. Blakely Oil & Fert. Co., 128 Ga. 606, 57 S. E. 879.

Judgment reversed.

(10 Ga. App. 154)

PUFFER MFG. CO. v. RIVERS et al.

(No. 3,197.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***1. JUDGMENT (§ 713*)—RES JUDICATA.**

A judgment of a court of competent jurisdiction is conclusive between the parties and their privies as to all matters put in issue, or which, under the rules of law, might have been put in issue, in the cause wherein the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. JUDGMENT (§ 603*)—RES JUDICATA.

Where suit is brought, by the payee of a series of notes given for the balance of the pur-

chase price of an article, on one or more of such notes, and the defendant pleads failure of consideration, a verdict and judgment in his favor can be pleaded as *res judicata* to a suit on the other notes of the same series.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1118; Dec. Dig. § 603.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Puffer Manufacturing Company against J. H. Rivers and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The Puffer Manufacturing Company sold the defendants a soda fount and apparatus for \$530, of which sum the defendants paid \$25 cash and \$25 on delivery of the fount, executing for the balance a series of monthly promissory notes containing the usual clause that, in the event of default in the prompt payment of one note, the holder might at his option elect to treat the entire series as due and collectible. The defendants paid in all \$150, and, on their refusal to pay the balance, the plaintiffs instituted suit in a justice's court on the five notes past due at that time, aggregating \$75. The defendants pleaded that the consideration of the notes had totally failed in that the apparatus was utterly unsuited for the purpose for which it was bought. They further pleaded, by way of recoupment, that through leakage in certain parts of the apparatus they had sustained a loss of \$50 worth of syrups and mineral waters. Judgment was asked for \$100 against plaintiff for breach of contract, and also for \$150 as the amount paid on the purchase price of the apparatus. On appeal to the superior court the jury found a verdict in favor of the defendants. Subsequently the plaintiff instituted suit on the other notes, by levying a purchase-money attachment on the apparatus. The defendants pleaded *res judicata*, and, on the trial of this issue, introduced the pleadings and the verdict and judgment in the former suit. There was no other evidence, and the judge thereupon directed the jury to return a verdict sustaining the plea of *res judicata*. The plaintiff excepts to this ruling.

Jos. D. Greene and Dorsey, Brewster, Howell & Heyman, for plaintiff in error. Thos. L. Bishop, for defendants in error.

RUSSELL, J. We think the court properly ruled in favor of the plea of *res judicata*. There was one entire contract between the parties, growing out of the purchase of a soda fount and apparatus, and the serial notes merely evidenced the time and manner of payment. When sued on one of the serial notes, it was proper to give in evidence, under a plea of total or partial failure of consideration, that one or more of the notes has been paid. *Crouch & Son v. Spooner*, 9 Ga. App. 695 (5), 72 S. E. 61. Likewise it would

be relevant to show that there were other notes outstanding, not yet due or paid. The issue, therefore, on the first trial, was whether the soda fount and apparatus was worth more than the sum which had already been paid, namely, \$150. The defendant contended that it was utterly worthless, and asked, not only a return of the amount paid, but also special damages in the sum of \$100. The jury found a verdict in favor of the defendant, without allowing the special damages, thereby adjudicating necessarily one or the other of two things, to wit, that the soda fount and apparatus was worth either \$150 or \$250, and no more. If the jury believed that the defendant had really suffered the special damages sought to be recouped, and that under the charge of the court it could properly be allowed, then their verdict indicates that the soda fount and apparatus was worth in their belief \$250, and no more. If no such special damage were allowed, then the verdict indicates that the apparatus was worth the sum already paid, namely, \$150, and no more. This was the controversy between the parties, which the jury settled in favor of the defendant.

[1] A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered. Civil Code 1910, § 4336. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded. *Kelly & Jones Co. v. Moore*, 128 Ga. 683, 686, 58 S. E. 181. However, if the defendant had not pleaded the failure of consideration in the first case, thereby raising the question the principle of the case of *Worth v. Carmichael*, 114 Ga. 699, 40 S. E. 797, would have been applicable; and there would have been no estoppel.

The case at bar is very similar in principle to that of *Kennedy v. McCarthy*, 73 Ga. 346, in which an employé under contract for a year, with salary payable monthly, was discharged during the year, and, at the end of the first month thereafter, sued for the salary of that month. The employer defended on the ground of the incompetency of the employé, and claimed he had a right to discharge him. The jury found a verdict for the plaintiff. Subsequently the employé sued for other months during the year, and the employer sought to interpose the same defense; but the court held that the decision in the first case was conclusive as to the same defense in the second. The only substantial difference between that case and this one is that here the shoe pinches the other foot. Here the seller held a lot of notes, all of which were parts of the same contract, and all of which were, at his option, due and

collectible. He elects to sue merely on some of the notes, and the defendants assert a defense which goes to the very heart of the entire contract, and the issue terminates in their favor.

[2] Now, by instituting suit on other notes under the same contract, the plaintiff seeks to reopen the old controversy, and force the defendant again to assert the same defense of failure of consideration. If this could be done, then the plaintiff could have instituted a separate suit on every one of the 35 notes, and thus have forced the defendant to assert and prove the same defense as to every one of them. The law of *res judicata* is intended to put an end to litigation, and where one controversy between the same parties has been fully heard on the merits and determined, the matter should be dropped.

There was no error in directing a verdict in favor of the defendant.

Judgment affirmed.

(10 Ga. App. 204)

W. W. STOVALL & BRO. v. JOINER.
(No. 3,421.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

GARNISHMENT (§ 87*)—AFFIDAVIT—AMENDMENT.

Where an affidavit for garnishment against an administrator omits the allegation that the defendant is insolvent, the omission may be supplied by amendment, unless in the meantime the garnishee, or some third party, has acted to his injury by reason of the omission.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 166; Dec. Dig. § 87.*]

Error from City Court of Nashville; J. G. Cranford, Judge.

Garnishment proceedings by W. W. Stovall & Bro. against W. D. Joiner, administrator. From a judgment dismissing the proceedings, plaintiffs bring error. Reversed.

The plaintiff in *fi. fa.*, through his attorney, made affidavit and bond for garnishment in ordinary form, and the process of garnishment issued thereon was served on the administrator of the deceased ancestor of the defendant in *fi. fa.* The administrator, at the first term thereafter, answered that the defendant was entitled to a share in the estate, the exact amount of which could not at that time be given, but would be set up thereafter. At a later term of the court the administrator moved to dismiss the garnishment proceedings, because the affidavit failed to allege that the defendant was insolvent, or that he was a nonresident, as required by Civil Code 1910, § 5304. Thereupon the plaintiff offered to amend the affidavit, by adding thereto the allegation that the defendant was insolvent. The court refused to allow the amendment, and sustained the motion to dismiss the garnishment proceedings.

Hendricks & Christian, for plaintiffs in error. Chastain & Gaskins and Alexander & Gary, for defendant in error.

RUSSELL, J. 1. It is provided by Civil Code 1910, § 5706, that all affidavits that are the foundation of legal proceedings "shall be amendable to the same extent as ordinary declarations, and with only the restrictions, limitations and consequences now obtaining in the case of ordinary declaration and pleas." This provision of the law changed the rule as it previously existed into harmony with the statement of Judge Bleckley that in this state the doctrine of amendment is as broad as the plan of universal salvation. *Ellison v. Georgia Railroad Company*, 87 Ga. 691, 13 S. E. 809. The statute, being remedial in nature, is to be liberally construed, to the end that the vice aimed at may be fully cured. *Levin v. American Furniture Co.*, 133 Ga. 670, 671, 66 S. E. 888. Any amendment which is aimed to make the affidavit conform to the actual conditions existing at the time of its making is in the interest of truth and justice, and should not be disallowed for purely technical objections not going to the merits of the controversy. *Collins v. Taylor*, 128 Ga. 789, 790, 58 S. E. 446. The failure to allege that the defendant was insolvent was necessary to confer jurisdiction on the court; and, in the absence of such an allegation, either originally or by way of amendment, before prejudice therefrom to the rights of third parties, the garnishment proceedings are void, and the court has no jurisdiction to render judgment against the administrator. *National Lumber Co. v. Turner*, 2 Ga. App. 750, 59 S. E. 15. Construing the foregoing Code section relating to the amendment of affidavits, however, in connection with section 5691, providing that the omission to give the court jurisdiction in the pleadings is amendable, it appears that the omission to give the court jurisdiction by the allegations of the original affidavit may be cured by amendment. By the former section affidavits are expressly made amendable in all respects like pleadings, and by the latter section pleadings are expressly made amendable by supplying facts conferring jurisdiction, from which it follows that affidavits are amendable by supplying necessary jurisdictional facts.

A case similar in principle to the case at bar is that of *Johnson v. Johnson*, 113 Ga. 942, 39 S. E. 311. There suit was brought in a justice's court upon a promissory note for \$100 principal and 10 per cent. attorney's fees. Such a suit is not within the jurisdiction of that court; but nevertheless the Supreme Court held that the suit could be amended, so as to show that the amount really due upon the note at the time suit was begun was less than \$100, inclusive of attorney's fees. The actual facts existing at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the time the suit was brought made the case one within the jurisdiction of the court, and the omission of the pleader to set forth all these facts can be supplied by amendment. In the case at bar the actual facts existing at the time the garnishment suit was begun show that the plaintiff held an unsatisfied execution against the defendant, and that the garnishee held property belonging to the defendant which in justice ought to go toward the satisfaction of the execution, and that the defendant is insolvent. These facts give the court jurisdiction, and, under the law as we understand it, one of the facts, to wit, the insolvency of the defendant, can be supplied by amendment, which relates back and becomes a part of the original proceedings. *Brumby v. Rickoff*, 94 Ga. 429, 21 S. E. 232. To hold otherwise would be to go contrary to the whole policy of our law and to the evident purpose and intent of the statutes referred to above. If the suit as originally begun contains the skeleton, the meat may be put on the bones by way of amendment. *Penn & Watson v. McGhee*, 6 Ga. App. 635, 65 S. E. 686. We hold, therefore, that the court erred in refusing to allow the amendment, and in dismissing the garnishment proceedings.

Judgment reversed.

(10 Ga. App. 181)

CALHOUN BRICK CO. v. PATILLO LUMBER CO. (No. 3,263.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

1. MECHANICS' LIENS (§ 155*)—MATERIAL FURNISHED—RECORDING OF CLAIM.

The recording of a materialman's claim of lien on the proper book in the office of the clerk of the superior court in the county where the property upon which the lien is claimed is situated, within three months after the material is furnished, substantially in the form prescribed by the statute, is a sufficient record, although the entry of filing and recording, and the actual inscribing of the claim of lien, may have been done by an employé of the clerk, charged specially with such clerical work in the office. It is the fact of record, and not the mere ministerial or mechanical act of recording, that is essential.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 155.*]

2. MECHANICS' LIENS (§ 132*)—FILING CLAIM—RECORD.

A claim of lien for material furnished for building purposes from time to time under one and the same contract is recorded in time, if the record of the claim be made within three months from the delivery of the last item constituting a part of the running account covered by the contract, although many items of the account had been furnished more than three months from the date of record.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 132.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

In the matter of the distribution of cer-

tain funds in the hands of the sheriff. From an order giving the fund to the Patillo Lumber Company, the Calhoun Brick Company brings error. Affirmed.

Thomas & King, for plaintiff in error. E. A. Stephens and Walter McElreath, for defendant in error.

HILL, C. J. The questions in this case arose on a rule against the sheriff for distribution of the fund in his hands realized from the sale of property under execution. There were two claimants of the fund; the Patillo Lumber Company claiming it under a materialman's lien, and the Calhoun Brick Company under a general execution. The judge, by agreement, heard the case without the intervention of a jury, and decided that the materialman's lien had priority.

It is admitted that if the materialman's lien was valid, it was entitled to priority of payment, and there was no contention that this claim of lien was not in due form, or that it was not recorded in the proper office on the proper book. But its validity is challenged on two grounds: First. Because the entry of filing and recording was not made by the clerk of the superior court, but was made by a clerk employed in his office and not in his presence; that the entry of filing and recording, as well as the recording of the claim of lien, was made by this employé, he writing the name of the clerk; that this clerk was employed in the office of the clerk of the superior court in doing the actual work of writing on the books of the clerk's office. Second. That the claim of lien was not filed for record in the office of the clerk, or recorded, within three months after the material had been furnished. The evidence showed that some of the material for which the lien was claimed was furnished within three months before the filing for record of the claim of lien, but it was insisted this material was not included in the material furnished in the original contract, but was extra material, ordered from time to time, and was not a part of the account, and therefore could not be included in the claim of lien. The judge found against this contention, holding that these items of the account constituted a part of the running account furnished from time to time under one and the same contract, and that the record of the claim of lien was made three months from the delivery of the material constituting several of these last items.

[1] 1. The recording of the materialman's claim of lien in the office of the clerk of the superior court in the county where such property is situated, within three months after such material is furnished, substantially in the form as designated in the statute, is legally sufficient. Civil Code 1910, § 3353, par. 2. A claim of lien must not only be filed for record, but must be recorded

within three months after the material shall have been furnished, to meet the requirements of the statute. If the claim of lien is actually recorded on the proper book in the clerk's office, in so far as the record is concerned, the creation of the lien is established. *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850. The omission of the clerk to enter the fact of the record on the original paper, if the record was actually made, would not invalidate or affect its regularity. *Grice & Ryan v. Haskins*, 73 Ga. 701. In other words, it is the fact that the claim is duly recorded in the proper office and on the proper book that is necessary, and it is immaterial whether the clerk himself, or some one in his office and in his employ, does the physical act of recording, for the writing of the lien upon the record is a mere ministerial or mechanical duty, and can be properly performed by any one employed in the office by the clerk who is charged with the duty of making such recordation. The act of recording does not require the exercise of any judgment or discretion on the part of the clerk. It is purely a mechanical or executive act, and can be delegated by the clerk to an employé in his office, unless this is expressly prohibited by statute. *Mechem on Public Offices*, § 567; *Horton v. State*, 120 Ga. 307, 47 S. E. 969. The decisions relied upon by counsel for the plaintiff in error relate to cases involving some act which the statute expressly requires shall be performed by the officer in person, or which necessitates the exercise of some judgment or discretion or to cases referring to the signing of something in the nature of judicial writs, such as the issuance of subpoenas, or executions, and official documents of like character. We think, therefore, that the learned trial judge very properly held that the claim of lien was valid, notwithstanding the fact that the entry of filing and recording had been made by an employé in the clerk's office who was specially charged with that work; the claim of lien having been duly recorded in the proper office on the proper book.

[2] 2. The second objection to the validity of the lien involves a question of fact, largely to be determined by an inspection of the items of the account, and there was ample evidence to sustain the finding on this point. The documentary evidence clearly showed that the claim of lien was recorded within three months from the delivery of some of the items of the material which constituted as a whole the claim of lien, and it is well settled that, if the recording was within three months from the delivery of the last item of the material constituting the lien, this requirement of the statute

would be fulfilled. *Alexander's Lien Laws* of the Southeastern States, and cases cited on page 188.

Judgment affirmed.

(10 Ga. App. 209)

GEORGE v. STATE. (No. 3,512.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence is weak, contradictory, and unsatisfactory, but legally sufficient to authorize the inference of guilt.

2. INSTRUCTIONS.

When the judge's charge is considered in connection with the defendant's contentions as disclosed by the evidence, no sufficient reason for granting a new trial appears.

Russell, J., dissenting.

Error from City Court of Sylvester; J. B. Williamson, Judge.

Jimmy George was convicted of illegal sale of liquor, and brings error. Affirmed.

Perry, Foy & Monk, for plaintiff in error. J. H. Tipton, Sol., for the State.

PER CURIAM. Judgment affirmed.

RUSSELL, J. (dissenting). In the head-notes I have announced the conclusion of the majority of the court. Personally I am of the opinion that the plaintiff in error was entitled to a new trial, upon the assignment of error that the court failed to instruct the jury as to the degree of proof required where the conviction depends upon circumstantial evidence alone. I think that the jury should have been instructed that the guilt of the accused should have been manifest, to the exclusion of every other reasonable hypothesis save that of his guilt. I am aware that it is very difficult to fix the exact line of demarcation in many cases between direct and circumstantial evidence. To my mind, however, the inference of guilt which is authorized from the receipt of money, and the delivery shortly thereafter of intoxicating liquor, is purely circumstantial in its nature. I think, too, that the plaintiff in error rightly complains of the use of the word "purchaser" as descriptive of the person to whom the whisky was delivered, in view of the fact that the defense rested upon proof that there was no purchase at all, and that he was sent merely to bring to the person who was shown to have received the whisky his own property, which he had previously acquired from a different person. The phrase employed by the court (no doubt unintentionally, but in my opinion effectually) eliminated the defendant's defense.

(10 Ga. App. 175)

BUTLER v. ATLANTA BUGGY CO.
(No. 3,281.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***MASTER AND SERVANT (§ 234*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF SERVANT.**

It appearing from the evidence in behalf of the plaintiff that, even conceding that his employer was guilty of negligence, as alleged in the petition, in furnishing him a defective instrumentality with which to do his work, yet his opportunities of discovering this defective condition were equal, if not superior, to those of the employer, and that this defective condition was patent to superficial observation, and was in fact observed by the plaintiff before he was injured by his voluntary use of the defective instrumentality, a nonsuit was properly granted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. T. Butler against the Atlanta Buggy Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Butler sued the Atlanta Buggy Company for damages on account of personal injuries. The court overruled a demurrer to the petition, and after the introduction of testimony for the plaintiff, granted a nonsuit, and the latter judgment is here for review. The allegations of the petition are in substance as follows: Butler was an employé of the defendant as a woodworker, and had been so employed for over two years, and while he was at work endeavoring to saw a piece of wood with a rip or buzz saw furnished him by the defendant for that purpose, his left hand was jerked against the saw, and two of his fingers were cut off, and he was otherwise injured. He claims that the saw was not in a proper condition to be used, because several of the teeth were improperly set; that is, some of the teeth to the saw were bent more than the others. This defective condition caused the plank that he was pushing against the revolving saw to jerk back, and, when these imperfect teeth came against the plank, his hand was jerked against the saw. He did not know of the defective condition of the saw, and had no opportunity of discovering its defective condition before he used it, and he was not guilty of negligence in attempting to use it in this condition. The defendant had an employé whose duty it was to keep this saw in proper condition, and this duty had not been discharged, and an inspection by the defendant through this employé would have discovered this defective condition of the saw. It is alleged that the employer was negligent in failing to furnish the plaintiff with proper machinery with which to work;

that in its improper and defective condition the saw was not a safe instrument for him to use at his work.

The plaintiff proved his employment, the nature of his work, and that several of the teeth of the saw he was using were set out more than the other teeth; that the defendant kept an employé whose duty it was to keep the machine and tools in proper condition, and that while he was attempting to use the saw, being ignorant of its defective condition, his hand was injured in being thrown against the saw; that at the time he received the injuries he was pushing a piece of plank about 18 or 20 inches long, 5 or 6 inches wide, and three-fourths of an inch in thickness, against the revolving saw, for the purpose of having it cut or ripped; that the plank lacked only about 5 inches of being sawed or ripped through, and while he was pushing the timber against the saw the piece of timber would rise up and not go through and it became necessary for him to put his hand around the saw to hold down the timber; that, just as he got the plank or piece of timber almost cut through, the saw raised or jerked the plank, and his hand was thus thrown against the saw and injured; that he was sawing the plank in the usual and proper way, and the reason the plank rode the saw and jerked his hand against it was "because one of the teeth of the saw, that was bent too far out, instead of going through the slot which had been sawed in the plank, struck the plank by the side of the slot," thus raising the plank up and throwing his hand against the saw. The saw was about 12 inches in diameter, and revolved towards the plank where the timber was pushed against it. It was set in a table having a steel top, and almost a half of the saw revolved above the surface of the table. The timber to be sawed was pushed along the surface of the table to the saw.

The plaintiff himself testified that he had been working as an employé of the defendant for about two years, and that in connection with this work he made constant use of the saw in question; that he was an experienced workman; that he did not notice the condition of the saw on the day of his injury, and was doing his work that day in the proper and usual way; that it was necessary for him to put his hand in front of the saw to hold the plank down, as it flew up, in order to get it through the saw; that it was a piece of hard oak timber; that he was using a guide or gauge for the purpose of having a straight line sawed, and that a guide would keep the line straight if it was a good one, but this guide "would just wobble about"; that it was not of any account, and this made crooked the line he was endeavoring to saw; that he saw the guide "wobble"; that there was no way to

tighten it, and that he went on and did the best he could with the "wobbly guide," because he had not noticed its imperfect condition until after he had started sawing the plank; that he saw that one of the teeth was bent too far out, but could not tell upon which side of the saw the bent tooth was; that he discovered the condition of the saw on that day, and before he was injured, and he had not seen the saw since that day. A fellow workman who testified in behalf of the plaintiff described the manner in which plaintiff's injuries were received, about as detailed by the plaintiff, and testified as to the condition of the teeth of the saw, stating that he did not give the saw a close examination, but "just glanced at it, and saw that the teeth were irregular"; that he made a further examination of it after the injury occurred, and "it was in about as good condition as they generally run it."

Moore & Branch, for plaintiff in error.
Smith, Hammond & Smith, for defendant in error.

HILL, C. J. (after stating the facts as above). The evidence, even when considered most favorably for the plaintiff, fails to show that he successfully carried the burden which the law imposed upon him. It was incumbent upon him to prove, not only that the defendant was guilty of negligence as alleged in the petition, but that he himself was free from fault. The evidence leaves it doubtful whether the plaintiff's injuries resulted in fact from the defective condition of the saw as described. His fellow servant, who testified as to the condition of the saw, said that "it was in about as good condition as they generally ran it." If this was true, its defective condition could not have furnished a basis of negligence on the part of the defendant, in view of the fact that plaintiff was an experienced workman, and had been for over two years familiar with the saw as it was generally used by him in his work. But, even conceding that the saw was in a defective condition, and that it was the duty of the defendant to have had it inspected and to have remedied these defects, yet these things alone would not have entitled the plaintiff to recover. The law raises an implied warranty on the part of the master that he will keep and maintain the instrumentalities with which his employes are required to work free from any hidden defects so far as he knows of, or in the exercise of ordinary diligence can anticipate or discover. It also implies an agreement on the part of the servant to assume the risk of all dangers that are within his knowledge, or can be discovered by him in the exercise of ordinary diligence on his part. The obligation is mutual. The degree of diligence is the same, and, before a recovery can be had, the servant must show

that the master violated his implied obligations, while he himself fully performed the obligation which the law imposed upon him. This principle is well settled and is universal, and this court, as well as the Supreme Court of Georgia, has made many decisions emphasizing the rule of mutual obligation which the law imposes upon both the employer and the employe. Some of these decisions pertinent to the facts of the case sub judice are *Brown v. Rome Foundry Co.*, 5 Ga. App. 143, 62 S. E. 720; *Attleton v. Bibb Manufacturing Co.*, 5 Ga. App. 777, 63 S. E. 918; *Flury v. Hightower Box & Tank Co.*, 132 Ga. 300, 64 S. E. 72; *Hendrix v. Vale Royal Mfg. Co.*, 134 Ga. 712, 68 S. E. 483; *White v. Kennon & Co.*, 83 Ga. 343, 9 S. E. 1082; *Ingram v. Hilton Dodge Lumber Co.*, 108 Ga. 197, 33 S. E. 961; *Smalls v. Southern Ry. Co.*, 115 Ga. 137, 41 S. E. 492; *Manchester Mfg. Co. v. Pope*, 115 Ga. 542, 41 S. E. 1915; *DeLay v. Southern Ry. Co.*, 115 Ga. 934, 42 S. E. 218; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Zipperer v. S. A. L. Ry. Co.*, 129 Ga. 387, 58 S. E. 872.

The whole law on the subject, however, is comprehensively and clearly contained in the two sections of the Civil Code of this state. Section 3130 of the Civil Code of 1910 declares that "the master is bound to exercise ordinary care * * * in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in the machinery, or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto." Section 3131 declares that "a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with the duties imposed by the preceding section, it must appear that the master knew or ought to have known * * * of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." When we apply these sections of the Code, which simply embody well-settled principles of law, to the facts proved by the plaintiff, it is obvious that, even conceding that the master may have been negligent in furnishing to him a defective saw with which to do his work, it is also perfectly obvious that this defective condition was either actually or constructively known to the plaintiff. His own witness testified that he discovered the defective condition by a mere glance at the saw. The plaintiff was an experienced workman. He had worked with this identical saw repeat-

edly. He had been working with it that very day. According to his testimony he did actually notice that it "wobbled" and was not proceeding in its normal way. If his employé, by a glance, discovered that its teeth were deflected from their normal position, could not the plaintiff, when he was about to use it, and was actually using it, also have seen its defective condition, which he described, and which he says caused his injuries? Indeed, he must have seen it, because he fully described its condition, and testified that he did not see the saw for months after his injuries. His own evidence affirmatively shows that he not only had an equal opportunity with the master to discover the defective condition of the saw, but had a better opportunity than the master to make this discovery.

Learned counsel for the plaintiff insists that, as a general demurrer had been overruled, his right to recover, if he proved the allegations of his petition, was settled. But did he prove the allegations of his petition? The principal allegations of his petition, on proof of which alone he was entitled to recover, were that the saw was defective, that its defective condition was unknown to him, and that this condition could not have been known to him by the exercise of ordinary diligence and care. It was necessary for him to show these things, even after he had proved that the master was guilty of negligence in furnishing him a defective tool with which to work. But the evidence in his behalf utterly fails to show this. A faithful employé, who is injured in the zealous service of his master, is entitled to compensation for any injuries that he may receive, caused by his master's negligence, and which could not have been avoided by him in the exercise of ordinary care and prudence; and this court will not be diligent to detect the negligence of a faithful and zealous servant. But where that rule of justice, to wit, the rule of mutual obligation, is clearly violated by the failure of the servant, either through recklessness or negligence, to avail himself of his senses, aided by his experience, in discovering defects in the instrumentalities with which he is working, and which are discoverable even by a glance of the eye, and cannot possibly be hidden from the view of any one who looks at the instrumentality in the light of day, the zeal and fidelity of the servant is not sufficient to overcome such manifest negligence. A careful study of the evidence for the plaintiff, giving to it every reasonable inference that would support his claim to recover damages, leads us to the conclusion that the question of his negligence, under well-settled principles of law, was not even issuable, and the judge properly awarded a nonsuit.

Judgment affirmed.

(10 Ga. App. 190)

HENDERSON v. DE MEDICIS. (No. 3,234.)
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

POSSESSORY WARRANT (§ 4*)—JUDGMENT—EVIDENCE.

The possession of the personal property described in the possessory warrant was not acquired by the defendant by any of the modes set forth in section 5371 of the Civil Code of 1910, and a judgment in favor of the plaintiff was for that reason unauthorized, and, on certiorari, the court properly set it aside and rendered final judgment in favor of the defendant. *Dennard & Co. v. Butler*, 2 Ga. App. 198, 58 S. E. 297; *Brown v. Todd*, 124 Ga. 939, 53 S. E. 678.

[Ed. Note.—For other cases, see Possessory Warrant, Dec. Dig. § 4.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. A. Henderson against C. P. De Medicis. Judgment for plaintiff was set aside on certiorari, and he brings error. Affirmed.

B. B. McCowen, for plaintiff in error.
Pierce Bros., for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 214)

WHIPPLE v. STATE. (No. 3,787.)
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 252*)—TRIAL—AMENDMENT TO ACCUSATION—WAIVER OF OBJECTIONS.

On the trial of an accusation in a city court, the solicitor, after the accused had been arraigned and the jury stricken and sworn, but before any evidence was introduced, made a formal amendment to the accusation, which was not then objected to by the accused. Subsequently, when testimony was offered to prove the truth of the amendment, the accused objected to the evidence, and then made an oral demurrer to the amendment to the accusation. *Held*, the objection to the amendment came too late. If good at all, the objection should have been interposed when the amendment was offered, and not delayed until after testimony had been offered in support of the allegation covered by the amendment. The delay in making the objection to the amendment operated as a waiver thereof.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 252.*]

2. RULINGS ON EVIDENCE.

The objections made to rulings on the admissibility of evidence are without merit. No error of law appears, and the verdict is fully supported by the evidence.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Arthur Whipple was convicted of crime, and brings error. Affirmed.

R. Earl Camp, for plaintiff in error. Geo. B. Davis, Sol., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 169)

ALLEN v. WINDHAM. (No. 3,239.)
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

EXECUTION (§ 168*)—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

An affidavit of illegality was filed to the levy of an execution issued on a judgment rendered on a bond for the dissolution of a garnishment, on the alleged ground that the summons of garnishment was issued by the clerk of the superior court, who was not authorized to issue summons of garnishment. The recitals contained in the bill of exceptions show that the affidavit for garnishment was made before a justice of the peace, and the summons of garnishment was duly issued by him, and the garnishment proceedings were in all respects regular, and these admissions in the bill of exceptions are corroborated by the record of the garnishment proceedings specified as a part of the record and transmitted to this court. The judgment dismissing the affidavit of illegality is affirmed.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 168.*]

Error from City Court of Ashburn; R. L. Tipton, Judge.

Affidavit of illegality by J. H. Allen against Rebecca Windham. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Story and W. A. Hawkins, for plaintiff in error. Jas. H. Pate, for defendant in error.

HILL, O. J. Judgment affirmed.

(10 Ga. App. 208)

HORNE v. MAYOR OF CITY OF MACON. (No. 3,503.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***LOCKER CLUB.**

The evidence authorized the inference that the defendant was managing and operating for profit a "blind tiger," under the guise of a so-called locker club, and in connection therewith kept on hand intoxicating liquors for the purpose of illegal sale, in violation of the ordinance of the city of Macon.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

J. W. Horne, Jr., was convicted of violating an ordinance of the City of Macon, and brings error. Affirmed.

Jesse Harris, for plaintiff in error. A. W. Lane, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 218)

McGINTY v. STATE. (No. 3,836.)
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.
No error appears.

Error from City Court of Macon; Robt. Hodges, Judge.

John McGinty was convicted of crime, and brings error. Affirmed.

John P. Ross, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

POWELL, J. This is a liquor case, with conviction on the count charging the keeping on hand of liquors at defendant's place of business. While there are a number of assignments of error, all of them, so far as material, are directly controlled adversely to the plaintiff in error by the decisions of this court—most of them so very recent as that it would result in mere idle judicial tautology for us to enter into an elaboration of the points here presented.

Judgment affirmed.

(10 Ga. App. 191)

HAZZARD v. MAYOR, ETC., OF CITY OF SAVANNAH. (No. 3,331.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 209*)—CERTIORARI—JUDGMENT.

Even if the evidence was insufficient to authorize the verdict rendered by the justice of the peace, the judge of the superior court erred in rendering final judgment in favor of the defendant. In sustaining the certiorari, he should have ordered a new trial, for the plaintiff might be able to supply any deficiency of evidence on another trial. The judgment is therefore affirmed, with direction that it operate to order a new trial in the justice court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 813-828; Dec. Dig. § 209.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Abraham Hazzard against the Mayor, etc., of the City of Savannah. From a judgment of the superior court sustaining a certiorari, and rendering a judgment for defendant, plaintiff brings error. Affirmed, with directions.

Twiggs & Gazan, for plaintiff in error. Sam'l B. Adams and H. E. Wilson, for defendant in error.

RUSSELL, J. Judgment affirmed, with directions.

(10 Ga. App. 191)

CHANDLER v. ATLANTIC COAST LINE R. CO. et al.

ATLANTIC COAST LINE R. CO. et al. v. CHANDLER.

(Nos. 3,345 and 3,346.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

*(Syllabus by the Court.)***OBLIGATION OF CONTRACTS.**

The constitutional questions raised by the record in this case were certified to the Supreme Court for instruction, and the decision

of that court thereon, rendered August 15, 1911 (Washington v. Atlantic Coast Line R. Co., 136 Ga. 638, 71 S. E. 1066), is controlling, and requires a reversal of the main bill of exceptions. The judgment on the cross-bill of exceptions is affirmed, as the special demurrer was without merit.

Error from City Court of Waycross; W. C. Lankford, Judge.

Action by A. S. Chandler against the Atlantic Coast Line Railroad Company and others. Judgment for defendants, and plaintiff brings error. Case certified to the Supreme Court. Questions answered (136 Ga. 638, 71 S. E. 1066), and judgment reversed on main bill of exceptions, and affirmed on cross-bill of exceptions.

Crawley & Crawley, R. L. Berner, and Jno. S. Walker, for plaintiff in error. Bennet, Twitty & Reese and Wilson, Bennett & Lambdin, for defendants in error.

HILL, C. J. Judgment reversed on main bill of exceptions; affirmed on cross-bill of exceptions.

(10 Ga. App. 198)

MOORE v. MAY. (No. 3,889.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

BROKERS (§ 46*) — COMMISSIONS — SALE BY OWNER—EVIDENCE.

An owner of real estate, by employing an agent to effect the sale thereof under a written contract under seal, does not preclude himself from selling it, provided he makes the sale in the utmost good faith, without any purpose to defraud the agent of his right to commissions under the contract. The fact that the contract provides that the agency created thereby is irrevocable for the term of three months is not of itself sufficient to prevent the owner from himself selling the property within that time, if he does so, as above stated, in the utmost good faith, to a person with whom the agent has had no prior negotiations relating to the sale or purchase of the property.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 46.*]

Error from City Court of Nashville; W. D. Bule, Judge.

Action by J. W. Moore against C. D. May. Judgment for defendant, and plaintiff brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. J. P. Knight and W. G. Harrison, for defendant in error.

HILL, O. J. The sole question in this case arises on the following contract: "Georgia, Berrien County. Know all men by these presents, that I have this day appointed J. W. Moore my agent to negotiate the sale of the following lands [described]. I obligate myself to make warranty deeds to said lands to any party named by my said agent upon

the payment of \$700, payments to be made as follows: \$100 cash; balance \$100 quarterly at 8 per cent. interest from date. And I allow my said agent \$100 as a remuneration for his services and expense in getting purchaser—all amounts he or they, the said agent, may contract for over and above the sum of \$700. This agency is created for the term of three months, and is irrevocable. Witness my hand and seal this the 4th day of April, 1910. [Signed] C. D. May. [Seal.]"

Moore brought suit against May to recover his commission as real estate broker under the terms of this contract. He alleges that he found and obtained a purchaser for the lands described in the contract, who was willing, able to buy, and desirous to purchase said lands upon the terms and conditions set forth in the contract, and that the defendant was requested to execute a deed to the purchaser named, and he (plaintiff) tendered to the defendant the net purchase price for which the defendant had agreed to sell the described real estate, within the time designated by the contract; that the defendant refused to execute a deed to the purchaser, and refused to pay plaintiff his commission. He further alleges that the defendant, after making this contract and within three months from the making of the same, himself sold the described lands "to another party other than petitioner or any party named by him." The trial judge sustained a general demurrer, and dismissed the petition, and this judgment is here for review.

Section 3587 of the Civil Code of 1910, contains the following language: "The fact that property is placed in the hands of a broker to sell does not prevent the owner from selling, unless otherwise agreed." It is insisted by plaintiff in error that the contract was in terms exclusive and was substantially an agreement that the owner of the property who made the contract relinquished absolutely to the real estate broker for the term of three months his right to sell the real estate. In support of this contention this clause in the contract is relied upon: "This agency is created for the term of three months, and is irrevocable." It is said that the word "irrevocable" is equivalent in meaning to the word "exclusive," and that the intention of the maker of the contract in the use of this word was to give to the agent or real estate broker for the three months the sole right to sell the real estate; that neither the owner of the real estate nor any other agent had the right during the three months to make a sale of the real estate that would prevent the broker from recovering his commission.

We do not agree with this construction of the language of the contract. The word "irrevocable" simply means that the agent would have the three months in which to make the sale on the terms stipulated, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that during three months the agency was not revocable by the maker of the contract, and possibly that during the three months no other agent or real estate broker would have the right to sell the real estate described in the contract. We do not think that the language relied upon is sufficient to constitute an agreement by the owner surrendering his right to sell his property himself. The statute gave him this right, notwithstanding the contract, unless by the contract it was otherwise agreed. And the mere stipulation that the contract of agency was irrevocable was not sufficient to prevent the owner from the exercise of his right as owner, unless clearly expressed to the contrary, to make a personal sale of his property. In the case of *Kidman v. Howard*, 18 S. D. 161, 99 N. W. 1104, it was held that the contract conferring agency to sell real estate, which contained the clause that the agency was to exist until the property therein described was sold by the agent, did not exclude the right of the owner of the real estate personally to make a sale of the property; and it has been frequently held that the owner of real estate, by employing a real estate agent or broker to effect the sale of property, does not preclude himself from employing other agents for the same purpose, or from effecting a sale himself, provided that in making the sale himself he acts in good faith; "good faith" meaning that the owner would not be allowed, after making a contract with a real estate broker, to avail himself of the broker's services, where the broker had procured a purchaser, and to effect the sale himself, thereby depriving the broker of his commission. The agent is entitled to his commission "when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." Civil Code (1910), § 3587. But if, before the broker finds a purchaser, the owner himself sells the property to a person with whom the broker has had no negotiations relating to the property, and the broker has had nothing to do with procuring the purchaser to whom the owner has sold, and the owner has acted entirely in good faith, and not endeavored in any manner to defraud the broker in reference to the contract, the agent would not be entitled to his commission. *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42; *Mechem on Agency*, § 967.

In this case there is no allegation of bad faith by the owner of the property in connection with the sale. On the contrary, it is alleged that the owner sold the property to another party, and not to the party found or named by the broker. We therefore conclude that the judgment of the lower court must be affirmed.

Judgment affirmed.

(10 Ga. App. 169)

LOUISVILLE & N. R. CO. et al. v. HUDSON.
(No. 3,246.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 202*)—LIABILITY
—TORTS OF EMPLOYÉ.

A railroad company is not liable in damages for a homicide committed by an employé, where the homicide was not committed in the prosecution of the business of the railroad and within the scope of his employment, but was his personal act in resenting a real or fancied insult.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 535-537; Dec. Dig. § 202.*]

2. MASTER AND SERVANT (§ 272*)—LIABILITY
—TORTS OF EMPLOYÉ—EVIDENCE.

Where the act of the employé in committing the homicide was one for which the master was not responsible, because it was an individual personal act of the employé, not within the scope of his employment, the fact that the employé was of high and ungovernable temper and habitually carried a pistol, would be wholly immaterial and irrelevant. The test for determining a master's liability for an act of the servant is not the servant's bad disposition or vicious habits, but whether the act was within the scope of his employment and was connected with the prosecution of the master's business.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 272.*]

(Additional Syllabus by Editorial Staff.)

3. CORPORATIONS (§ 488*)—"PERSON."

A corporation is a "person," within the meaning of Civ. Code 1910, § 4413, relating to the liability of the master for the torts of the servant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1899; Dec. Dig. § 488.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by Pearl Hudson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hudson was a night yard conductor of the Charleston & Western Carolina Railway Company, whose duty it was, among others, to receive cars delivered by a connecting carrier to the railroad. Jackson was a night engineer, employed by the defendant railroad companies, to wit, the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, as lessees, and it was his duty among others, to deliver the cars of his employer to the Charleston & Western Carolina Railway Company. On November 1, 1909, at night, Jackson, in the discharge of his duties, delivered 23 cars to the last-named company in its yards in Richmond county. When Jackson and his crew reached the yards for the purpose of making a delivery of these cars, he asked Hudson where he wanted the cars placed, and Hudson replied, "On track No. 1." When Jackson called the switch-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

man on that track, Hudson signaled Jackson to stop, whereupon the conductor who was with Jackson and his crew signaled Jackson to go ahead, and Jackson endeavored to move the line of cars. He could not move them, and, seeing that he could not do so, requested his fireman to get down and help him find out the trouble, and both Jackson and his fireman got down off of the engine, and began to inspect and examine the cars for the purpose of finding out the trouble. They claimed that the air was "cut out," and Jackson accused Hudson of cutting it out. Hudson replied that he knew nothing of it, and that, if Jackson said that he did it, he lied. Immediately Jackson jumped on his engine, got a revolver out of his box, and wrongfully, willfully, and unlawfully shot Hudson, killing him almost instantly.

Suit was brought to recover for this homicide, on two grounds: (1) That Jackson in committing the homicide was acting within the scope of his duty as the agent of his employer, the railway company, and that the act was committed by him while he was in the actual performance of and in connection with the discharge of his duties as such employé, and therefore that the railway companies were responsible for this tort of their agent; and (2) that Jackson was an unfit and improper person to act as an engineer; that he habitually carried a pistol while on duty, had an ungovernable temper, and was an incompetent man to discharge the work of an engineer, was a dangerous man, who was apt to use his pistol without provocation or justification, and did use it many times while in the employ of the defendants, and these facts were fully known to the defendant railway companies, who, notwithstanding, employed him and continued to keep him in their employment. A general demurrer filed to the petition was overruled, and the case came to this court on exception to that judgment.

Jas. B. & Bryan Cumming and J. M. Hull, Jr., for plaintiff in error. A. L. Franklin, for defendant in error.

HILL, C. J. (after stating the facts as above). The courts generally have found some difficulty in holding the master liable for a homicide intentionally committed by his servant, in the absence of any express command on the part of the master, and the majority of adjudications seem to favor the theory that in the absence of express authority the master is not liable in damages for the deliberate, intentional, and willful homicide committed by his servant. 1 Thomp. Neg. § 571. But, whatever may be the adjudications in other jurisdictions on this subject, it is settled by the statute law of this state that the master would be liable where the homicide was committed by the servant in the prosecution and within the scope of

the master's business, whether it was actually committed by the command of the master, or was the result of negligence on the part of the servant, or his voluntary act.

[§] Civil Code, § 4413, provides that "every person shall be liable for torts committed by his servants by command, or in the prosecution or within the scope of his business, whether the same be by negligence, or voluntary." And section 2780 declares that "a railroad company shall be liable * * * for damage done by any person in the employment or service of such company, unless the company shall make it appear that their agents were in the exercise of reasonable care and diligence, the presumption in all cases being against the company." A corporation, under the law, is a "person," in the meaning of the first section quoted, and the terms of the section apply to corporations as well as to natural persons, and the principle of law there announced is well settled by the adjudications of the courts. The difficulty is in the application of the general principle of law to the particular facts. In the great multitude of decisions made by the courts, applying the facts of the cases to the principle of law just announced, there is found much diversity of opinion and room for doubt; and, after all, the solution of the question is to be determined largely by the facts of each particular case, aided by the very best judgment of the court in making the application of the principle to those facts.

The master is not an insurer against wrongs perpetrated by his servants. It would be unjust to hold him responsible for these wrongs, unless they were done by his servant while he was in the performance of his master's business and was acting within the scope of his employment. The rule of liability in the case is based upon the old maxim, "*Qui facit per alium, facit per se.*" and if the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, and the act is not properly within the scope of his employment, it cannot be said that the master does the act by his servant. Mr. Thompson, in his work on Negligence (section 526), lays down the test by which to determine whether a servant acts within the scope of his employment. "The test is not that the act of the servant was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business; whether the servant was at that time engaged in serving his master, for, if the servant steps aside from his master's business for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and the servant alone is responsible for his act committed by him during this period." In the

case of *Savannah Electric Company v. Hodges*, 6 Ga. App. 470, 65 S. E. 322, Judge Russell, speaking for this court, quoted approvingly the foregoing test of liability of the master for the servant's act, and held that "if the servant steps aside from his master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not liable."

[1] The decision of this court in the case just cited would seem to control the case now under adjudication, for the facts of the two cases are not so different as to afford substantial room for any different application of the rule of law. The question here to be decided, under this rule of law, is whether the killing of Hudson by Jackson was done by Jackson in the prosecution or furtherance of his employer's business, or whether in the killing Jackson turned aside from his master's business and committed an act wholly disconnected therefrom, and for the consequences of which he, and not his master, would be liable. While repeated adjudications in analogous cases leave the solution of this question not entirely free from doubt, still it seems to us, restricting our view to the facts of this transaction, and not looking beyond, or permitting ourselves to become perplexed in the maze of contradictory rulings, that we should adopt, as the most reasonable conclusion, the view that when Jackson committed this homicide he had turned aside for that purpose from his master's business and was engaged in his own personal matter. Jackson made, against Hudson, an implied accusation of improper conduct. Hudson resented this accusation by in effect denouncing Jackson as a liar, and Jackson immediately ran to his box on the engine, secured his pistol, and instantly shot and killed Hudson. He shot Hudson, because Hudson called him a liar. It was to resent what he deemed a personal insult. He did not shoot and kill Hudson because in his opinion Hudson had been guilty of cutting off the air brakes and thus interrupting him in the proper discharge of his official work; and, even if he had done this, it is not clear that the master would have been liable. But the killing was due solely to an insulting epithet used by Hudson. Jackson was acting for his master in delivering the cars to the Charleston & Western Carolina Railway Company, and if Hudson had interfered with this work, and Jackson had resented such interference, and made an assault and battery, or killed Hudson for such interference, it might be claimed that the tort was committed by Jackson in connection with his master's business; but it cannot be doubted that the killing of Hudson was due solely to the insulting epithet, and that but for it the homicide would not have occurred. If the truth of this proposition is not sufficiently apparent from the mere statement of the

facts, we are sure it cannot be rendered any more manifest by argument, or by citation of authority. We therefore do not deem it profitable to extend the discussion on this point. See *Henderson v. Dade Co.*, 100 Ga. 568, 28 S. E. 251, 40 L. R. A. 95.

The cases relied upon by counsel for defendant in error (*Savannah Electric Co. v. Wheeler*, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. [N. S.] 1176, and *Mason v. Nashville, Chattanooga, & St. Louis Ry. Co.*, 135 Ga. 741, 70 S. E. 225, 33 L. R. A. [N. S.] 280) are distinguishable by the facts from the present case. Both of these were cases of passengers where the rule of extraordinary diligence applies, and the master is under a duty through his agents of personally protecting the passenger from any insult, either by one of his own employees or by third persons. In the *Wheeler Case* the conductor drew a pistol and fired at a passenger, missing the passenger and killing an innocent woman passing on a public street through which the car was running, because the passenger had asked the conductor for his change. The Supreme Court held that this tort of the conductor was within the scope of his business in collecting fares. The *Mason Case* was where the passenger was drunk and disorderly, and used foul and abusive language to the conductor, which brought on a difficulty, and the conductor was in the discharge of his duty in attempting to eject the disorderly passenger. The case was decided in favor of the company by the lower court, and the Supreme Court granted a new trial on a ground not involving the question in the present record. Mr. Justice Lumpkin, in the opinion in the *Mason Case*, reviews many previous decisions of the Supreme Court relating to the liability of railroad companies for the conduct of their employees, and modifies to some extent the rulings previously made. But there is nothing in the opinion in support of the proposition that the master in the present case was liable for the act of the engineer in killing the decedent.

[2] If the act of the engineer in the present case was, as we have held, his personal act, and not one for which the master was responsible, it would be wholly immaterial, on the question of the master's liability, whether the servant was of ungovernable temper, or habitually carried a pistol while on duty. If the master was liable because the act was performed by the servant within the scope of his employment, the employee's temper, or unfitness, or the fact that he carried a pistol with the master's knowledge, might be circumstances to be considered on the question of exemplary or punitive damages; but these facts of themselves cannot make the master liable for an act done by his servant outside the scope of his employment and for which the master is not otherwise responsible. In other words, we do not think that the fitness, or the temperament or

disposition, of the employé, or his private habits, are material facts to be considered, except on the question of aggravation, where the master is otherwise liable for the act of the servant.

For the foregoing reasons, we think the demurrer to the petition should have been sustained by the lower court.

Judgment reversed.

(10 Ga. App. 212)

SHARPE v. STATE. (No. 3,583.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1023*)—FINAL JUDGMENT—RIGHT TO APPEAL.

An order refusing to allow a demand for trial in a criminal case to be spread upon the minutes of the court is not such a final judgment as will support a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

S. I. Sharpe was indicted for misdemeanor. From an order refusing a demand for trial at the second term after indictment found, he brings error. Affirmed.

H. H. Elders, for plaintiff in error. Robt. E. De Loach, Sol., for the State.

RUSSELL, J. The defendant, under indictment for a misdemeanor, made a demand for trial at the second term after the indictment was found. The judge refused to allow the demand, and from the order refusing to allow the demand, the defendant sued out a bill of exceptions.

We are of the opinion that the bill of exceptions is premature. The remedy of the defendant was to except *pendente lite*, and then assign error in a bill of exceptions sued out from the final judgment. *Couch v. State*, 28 Ga. 64; Civil Code 1910, § 6138. Even if the demand had been allowed, that would not have been a final disposition of the case, for it would only have entitled the defendant to a trial at that term or at the subsequent term, provided that at both terms there were juries impaneled and qualified to try him. Penal Code 1910, § 983. It does not appear that the refusal to allow the demand has harmed the defendant. Harm from such refusal cannot be shown until after the expiration of the next succeeding term thereafter; for, even though the demand be refused, he may nevertheless be tried within the time which the state would have had, if the demand had been allowed.

The case of *Dacey v. State*, 15 Ga. 286, which apparently announces a contrary doctrine, was decided prior to the Code of 1863, at which time our present law limiting the Supreme Court to the review of final judgments

first came into existence. Prior to that time the jurisdiction of the Supreme Court as to bills of exceptions was not confined to a final, or a conditionally final, adjudication in the lower court, as it is now. As to the original act of 1845 organizing that court (Acts 1845, p. 18), it was said: "This grant of jurisdiction was designed to be and is very broad. It attaches upon any *decision, sentence, judgment, or decree* which may be had before the superior courts in any case, criminal or civil. Unlike the jurisdiction of the Supreme Court of the United States, it is not confined to *final judgments*. It contemplates unquestionably writs of error upon interlocutory judgments." *Carter v. Buchanan*, 2 Ga. 338; *Jones v. Dougherty*, 11 Ga. 308. By comparing the decision cited above with the present law, it appears that our jurisdiction is limited to bill of exceptions sued out from final judgments. An order refusing to allow a demand for a trial to be spread upon the minutes is not a final judgment.

Writ of error dismissed.

(10 Ga. App. 216)

BROWN v. STATE. (No. 3,797.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION.

On a criminal trial the judge cautioned the jury as to certain testimony which he had admitted in evidence, as follows: "The evidence of Mr. Killebrew as to certain statements made to him by James Brown cannot be considered by you in determining the question of whether or not the defendant is guilty, but can only be considered by you for the purpose of determining whether or not the witness has been impeached." The following portion of this charge, viz.: "The evidence of Mr. Killebrew as to certain statements made to him by James Brown"—is not subject to the criticism that it was an expression or intimation of opinion by the court as to what had been testified in such case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

2. HOMICIDE (§ 236*)—CAUSE OF DEATH—EVIDENCE.

Where one is charged with a homicide, proof that the homicide as charged was actually committed by him must be clear and unequivocal. Yet this fact can be proved by circumstances, and by inferences reasonably deducible from the facts in evidence, as well as by direct testimony. In this case the evidence was clear that the accused struck the decedent a blow with a deadly weapon, and the jury were authorized, although there was no expert testimony, and death did not result until several days thereafter, to find that the homicide was caused by the blow inflicted by the accused with the deadly instrument.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 236.*]

3. REVIEW.

No other error is assigned, and the verdict is supported by evidence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Boisie Brown, alias Grice, was convicted of crime, and brings error. Affirmed.

Isaac S. Peebles, Jr., for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 207)

ATLANTIC COAST LINE R. CO. v. WHITAKER. (No. 3,477.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 443*)—KILLING STOCK—JUDGMENT.

The statutory presumption of negligence, raised by proof that the plaintiff's cow was killed by the running of the locomotive and cars of the defendant railroad company, was fully rebutted by the undisputed evidence; and, other than the presumption, there was no evidence whatever of negligence. The verdict against the company is therefore contrary to law, because without any evidence to support it. Macon, Dublin & Savannah R. Co. v. Hamilton, 9 Ga. App. 254, 70 S. E. 1126; Southern R. Co. v. Harrell, 119 Ga. 521, 46 S. E. 637.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by J. J. Whitaker against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Pope & Bennet and R. G. Hartsfield, for plaintiff in error. G. G. Bower, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 215)

STEWART v. STATE. (No. 3,790.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 238*)—ILLEGAL SALE—EVIDENCE.

The evidence that the accused on four separate and distinct occasions procured whisky for four separate persons is not disputed. Whether in each case he carried the burden which the law imposed upon him of showing to the satisfaction of the jury that the unknown negro from whom he said he bought the whisky was the seller, and that he himself acted simply as a matter of accommodation to the purchasers and as their agent, and had no interest otherwise in the sale, or whether this defense was resorted to as a subterfuge to cover up the illegal sales made by himself, or in which he had some interest, were matters to be determined by the jury, and the conclusion at which they arrived seems to have been fully supported by circumstances and reasonable deductions therefrom.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 238.*]

2. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony is not of such character as would probably produce a different result on a second trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

J. B. Stewart was convicted of violating the liquor law, and brings error. Affirmed.

J. E. Burch, for plaintiff in error. Geo. B. Davis, Sol., for the state.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 219)

COOK v. STATE. (No. 3,856.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—QUESTIONS OF FACT.

This court has no jurisdiction to review issues of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Fannin County; N. A. Morris, Judge.

W. D. Cook was convicted of crime, and brings error. Affirmed.

A. S. J. Hall, B. L. Smith, and J. Z. Foster, for plaintiff in error. J. P. Brooke, Sol. Gen., for the state.

POWELL, J. Judgment affirmed.

(10 Ga. App. 214)

BYRD v. STATE. (No. 3,786.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. MOTION FOR CONTINUANCE OVERRULED—NO ERROR.

Under all the circumstances, the court did not err in overruling the motion for a continuance.

2. LARCENY (§ 51*)—EVIDENCE—ADMISSIBILITY.

Where the defendant, though under illegal arrest at the time, consents to be searched, and the search discloses that he has hidden upon his person stolen property, evidence of the discovery of the property in this manner is admissible against him in a prosecution for the larceny. Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 144-146; Dec. Dig. § 51.*]

3. LIMITING ISSUES.

Under the evidence, the court properly confined the issue to the count in the indictment which charged larceny from the house.

4. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence fully authorized the conviction, and no material error appears.

Error from City Court of Blackshear; W. A. Milton, Judge.

John Byrd was convicted of larceny, and brings error. Affirmed.

Jas. R. Thomas, for plaintiff in error. S. F. Memory, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 212)

JORDAN v. STATE. (No. 3,814.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 856*)—TRIAL—CONDUCT IN GENERAL—REMARKS OF JUDGE.

The defendant was making a statement to the jury, under Penal Code 1910, § 1036. Instead of talking about the matter in issue and things relating to the case on trial, he went into a long and rambling statement concerning a number of wholly irrelevant matters. After he had thus been indulged for a great length of time, and while he was speaking of a matter wholly foreign to the issue involved in the case on trial, the judge interrupted him and said to him: "Mr. Jordan, the law allows you great latitude in making your statement; but I cannot permit you to go into matters wholly at variance with your case, and not connected with the case. What has cross-ties, or Mr. Simmons, or Christmas dinners, to do with the case? I beg of you to confine yourself to matters connected with the issues involved. At any rate, I do not think it will do your case any good." *Held*, not to be error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

Error from City Court of Houston County; C. E. Brunson, Judge.

J. A. Jordan was convicted of crime, and brings error. Affirmed.

Oliver C. Hancock, for plaintiff in error. R. E. Brown, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 219)

DENNIS v. STATE. (No. 3,847.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 918*)—NEW TRIAL—EXCLUSION OF WITNESSES.

While, under a number of decisions of this court and of the Supreme Court, it is error to exclude a witness from testifying because he has remained in the courtroom after an order for the sequestration of witnesses has been granted, still it is equally well settled that a ground of a motion for a new trial complaining of such an error must show that the error resulted in injury, which is generally to be shown by a statement of what the complaining party expected to prove by the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2180; Dec. Dig. § 918.*]

Error from City Court of Monticello; A. S. Thurman, Judge.

Frank Dennis was convicted of crime, and brings error. Affirmed.

Eugene M. Baynes, for plaintiff in error. Greene F. Johnson, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 161)

WILLIAM FINE & BRO. v. SOUTHERN EXPRESS CO. (No. 3,224.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 37*)—JURISDICTION—FORM OF ACTION.

The action was for breach of contract, and the justice's court had jurisdiction. If there is doubt as to the form of a suit, the construction favorable to the jurisdiction should be adopted, but, under the allegations of the petition here, there is no doubt that the suit was on the contract of carriage, for breach thereof, and consequent damage.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 115; Dec. Dig. § 37.*]

2. JUSTICES OF THE PEACE (§ 111*)—PROCEDURE—DIRECTION OF VERDICT.

A justice of the peace should not direct a verdict.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 364; Dec. Dig. § 111.*]

3. CARRIERS (§ 124½*)—CARRIAGE OF GOODS—FAILURE TO DELIVER—LIABILITY—DEDUCTION OF UNPAID CHARGES.

Where a common carrier has breached his contract by failure to deliver the goods entrusted to him, and admits that they were lost while in his possession, he is not entitled to be paid the freight, or to have the amount of the freight deducted from the verdict for the value of the lost goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 858; Dec. Dig. § 124½.*]

4. CARRIERS (§ 110*)—CARRIAGE OF GOODS—FRAUD BY SHIPPER.

The shipper neither, by omission nor commission, perpetrated nor attempted to perpetrate a fraud upon the carrier, and the undisputed evidence proved that he was entitled to recover the value of his goods, because of the breach of the contract by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.*]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"JEWELRY."

Articles of jewelry have been generally defined by the courts to be such articles as are made of precious metal, silver, gold, diamonds, sapphires, rubies, pearls, etc. (citing 4 Words & Phrases, 3811).

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by William Fine & Bro., against the Southern Express Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. B. Rosser, Jr., for plaintiff in error. Robert C. and Phillip H. Alston, for defendant in error.

HILL, C. J. William Fine & Bro. (engaged in the novelty jewelry business in Atlanta, Ga., and Chattanooga, Tenn., under the name of the Radius Jewelry Company) delivered a package containing 145 articles of their novelty jewelry to the Southern Express Company in Atlanta for transportation and delivery to the Radius Jewelry Company in Chattanooga, under a contract made

with the express company. The package was lost by the express company, and the shipper brought suit against it in a justice's court to recover the value of the contents of the package. The justice rendered a judgment for the defendant, and, on appeal to a jury in the justice's court, a verdict was returned for the plaintiffs for the proved value of the contents of the package—\$46.20—with interest. The case was taken by certiorari to the superior court, which, on the hearing, sustained the certiorari, and set aside the verdict and the judgment rendered thereon, and entered up a final judgment in favor of the express company; and to this the plaintiffs excepted.

On the trial in the justice's court the plaintiffs proved the contract of shipment made with the express company, and the delivery to it of the package containing the 145 articles specified, to be transported to Chattanooga and there delivered to the Radius Company, proved the value of the contents of the package, and proved that the package was lost while in the possession of the express company. Indeed, there was no substantial controversy on the evidence, and it would seem that the verdict in behalf of the plaintiffs was demanded. Counsel for the express company submits to this court four legal reasons, covered by the petition for certiorari, in support of the contention that the verdict against the express company was contrary to law: (1) That the justice's court had no jurisdiction of the subject-matter of the suit, the same sounding in trover, and not in contract; (2) that, the proposition involved being solely one of law, the magistrate, on the hearing of the appeal in the justice's court, should have directed a verdict in favor of the defendant; (3) that, the freight charge of 25 cents never having been paid, the verdict for the full amount of the goods, to wit, \$46.20, was without evidence to support it; (4) that, this being a shipment of jewelry, and the nature of the shipment not being disclosed to the express company, and it being offered through the ordinary freight channels instead of the money department, the shipper committed a constructive fraud upon the Southern Express Company, which would prevent them from recovering.

We do not know upon which one of these grounds the learned judge of the superior court sustained the certiorari and entered up final judgment in favor of the express company. It is stated in the argument, and in the brief of counsel submitted to this court, that he did so on the ground that the suit was *ex delicto*, and the justice's court was without jurisdiction. The judgment of the superior court, however, is general, and, if for any reason it is right, it should be affirmed without reference to the ground upon which it was based. We cannot agree with the judge of the superior court in his conclusion upon any ground that we have

been able to find in the record. On the contrary, we are clear that under the undisputed evidence and the well-established principles of law applicable thereto the Southern Express Company was liable to the plaintiffs for the value of the contents of the package, and that the verdict in their favor was right. Indeed, the reasons in support of the judgment of the superior court are in our opinion so manifestly without merit as hardly to justify any extended consideration. But, since they are made and earnestly insisted upon, we will briefly consider them.

[1] 1. It is well settled that in a justice's court technical pleading is not required. In the present case, however, the plaintiffs, by formal petition, set forth their cause of action. An examination of this petition shows that in form and substance it is a suit on a contract, alleging a breach of that contract, and suing for the value of the goods which were to be delivered by the defendant under the contract, and which were lost to the plaintiffs by reason of defendant's breach of contract, and that the plaintiffs expressly waive any tort. The only ground upon which the defendant supports its view that the case was one *ex delicto* is the allegation in the petition that the defendant "failed, neglected, and refused to deliver said package to the consignee as aforesaid, and has likewise failed and refused to pay the value thereof to plaintiffs, although often requested so to do." It is insisted that this is a direct charge of a conversion of the property intrusted to the Southern Express Company, and therefore that the suit was in the nature of trover. We do not agree with this construction of this part of the petition. The language used is, in our opinion, clearly susceptible of the construction that it charges a breach of contract. If there was any doubt as to the construction of the petition, it was the duty of the justice's court to adopt the construction which would hold the action and not defeat it. This rule applies especially to suits in a justice's court, and especially where the question of jurisdiction is not raised by demurrer. *Payton v. Gulf Line Ry. Co.*, 4 Ga. App. 762, 62 S. E. 469; *Central Railroad Co. v. Pickett & Blair*, 87 Ga. 734, 13 S. E. 750. But we think this suit is so clearly one arising *ex contractu* that there is no reason why this rule of construction should be invoked. The plaintiffs in their petition set forth the contract, charge a breach thereof, allege the value of the goods and the refusal to pay, distinctly declare their purpose to waive any tort and to sue on the contract, and, under the express provision of the Constitution of this state (article 6, § 7, par. 2), the justice's court had jurisdiction of the amount claimed; it not exceeding \$100. *Southern Express Co. v. Hilton*, 94 Ga. 450, 20 S. E. 126; *Bates v. Bigby*, 123 Ga. 729, 51 S. E. 717; *Southern Express Co. v. Briggs*, 1 Ga.

App. 300, 57 S. E. 1066; Jenkins v. Seaboard Air Line Ry. Co., 3 Ga. App. 381, 59 S. E. 1120; Southern Ry. Co. v. Maddox, 7 Ga. App. 650, 67 S. E. 838.

[2] 2. The second reason asserted in support of the soundness of the judgment of the superior court is that, the proposition involved being solely one of law, the magistrate should have directed a verdict when the case was appealed to a jury in the justice's court. We do not know of any law which would authorize a magistrate to direct a verdict in a justice's court. But, if there were such a rule of law, we are certain that if the magistrate had directed a verdict for the defendant in this case, under the admitted facts, it would have been a gross abuse of his discretion, as, in our opinion, the undisputed facts demanded a verdict for the plaintiffs.

[3] 3. The contention that the verdict for \$46.20 was too large and was without any evidence to support it, because the defendant was entitled to at least a deduction from this amount of 25 cents due to it as freight charges, is without any merit. If it was meritorious, the amount of 25 cents could be directed to be written off from the amount of the judgment. But we are somewhat at a loss to understand why the express company should have been entitled to its freight charges when the evidence showed that it had failed to perform its contract of transportation. The package was lost, and not delivered in a partially damaged condition. It was totally lost, presumptively by the negligence of the company, and the presumption was not conclusively met. It would be a remarkable proposition of law that, under these facts, the plaintiffs would not be entitled to recover the proved value of their property which had been lost by such negligence, because they had failed to pay the freight charges. Wilensky v. Central Ry. Co., 136 Ga. 889, 72 S. E. 418, and cases cited. Besides, this question of freight charges was not raised in the justice's court on the trial, and could not properly have been raised in the superior court or this court. Civ. Code 1910, § 5199; Perry v. Brunswick & Western Ry. Co., 119 Ga. 819, 47 S. E. 172; Callaway v. City of Atlanta, 6 Ga. App. 354, 64 S. E. 1105.

[4] 4. It is insisted in the fourth ground that the plaintiffs could not recover because in shipping the package in the ordinary freight department and not in the money department, and in not disclosing its contents to the express company, they were guilty of constructive fraud upon the express company. Under the facts of this case, we do not think that the plaintiffs perpetrated upon the express company any fraud, actual or constructive. What are the facts? The plaintiffs, who were merchants in Atlanta, were in the habit of frequently shipping articles of merchandise through the express company, and for this purpose used the print-

ed blank receipt generally in use by the customers of the express company. The package in this case was sent to the express company by a colored porter. It was an ordinary pasteboard shoe box, wrapped in heavy brown paper, securely fastened with a string, and marked: "Radius Jewelry Company, 722 Market Street, Chattanooga, Tennessee." The receipt for the package to be signed by the company was, according to the general custom among the merchants of the city, prepared by the plaintiffs. The agent of the defendant signed this receipt and delivered it to the plaintiffs' agent, with the freight charge, 25 cents, entered thereon, and with the following additional entry stamped thereon with a rubber stamp: "Value asked, but not given. Accepted at owner's risk of breakage. Accepted as merchandise only. No money, jewelry, or valuables." The package contained 145 articles of merchandise or novelty goods, the same class of goods that are sold by dry goods stores, retail hardware stores, ten cent stores, drug stores, cigar and soda water stores. The receipt limited the liability of the express company in case of loss or damage to \$50. The value of the goods shipped in this case was claimed to be \$46.20, and proved to be of that value. The defendant knew the character of novelties or merchandise that the plaintiffs were dealing in. It accepted this package as merchandise, and made the minimum charge of 25 cents for it as merchandise, and the limit of its liability for merchandise, where the value is not stated, is \$50. Whether the package contained jewelry in the technical sense, or whether it contained merchandise, the express company could in no event have been liable for more than \$50. This fact was known to the shipper. Nothing was said or done by the plaintiffs to deceive the express company as to the contents of the package, and no effort is made by the shipper to recover more for the property than if the property had been in fact merchandise. It seems to us, therefore, that the question of whether the contents of the package were in fact valuable jewelry or merchandise was immaterial. The plaintiffs are endeavoring to recover for it, not as valuable jewelry, but simply as merchandise. The facts of this case do not bring it within the principles decided in Southern Express Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809. In that case it was represented to the express company at the time of the shipment that the package was of the value of \$5, and on this amount the express charge of 25 cents was paid. The shipper afterwards claimed that the package contained a valuable pearl pendant worth \$150, and sought to recover the value of this pearl from the express company. The shipper having endeavored to conceal the true value of the contents of the package, this court held that such fraud was perpetrated upon the express company as would preclude a recovery of the

value of the pearl, and that this fraud absolutely voided the contract. Besides, it does not appear from the evidence in this case that the package shipped as merchandise was anything else than merchandise. There were 145 articles. The aggregate value was \$46.20. The articles, according to the evidence, were combs, purses, plated rings, Ingersoll watches, barlow knives, goods such as are sold by dry goods stores, retail hardware stores, drug stores, and the like. We think it was fairly open to question whether these articles were jewelry in the ordinary acceptation of that term; and we think they were in fact merchandise.

[5] Articles of jewelry have been generally defined by the courts to be such articles as are made of precious metal, silver, gold, diamonds, sapphires, rubies, pearls, etc. 4 Words & Phrases, p. 3811.

Fraud must never be presumed. It must be proved. Civ. Code 1910, § 4626. And while we do not think that under the undisputed facts of this case any fraud, either actual or constructive, was perpetrated on the express company by the shippers, certainly the most that could be claimed by the express company was that the evidence as to fraud was in conflict; and, as the question was squarely made and decided by the jury on the trial, the issue was settled by the verdict. To sum up the case we find no error of law, material or technical, in the case as presented to the superior court on certiorari, and the verdict in behalf of the plaintiffs under the undisputed evidence was demanded.

For these reasons, the judgment of the superior court in sustaining the certiorari and entering final judgment in favor of the express company was contrary to law.

Judgment reversed.

(10 Ga. App. 183)

FLETCHER v. YOUNG et al. (No. 3,274.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. PAYMENT (§ 67*)—EVIDENCE—GIVING OF NOTE BY CREDITOR.

The execution of a promissory note is evidence of a full settlement of all debts up to the date thereof, except such as are specially excepted at the time; and, where the maker sues the payee for a debt alleged to be due before the execution of the note, the giving of the note to the payee is presumptive evidence that he had paid the debt to the maker before or when the note was executed. This presumption can be rebutted.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 189-198; Dec. Dig. § 67.*]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of secondary evidence is not generally ground for reversal, where otherwise there is sufficient legal evidence in proof

of the fact to which the secondary evidence relates.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. PAYMENT (§ 77*)—INSTRUCTIONS.

Where the plea of payment is made, and there is evidence to support the plea, it is not erroneous to charge in effect that if the jury believe from the evidence that the defendant in fact paid the debt to the plaintiff the time and place when and where he had paid it are immaterial. Evidence of the time and place of payment might add probative value to the proof relied upon to establish the plea, but the act of payment is the essential fact to be shown.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 77.*]

4. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence and inferences reasonably deducible therefrom were sufficient to raise the presumption that the debt sued for, if it ever existed, had in fact been paid by the defendant; and, no error of law appearing, the verdict in his behalf must stand.

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by T. Y. Fletcher against Love Young and another, as administrators of George Young. Judgment for defendants, and plaintiff brings error. Affirmed.

Fletcher brought suit against Love Young and W. W. D. Branch, as administrators of George Young, alleging that on May 15, 1902, he and George Young signed, as sureties, the note of one J. B. Harris for \$2,000; that Harris died without paying the note, and that subsequently he paid the note to the Bank of Tifton, and that by reason of this payment his cosurety, George Young, became indebted to him in the sum of \$1,000, with interest from time of payment; that on December 6, 1908, George Young died without having paid him any part of the \$1,000, and this suit was for the purpose of enforcing contribution. The defendants filed an answer, setting up that if any liability ever existed against their intestate, as surety upon the note sued on, the liability had been paid off and discharged by him during his lifetime, and that the defendants, as administrators, did not owe the plaintiff any amount whatever upon the note. In other words, they alleged that the intestate had paid to the plaintiff whatever amount he became indebted because of cosuretyship on the note, if, indeed, such indebtedness ever existed. On the trial the plaintiff proved by the cashier of the Bank of Tifton that the \$2,000 note was given by J. B. Harris, as maker, with the plaintiff, Fletcher, and the decedent, George Young, as sureties, and that Fletcher "had paid the note in full to the bank." The plaintiff testified that the original note for \$2,000 had been lost; that he had paid this original note by a renewal note to the bank, which renewal note he paid when the same became due.

In support of the plea of payment, it was

shown by the defendants that in October, 1906, Fletcher and George Young had made a settlement of their financial matters, and in this settlement it was shown that Fletcher was indebted to Young in the sum of \$440, for which amount Fletcher then gave his duebill, or promissory note, to Young; that Fletcher, during the life of Young, made two payments on this duebill, and after George Young's death had paid the balance to the administrators; that at the settlement between Fletcher and Young, Fletcher made no mention whatever of the fact that he had paid this note of Harris', on which he and Young were cosureties, and made no claim against Young for any contribution on account of any alleged indebtedness arising from such payment; that Fletcher and Young resided about three miles apart, and were good friends; that prior to his death Young was sick about 15 months, and during that time the defendant Branch looked after Young's business, and Fletcher made no statement to Branch during this entire time as to any indebtedness which he claimed against Young on account of having paid the Harris note; and that nothing was ever said about it by Fletcher until 4½ years after Young had died, when, for the first time, he claimed the amount for which the suit was brought.

It further appeared that during all the time from 1902, when Fletcher claims to have paid the note to the bank, until 1908, when Young died, a period of six years, Young was entirely solvent; that his estate was worth from \$17,000 to \$18,000; and that he owed no debts at the time of his death, except his physician's bill for his last sickness, and \$3.45, which he owed as a store account to Fletcher. It was further shown that during this same period between 1902 and 1908 Fletcher was practically insolvent, and in proof of the fact of his insolvency defendants introduced from the execution dockets two unsatisfied executions against him, amounting to \$150, principal, and \$221, principal, and they insisted before the jury that all these circumstances were sufficient to raise a presumption that if Young ever did owe the amount to Fletcher for which he brought suit it had been fully paid off by Young in his lifetime, and that these facts, taken all together, were sufficient to warrant the jury in finding a verdict in favor of the defendants.

In his motion for a new trial, besides the usual general grounds, movant made the following special assignments of error:

(1) He moved the court, first, to exclude all the testimony of the defendant Branch, relating to the duebill given by Fletcher to Young in the settlement between the two, on the ground that the evidence was irrelevant and immaterial, and illustrated no issue in the case, which motion was overruled by the court.

(2) The court, over the objection of mov-

ant, admitted the general execution docket of Irwin county, Ga., showing the executions in favor of the Holmes Savings Bank v. T. Y. Fletcher, for \$150, principal, and that of Frank & Co. v. Fletcher, for \$221, principal, both of which were dated April 15, 1907. He objected to the admission of this evidence, on the grounds that it was irrelevant, immaterial, and illustrated no issue in the case, and because the execution docket was not the best and highest evidence of the facts sought to be proved.

(3) Because the court erred in charging the jury as follows: "The defendants' contentions have been stated to you in the beginning, and I charge you that the execution of a promissory note or duebill by one party to another is evidence in law that all prior past-due accounts owing from the payee of the duebill or note to the maker of the same is settled, without they are excepted." The ground of objection being that the charge was not applicable to the facts as developed by the evidence.

(4) The court erred in charging the jury as follows: "I charge you that if you should find that Fletcher gave to George Young, during his lifetime, a certain note or duebill, after the indebtedness sued for is alleged to be due, then that would be presumptive evidence that the debt, if any ever existed, was canceled; and if you should believe that this presumption has not been rebutted and explained by the facts or circumstances, or the evidence in the case, then you would be authorized to find for the defendants; it being a matter, however, entirely for you to say as to whether or not, considering the case as a whole, the presumption referred to has been explained or rebutted." It is insisted that this charge was not applicable to the facts as developed by the evidence, inasmuch as it was shown that the duebill in question was given as a part of a distinct and separate transaction from the indebtedness sued on, and entirely apart from it; and that it was error, for the further reason that it charged affirmatively that the evidence of the defendants had raised a presumption that payment had been made; and that it was incumbent on the part of the plaintiff to rebut or explain such presumption and overcome the same with evidence.

(5) The court erred in charging to the effect that payment may be established by facts and circumstances, without fixing the time and place of payment; "the question of payment being determined by you from the facts in the case."

R. D. Smith, J. J. Walker, and Elkins & Wall, for plaintiff in error. H. J. Quincey and L. Kennedy, for defendants in error.

HILL, C. J. (after stating the facts as above). [1] 1. The exception, relating to the exclusion of the evidence of the settlement

and the giving of a duebill by Fletcher to Young, and the charge of the court, relating to the effect of this evidence, may be disposed of together. If the evidence was admissible, clearly the charge was pertinent and correct. Unquestionably the evidence was admissible. In fact, the circumstance which tended to prove that the decedent Young, intestate of the defendants, did not owe the plaintiff, Fletcher, anything was admissible in support of the answer of payment. The fact that Fletcher and Young had a settlement of their matters, and as a result of this settlement Fletcher gave his duebill or promissory note to Young, was a circumstance of more or less probative value that Young did not owe Fletcher anything at that time; for, if he had been indebted to Fletcher, there would have been no reason why Fletcher should have given him his duebill or promissory note, and if there was a settlement between them it is fair to presume that all mutual accounts and claims would have then been made and adjusted, and a balance struck between them. That this in fact was done in the settlement, and the balance was in favor of Young, is indicated by the fact that Fletcher did give his duebill or promissory note.

As early as in the case of *Mills v. Mercer*, *Dudley's Reports*, 158, it was held that the execution of a promissory note is evidence in law of a full settlement of accounts up to the date thereof, except such as were especially excepted at the time of the settlement, and the excerpt excepted to is in the very language of this opinion. Of course, the presumption was not conclusive. The court correctly stated that it was an inference of fact, and subject to be rebutted by evidence.

In *Baldwin v. Walden*, 30 Ga. 829, it was held that a credit on a note, put there by the maker, is presumptive evidence that there was no account due by the holder to the maker. Both of these cases are referred to with approval in *Broughton v. Thornton*, 50 Ga. 571.

It is not objected here that these excerpts from the charge did not state a correct principle of law, but they are objected to for the alleged reason that they do not illustrate any issue in the case. It seems to us that they do illustrate the only issue in the case, to wit, whether or not Young owed Fletcher the debt for which the administrators were being sued; it being contended that if Young did in fact owe this debt to Fletcher, and it was in existence at the time of the proved settlement between them, it was either included in the settlement, or did not exist, because not then referred to by Fletcher; the witness testifying that he was present when the settlement was made, and no reference was made to this debt by Fletcher to Young. In *Norton v. Aiken*, 134 Ga. 24, 67 S. E. 425, it is said that "any circumstance which tends

to make the proposition of payment more or less probable may be considered by the jury." Certainly the failure of Fletcher to mention this debt to Young at the time of the settlement was a circumstance which tended to establish the fact that Young did not owe Fletcher the debt.

It is insisted by learned counsel for the plaintiff in error that the testimony as to this settlement and the giving of this duebill or note was not relevant, and the charge of the court, relating thereto, was not pertinent, because the settlement was as to different matters between Fletcher and Young than that growing out of his right of contribution as a cosurety for Harris. This may affect the probative weight or value of the testimony, but does not destroy its relevancy, or make improper the charge referred to. Of course, if the duebill given by Fletcher to Young had been given expressly in reference to a claim of Fletcher against Young, growing out of his relation of cosurety on the note given by Harris to the bank and its payment by Fletcher, it would have been conclusive against Fletcher. But it was a circumstance, in any event, which tended to raise a presumption against him that Young did not owe him anything at the time of the settlement; for it must be conceded that, being an insolvent man, according to the evidence, Fletcher would hardly have been giving his duebill or promissory note to a creditor, if, at that time, this creditor was in his debt. He would have claimed the debt, and would then have insisted upon its payment. So we conclude on this part of the case that the evidence was properly admitted, and the charge was properly given.

[2] 2. In the ruling of the court in admitting in evidence the general execution docket, showing the entry of the executions against Fletcher, there was probably error. The evidence was secondary; the best evidence being an exemplified copy of these entries. This error, however, was not material, and hardly contributed to the verdict. The existence of the unpaid executions was only a slight circumstance against the plaintiff; and, irrespective of this evidence, in our opinion, the verdict is amply supported.

[3] 3. There was no error in the charge of the court that payment might be established by facts or circumstances, without fixing the time or place of payment; the question of payment being one for the jury to determine from the facts in the case. It is the fact of payment, and not the time or place of the payment, that is the essential fact to be proved; and if the evidence established the fact of payment it is wholly immaterial that it did not go further and prove the place and time when the payment was actually made. Proof of the time and place of payment might render the evidence of payment stronger, but certainly the failure to prove the time and place could not destroy the probative value

of the proof that payment was in fact made.

[4] We think there was sufficient evidence to warrant the jury in coming to the conclusion that if Young, the intestate of the defendants, ever owed Fletcher the \$1,000 he had paid the debt during his lifetime. Fletcher alleges that he paid this note on which Young was cosurety to the bank in 1902. For six years thereafter he made no claim upon Young for contribution, although during that time Young was entirely solvent and lived near Fletcher, and during that time Fletcher had had a settlement with Young, and had given Young his duebill for \$440. During this time, also, Young was sick for 15 months, and Branch, one of the administrators, attended to his business, and yet Fletcher, with no written evidence that he had paid the surety debt of Harris' in his possession, for he testified that he had lost the note which he had paid, did not say one word as to the existence of this debt, either to Young or his agent, Branch. These facts and circumstances, taken all together, fully warrant the inference, either that Young had never owed the debt sued for, or, if he had owed it, had paid it during his lifetime, and this reasonable inference was not in any manner rebutted by evidence. No error appears to have been committed, the verdict is supported by the evidence, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

POWELL, J. (specially concurring). I doubt that the presumption or inference of settlement of previous differences arising from the giving of a note or duebill is as broad as the opinion of the Chief Judge indicates, but, as applied to the facts of the present case, the charge was not misleading or erroneous. Besides, it should not be overlooked that the alleged indebtedness for contribution had become barred by the statute of limitations, before the death of the decedent, even if it had not been discharged. Though the statute of limitations was not pleaded, the very fact of the lapse of time, without claim of indebtedness, greatly enhances the inference arising from the giving of the duebill.

Judge RUSSELL authorizes me to state that he concurs with these views.

(19 Ga. App. 201)

VERUKI v. SAVANNAH ELECTRIC CO.
(No. 3,420.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 161*)—APPEAL—PROCEEDINGS TO TRANSFER CAUSE.

Where an appeal was timely entered in a justice's court, and the appeal bond was taken and approved by the justice, who recited that the cost of the appeal had been paid by the

appellant, these facts show that the appeal was properly entered; and, where the appeal was timely transmitted by the justice to the clerk of the superior court, the failure of the justice to make a formal entry of filing on the appeal papers, even if the statute required the entry to be made, was not, of itself, sufficient ground for the judge of the superior court to dismiss the appeal. The appellant, having done everything that the law required of him to entitle him to an appeal, should not be deprived of the right by the failure of the justice to perform the merely formal act of marking the proceedings filed, since they were in fact and in substance actually filed.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 161.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Savannah Electric Company against Eli Veruki. From a judgment of the Superior Court, dismissing an appeal from justice's court, the defendant brings error. Reversed.

Wilson & Rogers, for plaintiff in error. Edmund H. Abrahams and Osborne & Lawrence, for defendant in error.

HILL, C. J. This was an appeal from a justice's court to a jury in the superior court. When the case was called in the superior court, the plaintiff moved to dismiss the appeal, on the ground that the appeal had never been filed in the office of the justice of the peace, and the court sustained the motion in the following order: "Upon motion of the Savannah Electric Company, the foregoing appeal is hereby dismissed; it appearing never to have been filed in the office of the justice of the peace." To the judgment dismissing the appeal, the defendant excepted.

Section 4998 of the Civil Code of 1910 provides that "in all civil cases tried and determined by a county judge or a justice of the peace * * * where the sum or property claimed is more than \$50, either party may as a matter of right enter an appeal to the superior court." Section 5000 requires that appeals shall be "entered within four days after the adjournment of the court in which the judgment was rendered." The record in this case shows that within the four days allowed for entering an appeal in the justice court the following proceedings were had in that court:

"Savannah Electric Company v. Eli Veruki. In Justice Van Giesen's Court. October Term, 1909. Suit on account. Judgment for plaintiff. And now, within the time allowed by law, comes Eli Veruki, and, being dissatisfied with the judgment in the above-stated cause and having paid the costs in said cause, enters this his appeal to a jury in the superior court, and the said Eli Veruki, as principal, and the undersigned, M. K. Jones, as security, hereby acknowledge themselves bound for the eventual condemnation money

in said cause. Witness our hands and seals this twelfth day of October, 1909. Eli Veruki. [L. S.] M. K. Jones. [L. S.]

"Bond approved and all costs paid this October 25, 1909. F. S. Van Giesen, J. P. 2nd G. M. District, C. C. Ga. [Official Seal.]"

It would seem from this record that the appellant had complied fully with the requirements of the statute, and was entitled to have his appeal entered and transmitted to the superior court of the county. Having so entered his appeal, paid the costs, and given the appeal bond, there was nothing more for him to do; and when this had been done the law required the justice of the peace to transmit the same to the clerk of the superior court. Section 5013 of the Civil Code of 1910 provides that, "when an appeal from the judgment of a justice of the peace or notary public has been entered, it shall be the duty of such justice of the peace or notary public to transmit the same to the clerk of the superior court of the county in which proceedings may have been had, at least ten days before the next superior court of said county." Nothing is said in the statute about requiring the justice of the peace to formally mark the appeal papers filed in his office. It would seem that the filing could be presumed from the entering of the appeal in the office of the justice of the peace and the approval of the appeal bond by the justice of the peace, with the statement that the costs of the appeal had been paid by the appellant; and when the appeal proceedings made timely appearance in the superior court of the county it would be fair to presume that the record in the appeal case had been transmitted by the justice of the peace to the clerk of the superior court. It is immaterial how the justice of the peace transmitted the papers. If they were in fact transmitted and got into the possession of the clerk of the superior court in any manner, it was sufficient; and it must be presumed that the justice of the peace did transmit these papers to the clerk of the superior court; the presumption as to all officers, until the contrary appears, being that they have done their official duty.

We know of no law that requires a justice of the peace to mark appeal papers as filed in his office. If all of those things are done by the appellant which the statute says he shall do to entitle him to an appeal, in our opinion, he would be entitled to the appeal, although the justice of the peace had not marked the papers constituting the appeal proceedings as of file in his office. We cannot think that the mere failure of the magistrate to make a formal entry of filing, which is purely a ministerial act, should work such an injury to the appellant as to have his appeal dismissed, when the proceedings show that he had complied strictly with all that the law required of him in en-

tering his appeal, in giving his appeal bond, and in paying the costs.

In *Pearce v. Renfro*, 68 Ga. 194, it was held to be no cause of dismissal of an appeal that the magistrate did not file the papers in the office of the clerk of the superior court within the time required by law, or did not send up the judgment rendered by him, or made no proper certificate that the appellant had, within the proper time, paid the costs and given the bond. "When an appellant has done his duty," says the court, "the mistake of the magistrate may be corrected."

In *Holt v. Edmondson*, 31 Ga. 357, it was held that when a party, desiring to appeal, pays the costs, tenders security, and demands an appeal from the clerk during the term at which the judgment was rendered, and, through fault of the clerk, the appeal is not entered, the court, on application, will order the appeal to be entered *nunc pro tunc*. It follows logically from this that if the justice of the peace was required to formally mark the appeal proceedings filed in his office, and he had failed to do so, and it appeared that the appeal had nevertheless been entered, and all the requirements of the statute entitling the appellant to appeal had been complied with by him, the justice could be required to mark this entry of filing *nunc pro tunc*, on the hearing of the appeal in the superior court. The right of appeal is an important right; and, where the appellant has done everything that the statute requires him to do in order to secure this right, it would be a great wrong to deprive him of this right through no fault of his own, but on account of the failure of the justice of the peace to make the formal entry of filing.

For these reasons, we think the learned judge erred in dismissing the appeal, because it appeared "never to have been filed in the office of the justice of the peace."

Judgment reversed.

(10 Ga. App. 157)

SOUTHERN RY. CO. v. STROZIER & WATERS. (No. 3,212.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

1. **TROVER AND CONVERSION (§ 16*)—RIGHT OF ACTION—TITLE OF PLAINTIFF.**

It is well settled that, to support an action of trover, the plaintiff must show either title in himself at the time when the suit was commenced, prior possession, or the right of possession.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 119-147; Dec. Dig. § 16.*]

2. **CARRIERS (§ 51*)—CARRIAGE OF GOODS—BILL OF LADING—RIGHTS OF DRAWEE OF DRAFT ATTACHED.**

"Where a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to

the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 149; Dec. Dig. § 51.*]

3. CARRIERS (§ 83*)—CARRIAGE OF GOODS—PERFORMANCE OF CONTRACT—DELIVERY BY CARRIER—PRESENTATION OF BILL OF LADING.

While the general rule is that where one orders goods to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the carrier is a delivery to the purchaser, the carrier being the agent of the purchaser to receive them, and when this is done the title passes from the vendor to the vendee, this general rule, however, is subject to exception. If for any reason the seller, at the time of the shipment and delivery of the goods to the common carrier, takes a bill of lading to his own order, and attaches thereto a draft for the purchase money, he thereby expresses his intention to retain the title until the draft is paid, or accepted, and secured; and, where this method of shipment is adopted, the carrier becomes the agent of the seller or consignor, and would be authorized to deliver the goods only on a surrender to it of the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 308-315; Dec. Dig. § 83.*]

4. FORMER DECISION CONTROLLING.

This case is fully controlled by the decision of this court in *Moss v. Sell*, 8 Ga. App. 588, 70 S. E. 13, and the decision of the Supreme Court in *Erwin v. Harris*, 87 Ga. 335, 13 S. E. 513.

5. JUDGMENT UNAUTHORIZED.

The judgment in favor of the plaintiff was unauthorized, and a nonsuit should have been awarded.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Strozier & Waters against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Strozier & Waters sued the Southern Railway Company in trover in the city court of Savannah to recover bed lounges shipped by the Johnson Manufacturing Company at Fayetteville, N. C., to its own order at Savannah, Ga., with direction to notify Strozier & Waters. The facts are not in dispute, and, briefly stated, are as follows: Strozier & Waters gave an order for seven lounges, aggregating in price the sum of \$47, to a salesman of the Johnson Manufacturing Company on February 17, 1910, the terms to be 60 days from March 1st. On receipt of this order the Johnson Manufacturing Company wrote to Strozier & Waters, requesting a deposit of \$10 on account, and this deposit was made. Finding that Strozier & Waters had no commercial rating, the Johnson Manufacturing Company made a shipment of the seven lounges at Fayetteville, N. C., to itself at Savannah, with order to notify Strozier & Waters, attached a bill of lading to a sight draft drawn on Strozier & Waters, and placed it in the bank for collection. Strozier & Waters were then duly notified of

the method of shipment and were requested to pay the draft. They refused to pay the draft, and the railroad company refused to deliver possession of the goods to them, unless the bill of lading was surrendered, and upon this refusal Strozier & Waters instituted proceedings in trover, claiming title to the shipment. The case is before us on exceptions to the refusal of the court to grant a nonsuit, and also to the final judgment rendered in favor of the plaintiff. The questions raised by the record are as follows: (1) Can an action in trover be sustained without showing either title, prior possession, or the right of possession? (2) Where a vendor makes a shipment by means of a common carrier, to his own order, with directions to notify a third person at destination, and the bill of lading is attached to a sight draft for collection drawn on such third person, does any title pass to such third person until payment is made of the draft, or rightful possession of the bill of lading obtained? (3) Where a shipment is made to the order of the consignor, with direction to notify a third person, and a sight draft is deposited for collection, is not the carrier justified in refusing to deliver until presentation of the bill of lading; and can a recovery as for a conversion be had against the carrier for a refusal to deliver until presentation of the bill of lading under these facts?

E. H. Abrahams and Osborne & Lawrence, for plaintiff in error. A. L. Alexander and Alexander R. Lawton, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. It is well settled that to support a recovery in an action of trover the plaintiff must show either title in himself, prior possession, or right of possession. *Mitchell v. Georgia & Alabama R.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622. In this case the plaintiffs rely upon title to the shipment in question. They contend that the payment of the deposit of \$10 and the delivery of the goods to the carrier operated to fix this title in them; that the contract of sale was fully executed and was not in any sense executory; and that the railroad company held possession of the goods as their agent and not as the agent of the consignor.

[3] Unquestionably it is a general rule that delivery to the carrier of goods purchased is delivery to the consignee; but this general rule may be varied by a manifest exception thereto made by the vendor at the time of shipment. At the time of shipment in this case the Johnson Manufacturing Company expressly reserved title to the shipment by taking a bill of lading to its order and attached a sight draft to the same for collection.

[2] Section 4134 of the Civil Code (1910) in such case expressly provides that no title passes until the drawee pays the draft thus drawn upon him. "When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be." When the Johnson Manufacturing Company consigned the shipment to itself, with order to "notify Strozler & Waters," this was equivalent to a positive statement that it did not intend to part either with the title to the shipment or the possession thereof until this draft was paid.

[4] The case of *Erwin v. Harris*, 87 Ga. 335, 13 S. E. 513, seems to us controlling on this point. In that case a sale of oats was offered by a party in Texas to the vendee in Georgia. The vendee replied, offering to take five car loads f. o. b. at a Texas point, and the offer was accepted. The vendor shipped the oats, sending a draft for collection, with the bill of lading attached, and the vendee claimed title. The court ruled as follows: "The general rule is that when one orders goods from a distant place to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the common carrier is a delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and, when this is done, the title, without more, passes from the vendor to the vendee." Now note the exception: "If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title in himself, he may vary this rule, when he makes the consignment and delivers the goods to the carrier, by taking a bill of lading from the carrier to his own order. When the vendor does this, it is evidence that he does not part with the title of the goods shipped, but retains the same until the draft which he sends with the bill of lading is accepted or paid; and, when the title is thus reserved in the vendor or consignor, the carrier is his agent and not the agent of the consignee, and the risk is the consignor's and not the consignee's. *Erwin*, the consignor, having taken the bill of lading to his own order and attached it to the draft drawn on *Harris*, and sent them to the bank in Macon, Ga., delivery to the carrier in Texas was not a delivery to *Harris*. Under these facts, the title remained in *Erwin*, the consignor, and the delivery to *Harris* was contemplated to be at his residence in Macon; payment of the price to be made by him there on delivery." See, also, to the same effect, *F. C. & P. Railroad Co. v. Berry*, 116 Ga. 19, 42 S. E. 371, and the decision of this court in *Moss & Co. v. Sell*, 8 Ga. App. 588, 70 S. E. 18. In the case decided by this court, referring to

the conduct of the consignor in the method of shipment, it is said that "the seller thereby expresses his intention not to part with the title to the goods shipped to the buyer until his draft attached to the bill of lading is accepted and paid." The facts in the case sub judice are almost identical with the facts in the case of *Erwin v. Harris*, supra; the only difference being the payment of the \$10 deposit by *Strozler & Waters* as required by the *Johnson Manufacturing Company*. This payment of \$10 was simply a payment on account, and to this extent it gave to the purchasers an interest in the shipment, but it did not fix the title to the shipment in them in the face of the express declaration on the part of the consignors, as shown by their method of shipment, that the title to the shipment was reserved until the purchase price was fully paid by the consignees. Here the vendors were not satisfied of the solvency of the vendees. They found that the vendees had no commercial rating, and therefore the vendors exercised their right to protect themselves by consigning the shipment to themselves in Savannah and attaching a draft to the bill of lading. In the case of *Mathewson v. Belmont Flouring Mills Co.*, 76 Ga. 359, it was distinctly held that, where goods were shipped with sight draft and bill of lading attached, the return of the draft accepted or paid was a condition precedent to fix the title, and until this was done no title passed.

We might rest the decision of the case here, since by the authorities cited applicable to the facts, which are not in dispute, the plaintiffs in the court below not only failed to show any title in themselves to the shipment, but expressly showed that the vendor, *Johnson Manufacturing Company*, had reserved title in itself until the draft was paid. The carrier had knowledge of the method of shipment. It had the absolute right to refuse to deliver the shipment, made, as it was, without a surrender of its bill of lading. If it had delivered the shipment to the consignees without the bill of lading, it would have been in law liable to the vendors for any consequent loss, for the carrier is bound to see that it delivers a shipment only to the proper person designated by the consignor. Where a bill of lading covering a shipment has been issued, the carrier may demand its production as a condition precedent to making delivery. *Atlantic & Birmingham Ry. Co. v. Spires*, 1 Ga. App. 22, 57 S. E. 973; *Sellers v. Savannah, Florida & Western Ry. Co.*, 123 Ga. 386, 51 S. E. 398. It follows from the foregoing that a refusal by the railroad company to deliver the shipment to the consignees, under the facts as stated, did not amount to a conversion by the carrier, but that the carrier in refusing to deliver, without a surrender of its negotiable bill of lading, was standing squarely upon its rights.

[5] We conclude, therefore, that the trial court erred in not awarding a nonsuit, and that the judgment against the defendant was unauthorized.

Judgment reversed.

(10 Ga. App. 197)

MOORE v. COFIELD. (No. 3,377.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

MARSHALING ASSETS AND SECURITIES (§ 9*)—FORECLOSURE OF MORTGAGE—RIGHTS OF PARAMOUNT CREDITOR.

A. held a mortgage on two mules, and B. held a junior mortgage on one of them. The mortgagor, by the consent of A. and without the knowledge or consent of B., sold the one not covered by B.'s mortgage, and applied the proceeds to the payment of an open account which A. held against him. B. foreclosed his mortgage, and, under the execution, seized and sold the mule covered thereby. The amount realized from the mortgagor's sale of the mule covered by A.'s mortgage would have been sufficient to have paid the balance due on A.'s mortgage, as well as the mortgage *fi. fa.* held by B. Held that, in the distribution of the fund in the hands of the court, equitable principles should control, and, under the facts, there was no error in the judgment awarding the money to B.'s mortgage *fi. fa.*

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Dec. Dig. § 9.*]

Error from Superior Court, Walton County; C. H. Brand, Judge.

Claim by R. D. Moore to the proceeds of a mortgage foreclosure by E. W. Cofield. Judgment for Cofield, and Moore brings error. Affirmed.

W. O. Dean, for plaintiff in error. A. C. Stone, for defendant in error.

HILL, C. J. The question in this case arose on the distribution of a fund in the hands of the sheriff, arising from the sale of mortgaged property under execution. Cofield held a mortgage on one mule. Moore held a mortgage on two mules; one of them being the same mule covered by Cofield's mortgage. Cofield's mortgage was junior in date to that held by Moore. He foreclosed his mortgage, and had the mule levied upon and sold, and the fund realized from this sale was claimed by Moore, under his senior mortgage. The undisputed evidence before the court, on the hearing of the rule, showed that Moore agreed that the mortgagor should sell the mule not covered by Cofield's mortgage, and apply the proceeds arising from the sale of this mule to the debt or account against him, which was held by the firm of which Moore was a partner, and the money arising from the sale of the mule was accordingly applied to the payment of this debt. Cofield did not know of this arrangement between Moore and the mortgagor. If the money realized from the sale of the mule on which Moore held a mortgage had

been applied on this mortgage, it would have reduced this senior mortgage to only \$15 or \$20, and the money arising from the sale of the mule under the mortgage foreclosure by the sheriff would have been sufficient to pay off this balance and also the mortgage *fi. fa.* held by Cofield. Cofield contended that under these facts he was in justice and equity entitled to have the money realized from the sale of this mule, to pay off his mortgage *fi. fa.* The judge, without the intervention of a jury, tried the question of law involved, and rendered a finding in favor of Cofield.

We think the decision of the judge was within the well-settled principle, codified in section 3220 of the Civil Code of 1910, that, "as among themselves, creditors must so prosecute their own rights as to not unnecessarily jeopardize the rights of others; hence a creditor having a lien on two funds of the debtor, equally accessible to him, will be compelled to pursue the one on which other creditors have no lien." See, also, section 5218; *Mulherin v. Porter*, 1 Ga. App. 153, 58 S. E. 60.

Judgment affirmed.

(10 Ga. App. 194)

WHIDDEN v. CITY OF THOMASVILLE
(No. 3,374.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—JUDGMENT SUSTAINING DEMUR-
RER.**

The judgment sustaining the general demurrer to the petition is a final judgment, from which a writ of error will lie.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 725*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where a bill of exceptions recites that the court sustained a general demurrer, and that "the plaintiff in error excepted to the order sustaining said general demurrer, and assigns the same as error," the assignment of error is sufficient. *O'Neal v. Miller*, 9 Ga. App. —, 70 S. E. 971.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3002-3005; Dec. Dig. § 725.*]

3. MUNICIPAL CORPORATIONS (§ 816*)—DEFECTIVE STREET—ACTIONS FOR INJURIES—PLEADING.

In a suit to recover damages from a municipal corporation for an alleged injury resulting from a defective construction of a street, it is not necessary to allege either actual or constructive notice of such defective construction. *Pol. Code 1910, § 898; Mayor, etc., of Montezuma v. Wilson*, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1724; Dec. Dig. § 816.*]

4. SUFFICIENCY OF PETITION—DEMURRER.

The allegations of the petition in form and substance set forth a cause of action, and the

court erred in sustaining a general and special demurrer thereto.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by R. F. Whidden against the City of Thomasville. Judgment for defendant, and plaintiff brings error. Reversed.

Theodore Titus, for plaintiff in error. T. N. Hopkins and J. H. Merrill, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 215)

HOWE v. STATE. (No. 3,796.)
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 110*) — REQUISITES OF ACCUSATION — FOLLOWING LANGUAGE OF STATUTE.

An accusation which, following the general language of the statute, charges that the accused "did sell and barter, for a valuable consideration, alcoholic, spirituous, malt, and intoxicating liquors, intoxicating bitters, and drinks which, if drunk to excess, will produce intoxication," is not subject to special demurrer on the ground that the kind of drinks sold is not specified with sufficient definiteness. Hall v. State, 8 Ga. App. 747, 70 S. E. 211.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 294; Dec. Dig. § 110.*]

2. INTOXICATING LIQUORS (§ 216*) — CRIMINAL PROSECUTIONS—SUFFICIENCY OF ACCUSATION.

The specific point that, since some malt liquors are not intoxicating, the accusation should have expressly shown that the malt liquors referred to therein were intoxicating, is not meritorious. Stoner v. State, 5 Ga. App. 716, 63 S. E. 602.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 230-233; Dec. Dig. § 216.*]

3. REVIEW OF DECISIONS REFUSED.

The request to review these decisions, for the purpose of having them modified or overruled, is refused.

4. INTOXICATING LIQUORS (§§ 224, 236*) — CRIMINAL PROSECUTIONS—INSTRUCTIONS.

There was no error in the court's instructing the jury as follows: "On the trial of one charged with having violated the law by illegally selling intoxicating liquors, proof that the accused received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to such person, puts the onus on the defendant of explaining where, how, and from whom he got the liquor; and if the explanation offered by him is supported only by his own statement, the jury, if they believe it to be a mere subterfuge to cover up an illegal sale by himself, are authorized to find the defendant guilty." Mack v. State, 116 Ga. 546, 42 S. E. 776. A request to charge, stating a contrary doctrine, was properly refused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281, 300-322; Dec. Dig. §§ 224, 236.*]

5. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence strongly supports the conviction, and no material error appears.

Error from City Court of Fitzgerald; E. Wall, Judge.

L. W. Howe was convicted of violating the liquor law, and brings error. Affirmed.

Haygood & Cutts, for plaintiff in error. A. J. McDonald, Sol., for the State.

POWELL, J. Judgment affirmed.

(70 W. Va. 1)

PEALE et al. v. GROSSMAN et al.
(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 206*) — TRANSACTIONS INVALID—PRIOR OR SUBSEQUENT CREDITORS.

Whether one is a prior or a subsequent creditor in relation to a voluntary conveyance must be ascertained solely by reference to the time the debt was contracted.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 629, 630; Dec. Dig. § 206.*]

2. FRAUDULENT CONVEYANCES (§ 206*) — TRANSACTIONS INVALID — PRIORITY OF CLAIMS—RUNNING ACCOUNTS.

When a running or continuous account extends over the date of a voluntary conveyance, the creditor, as to the part of the indebtedness contracted prior to the conveyance, is a prior creditor, and, as to the part contracted subsequent to the conveyance, he is a subsequent creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 629, 630; Dec. Dig. § 206.*]

3. PAYMENT (§ 43*)—APPLICATION—RUNNING ACCOUNTS.

If payments are made on a running or continuous account, without particular application of the same thereto by direction of the paying debtor or act of the receiving creditor, the law applies the payments to the oldest items of the account.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

4. FRAUDULENT CONVEYANCES (§ 206*) — TRANSACTIONS INVALID — PRIORITY OF CLAIMS—RUNNING ACCOUNTS.

One loses his position of prior creditor by accepting payments which lawfully go in full discharge of the indebtedness contracted prior to the voluntary conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 629, 630; Dec. Dig. § 206.*]

5. FRAUDULENT CONVEYANCES (§ 312*)—REMEDIES OF CREDITORS—DECREE.

A decree charging property with the payment of debts in favor of various creditors should specifically state the amount due to each creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 312.*]

Appeal from Circuit Court, Kanawha County.

Bill by W. C. Peale and others, partners, against M. W. Grossman and others. From a decree for defendants, T. J. Peale, surviving partner, and others appeal. Affirmed and remanded, with a direction.

A. Burlew and D. W. Taylor, for appellant Peale. Nash & Nash, for appellant Sterling Paint & Glass Co. Price, Smith, Spillman & Clay, for appellants Chicago Varulsh Co. and others. Payne & Payne and Berkeley Minor, Jr., for appellees.

ROBINSON, J. This is a suit attacking conveyances to a wife as being in fraud of the husband's creditors. The chancellor found from the pleadings and proofs that the conveyances were not made in actual fraud, but that one of them conveying a lot of ground was voluntary and, therefore, void as to the debts contracted prior to its date; that all the debts claimed by the bill and petitions were contracted after this conveyance was made, except a debt of one of the petitioning creditors; that the wife furnished \$1,800 of the money that paid for the lot and the improvements thereon from resources of her own, other than those of her husband; and that the improvements placed on the lot a considerable time after the conveyance are chargeable with the debts of the husband, claimed by plaintiff and the other petitioners, to the extent that his means went into those improvements, that is, to the amount of \$1,325. Accordingly a decree was entered directing that the property be sold for the satisfaction of the debts to that amount, if not paid to that extent by the wife in a day given. From this decree plaintiff and other creditors have appealed. The main contention is that the court erred in not subjecting the property as a whole to the payment of the husband's debts.

The case is so similar to many that have received extended judicial discussion that it will serve no purpose to elaborate on facts like those which have time and again been reviewed in our cases and on well-settled principles in connection therewith. The books already contain full exposition of principles relating to voluntary and fraudulent conveyances. We have carefully weighed the evidence in connection with the familiar legal principles applicable thereto. It is enough to say that the evidence justifies the view of the case adopted in the decree. Therefore, the assignments and the cross assignment on this score are overruled. The decree is right as far as it goes. In one particular it should go further, but as to that we shall speak later.

[1, 2] Plaintiff claims that he is a prior creditor in relation to the conveyance of the lot. If it were so, his debt should have a better priority than that given in the decree; for the voluntary conveyance of the lot would then be void as to him. Because plaintiff's debt grows out of a running account extending from a date long before the conveyance to a date long thereafter, it is insisted that the balance finally remaining due on the account should be considered a debt prior to the conveyance, notwithstanding

ing the various payments made on the account more than equal the items of indebtedness contracted prior to the date of the conveyance. Our statute settles this matter. Code 1906, c. 74, § 2. Judge Lucas, in Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74, gives a clear exposition of this statute. Therein it is held: "Under said act the courts of this state have no power to substitute subsequent creditors to the shoes of prior creditors, or to confound the two classes which the act was intended to make, and has made, absolutely distinct." In a running account extending over the date of a voluntary conveyance, part is contracted prior to the conveyance and part subsequent to the conveyance. The creditor is clearly a prior creditor as to part and a subsequent creditor as to part. The conveyance can only be considered void for voluntariness as to the part contracted prior to it. As to the other part it is valid, unless overthrown for actual fraud in relation thereto. As to this subsequent part, mere voluntariness will not avoid the conveyance. The statute defines the debts for which a voluntary conveyance must give way. It declares that a conveyance "not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made; but shall not upon that account merely be void as to creditors whose debts shall have been contracted * * * after it was made." The dividing line is clearly fixed; and, as heretofore held, the courts have no power to confound the two classes or to substitute the one for the other. Whether one is a prior or a subsequent creditor in relation to a voluntary conveyance must be determined solely by reference to the time the indebtedness was contracted. Of course we are now dealing only with the aspect of the mere voluntary, not fraudulent, conveyance of the lot. The improvements, it is true, have been held chargeable with debts made subsequent to the conveyance, but upon the ground that the husband, a considerable time after the conveyance of the lot, put his money in the improvements in fraud of the subsequent debts. That is another branch of the case, as to which even the wife is not seriously contending, it seems.

[3, 4] Having observed that plaintiff's account was of such a character as to make him prior creditor as to one part and subsequent creditor as to the other part, we must next inquire whether he still retains the position of prior creditor. The payments made on the account are sufficient to pay all the items that were contracted prior to the conveyance. How are those payments to be applied? Clearly, in the absence of any direction by the paying debtor, or any specific application of the payments by the creditor, the law will apply the payments to the oldest part of the account. The payments on the account due plaintiff were made and credited thereon without direction or par-

ticular application. They should be held to apply as payments ordinarily do under such circumstances—they should go to the payment of the oldest items of account. "In cases of long standing accounts, where debits and credits are constantly occurring, and no balances are struck otherwise than for the mere purpose of making rests, the payments ought to be applied to extinguish the debts according to priority of time." 11 Enc. Dig. Va. & W. Va. 124; 30 Cyc. 1244. There is nothing to show that the parties intended the payments to go to the items of account contracted after the conveyance, or that they intended them to be distributed over the whole account. We can only give the payments the application that the acts of the parties gave them at the time they were made. The debtor paid on the account without direction. The creditor made no particular application of the payments. Under these circumstances, the acts of the parties in the making and receiving of the payments caused the same to apply to the oldest items of the account. We cannot change all this now, in order to make plaintiff a prior creditor, when indeed his receiving the payments in the way that he did made him to lose his position of prior creditor. He is chargeable with knowledge of the effect of his act in receiving the payments. If he desired to maintain his position as prior creditor, he should not have accepted the payments in the way he did. Plaintiff, by his own dealings, long ago made his position in reference to the voluntary conveyance to be that of subsequent creditor. The only items of indebtedness remaining due to him were contracted after the conveyance. The doctrine of applying payments to the part of a debt least secured has nothing to do with this case, though urged by plaintiff. The law applied these payments when they were made.

In some jurisdictions continuous or running accounts beginning before the conveyance are considered prior debts. 20 Cyc. 422; *Thomas v. Lye*, 37 Ill. App. 482; *Spuck v. Logan*, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; *Paulk v. Cooke*, 39 Conn. 566; *Wait on Fraudulent Conveyances*, § 103; *Bump on Fraudulent Conveyances*, § 296. But, as we have stated, our statute defines who is a prior creditor and who is not. By the terms of the statute a creditor's relation to a voluntary conveyance is fixed only by the time of the contracting of the debt. It does not permit making a creditor what he has not made himself in this regard. It does not recognize the subrogation which other jurisdictions have invoked to make one a prior creditor.

[5] The contention by plaintiff that the decree is erroneous in recognizing the debts of the petitioning creditors is overruled. Plaintiff's bill invited these petitioners to come into the suit. They filed petitions fully set-

ting up their debts and joining with plaintiff in the suit. Thereby they became responsible for costs. Not a word of objection to their petitions was entered in the court below. The debts claimed by them have been contested by no one, not even by the debtor or his wife who claims the property on which these debts are made charges. Several of these petitioning creditors were even allowed to join with plaintiff in this appeal.

The decree finds that plaintiff and petitioners, other than the petitioner decreed to be a prior creditor and whose debt is charged against the lot, shall share pro rata in the amount charged against the improvements on the property. But the decree does not go on, ascertain, and fix the amount of the respective debts of plaintiff and these petitioners. These amounts should be determined by decree before further proceedings are taken in the cause. The decree entered settles correctly the principles of the cause. But it should go further and ascertain each debt that is to be paid in pursuance of those principles. We presume this would have been done in the court below if plaintiff had called attention to the propriety of doing it. The debtor and the owner of the property are not complaining, and we shall not reverse for this cause at the instance of plaintiff and the other appellants, since they could have asked this additional decree below and there obtained it. We shall affirm the decree, and remand the cause with direction to the court below to ascertain and fix by further decree the respective amounts of the debts due plaintiff and petitioners, already directed to be paid under the former decree.

(70 W. Va. 52)

REGER v. McALLISTER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 29*)—CONTRACT—SUFFICIENCY OF DESCRIPTION.

Equity will not enforce performance of a contract for the sale of land, if the description of the boundaries is so indefinite as not to be capable of being made certain by extrinsic evidence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 31*)—ENFORCEMENT—CONTRACT AS TO BOUNDARY.

If the parties to a contract for sale of land agree that certain boundary lines "are to be run as may be hereafter agreed upon," equity will not enforce it, until such open boundary lines shall have been agreed upon by the parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 86-88; Dec. Dig. § 31.*]

8. BOUNDARIES (§ 48*)—ACQUIESCENCE.

In the absence of fraud, if a vendee accept a deed, based upon a survey made pursuant to a contract for the purchase of a boundary of land, which was to be surveyed out of a larger tract by a certain surveyor mutually agreed on by the parties, and which was surveyed by such surveyor, and rests for nearly five years before making complaint, he will be presumed to have acquiesced in the boundaries located by such survey and described in his deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

Appeal from Circuit Court, Pocahontas County.

Bill by Shelton L. Reger against William M. McAllister and others. Decree for complainant, and defendant McAllister appeals. Reversed, and bill dismissed.

Brown, Jackson & Knight, for appellant. Geo. E. Price, for appellee.

WILLIAMS, P. Shelton L. Reger, trustee, brought suit in the circuit court of Pocahontas county against William M. McAllister and others to compel specific performance of a contract for the sale of land, and from a final decree rendered in favor of plaintiff, on the 8th of October, 1908, defendant McAllister has appealed.

On the 8th of July, 1899, McAllister agreed in writing to sell and convey to Reger, trustee, two adjoining parcels of land at the price of \$4.50 per acre, \$500 of which was paid at the date of the contract, and the balance to be paid when the deed should be delivered. These parcels of land were to be surveyed out of larger tracts which McAllister owned, and, when surveyed, would constitute one contiguous body, or tract, of land. The agreement stipulated that McAllister should have "the lands surveyed at his own cost and charge, at the earliest practicable date, by B. M. Yeager, Uriah Bird, or some other competent surveyor, to be agreed upon by the said parties." He was to give Reger 10 days' notice of the time when the surveying would be done. A number of dates were agreed upon for making the survey, but in each instance, before the time arrived, either something occurred which made it inconvenient for Mr. Reger to attend, or the surveyor could not then do the work. Mr. Reger admits that the delay was chiefly on his own account. After several attempts to fix a date when it would suit the convenience of Mr. Reger to be present, he finally, on the 11th of October, 1899, wrote from Elkins, W. Va., to Mr. McAllister at Warm Springs, Va., the following letter, viz.: "I wired Mr. Bird to arrange with you as to a date to survey your land. I want it closed up, and I hope you and he can arrange dates satisfactory to both. I am now so I can meet you at any time after next week." On the 10th or 11th of October, 1899, Mr. Reger also wired Mr. Bird at Marlinton, W. Va., to arrange a date

with Mr. McAllister, and to go on and do the surveying, whether he (Reger) was there or not. Pursuant to these directions, McAllister and Bird went upon the land, about the 20th of October, 1899, and Bird says he did the surveying according to the contract, as he understood it. Mr. Reger was not present, but he went upon the land a few days afterwards—within a week afterwards—but he says he did not then examine the lines that had been run. On the 27th of October, 1899, he wrote to McAllister to execute the deed according to their contract to Henry G. Davis, when he should receive Bird's report. McAllister did execute a deed for 523 acres, according to Bird's survey, to Henry G. Davis, which was rejected because it failed to grant certain rights of way over McAllister's other lands, which had been provided for in the contract, and another deed was prepared by a lawyer, in Elkins, which did include said privileges and easements, and was mailed to McAllister, and was executed by him and returned. This deed was accepted, and the land conveyed by it paid for, and both parties, no doubt, then supposed the matter was a closed transaction. But in the summer of 1904, Mr. Reger discovered, as he claims, that the survey made by Bird did not include certain land which was described in the contract of sale, and he thereupon notified McAllister that, on the 15th day of July, 1904, he would go upon the lands with E. E. Taylor, a surveyor of Elkins, W. Va., and would survey out the land according to the boundaries given in the contract. He did go upon the land with E. E. Taylor, and had him survey out 236 $\frac{3}{4}$ acres more of McAllister's land. This suit is brought to compel McAllister to execute a deed for that additional boundary of 236 $\frac{3}{4}$ acres.

[1] In addition to his claim of complete performance, McAllister asserts that the boundaries of the tract of land are not described in the agreement with sufficient definiteness to enable a court to specifically enforce it. Certainty in description of land agreed to be conveyed is an essential prerequisite to specific performance. Mathews v. Jarrett, 20 W. Va. 415. The description of the land which the bill seeks to have conveyed is given in the contract of sale as follows, viz.: "Also the following described additional tract or parcel of land, the quantity of which cannot now be estimated, adjoining the said first-mentioned tract, and adjoining the said Bruce & Chumley 713-acre tract, and adjoining the D. W. Hile and others 2514-acre tract. The lines of said last-mentioned tract are to be run so as to include all the pine timber off the upper end of said tract, on the northwest side of said Crooked fork, running with the lines of the said Bruce & Chumley tract, and the D. W. Hile and others tract, and so as to exclude all the land that is heavily timbered with locust,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cherry, and other hardwood; that is to say, there is to be included in this tract all of the land, adjoining the Hile lands, upon which the pine timber predominates. The lines on the southeast side of this tract are to be run as may be hereafter agreed upon between the said Wm. M. McAllister and the said Shelton L. Reger, making as many corners as may be found necessary to carry out the terms of this agreement."

Counsel for appellee invokes the equity maxim, "*Id certum est quod certum reddi potest*," and insists that the land can be identified by the above description. There is no doubt that a boundary of land could be surveyed which would coincide with that description. But it is equally certain that it might be laid off by an indefinite number of different boundary lines, and each separate manner of laying it off would fit, in a general way, the description of the boundary named in the contract. That is what makes the contract indefinite as to boundary lines. The only facts stated in the agreement to fix definite boundary lines, on one side of the tract, are (1) that the land is on the northeast side of Crooked fork; (2) that the pine timber must predominate on it; and (3) that the land on which the hardwoods predominate is to be excluded. That the first fact is too uncertain is too patent to merit discussion. Crooked fork is not the boundary line, and the contract does not say how far the boundary lines are to be located from the stream. The second and third facts are so indefinite as description of boundary lines that no two surveyors, each working independently of the other, would lay the lines in the same place. This is verified by the fact that Bird, the surveyor mutually agreed on by the parties to lay off the lines, ran them in one place, and Taylor, the surveyor later employed by Reger, ran them in quite a different place. The bill does not charge McAllister with fraud of any kind, and it appears from the evidence that Bird ran the lines by the agreement as he interpreted it, and that he was not instructed by McAllister, otherwise than to follow the contract.

The element of uncertainty as to where the lines should be located is further complicated by the fact that the pine timber is not found on the land in a continuous body, but grows in patches; the pine predominating in some places, and the hardwoods in other places. The two varieties of timber shade off gradually into each other, and in some places it is difficult to tell which kind predominates; the two being so intermingled. Notwithstanding the contract provides that the land on which the hardwoods predominate is to be excluded, it is proven by plaintiff's own witnesses that Taylor's survey of the additional land, claimed by the bill, includes from 50 to 75 acres on which the hardwood predominates. It is very questionable whether or not the pine predominates on the 236 $\frac{1}{4}$ acres in question, taken

as a whole. But, assuming that it does, still that alone is not sufficient to determine the case for plaintiff. Because the tract might have been laid off in a different shape, bounded by different lines, and containing a greater or a less quantity, and still have been a tract on which the pine would predominate, could the court adopt any one of such tracts as the one which the parties to the agreement intended? We think not, because to do so would be in effect to make an agreement for them.

[2] But why should we extend this discussion, when the contract expressly states that the boundary lines on one side of the tract are to be the subject of future agreement. It reads: "The lines on the southeast side of this tract are to be run as may be hereafter agreed upon," etc. But Mr. Reger failed to meet Mr. McAllister on the land at the time he himself appointed, and they never actually agreed where the southeast boundary lines should be run. This case clearly falls within the principle declared and applied in the following cases, and is governed by them, viz.: *Mathews v. Jarrett*, 20 W. Va. 415, *Westfall v. Cottrills*, 24 W. Va. 763, and *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433. Each one of those cases was a suit for specific enforcement of a contract for the sale of land, and the description of the land in the contract of sale was no more uncertain in any one of those cases than it is in the case now under review, yet in each of them the court denied relief to the vendee on the ground of uncertainty of description. There is more danger of doing injustice, in cases involving uncertainty of description, by attempting to give relief, than there is in refusing it, because, if the vendee has paid nothing, and is denied relief, he has lost nothing but his bargain, and if he has paid in advance for the land, and fails to get it, he can recover his money in an action of assumpsit. On the other hand, if the court should undertake to enforce such contract, it is liable to compel the parties to perform that which they never agreed to.

[3] There is another reason, appearing from the facts in the case, why equity should deny relief, and that is the presumption of Reger's acquiescence in Bird's surveying, arising from his protracted delay in bringing his suit. After accepting the deed, and apparently acquiescing, for nearly five years, in the survey made by the surveyor who had been mutually agreed upon, and who was directed by Reger to survey the land, whether he was present or not, plaintiff seeks to compel defendant to convey to him an additional tract of land, which plaintiff had surveyed by a different surveyor, and according to his present idea of where the boundary lines should be located. Even if the boundary lines had been described with sufficient certainty by the contract to enable a court of equity to enforce specific performance, it would seem inequitable to grant relief be-

cause of plaintiff's laches. Moreover, between the acceptance of the deed and the bringing of the suit the land has greatly enhanced in value. If the land had depreciated, instead of appreciated, in that time, it is more than probable that plaintiff would have been content. Must he not be content as it is? We think so. He has delayed so long in bringing his suit that he must be regarded as having acquiesced in what was done. To grant his prayer would be to give him a great advantage over the other contracting party, in view of the enhanced value of the land. Equity will not permit him to occupy a position in relation to his vendor, in the absence of fraud, where he may say, in case the land depreciates, I am satisfied, and, in case it enhances, I must have more.

Reger bought the land as agent for an undisclosed principal, and the rights of his principal can rise no higher than his own, so far as they affect the vendor. The principal, now most vitally interested, did not become known to McAllister until after this suit was brought.

The decree will be reversed, and a decree entered here dismissing plaintiff's bill.

(70 W. Va. 6)

INTERIOR & W. V. R. CO. v. EPLING et al.
(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 614*)—CONSTRUCTION—ESTATE CONVEYED.

A testator devised: "My real & personal property is to be equally divided between my three daughters (naming them) and then to their children forever." At testator's death all the daughters were living; two of them had children; the other one, though married, had then no children and never produced issue. After testator's death, mutual deeds in partition of the land were made by the two daughters then living and the children of the other daughter then deceased. *Held*:

I. The daughters took life estates with remainders in fee to their respective children, in their respective shares allotted in equal division of the land.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 614.*]

2. WILLS (§ 634*)—CONSTRUCTION—VESTED AND CONTINGENT REMAINDERS.

II. As to the share of the daughter having no children at testator's death, the remainder was a contingent one—with possibility of vesting during her life on production of issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. DESCENT AND DISTRIBUTION (§ 17*)—CONTINGENT REMAINDERS—FAILURE.

III. At the death of this daughter without issue, the contingent remainder failed; and, there being no residuary clause in the will, the partitioned share of the land to which that remainder pertained descended to the heirs-at-law of the testator.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 51, 52; Dec. Dig. § 17.*]

4. PARTITION (§ 9*)—BY PARTIES—EFFECT—ESTOPPEL.

IV. The children of the deceased daughter were not estopped by their deed in partition from claiming an interest as heirs-at-law of the testator, in the partitioned share as to which the contingent remainder failed.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26-32; Dec. Dig. § 9.*]

(Additional Syllabus by Editorial Staff.)

5. WILLS (§ 591*)—CONSTRUCTION—DESIGNATION OF LEGATEES—"CHILDREN."

Where a will devised property to be equally divided among testator's three daughters, "and then to their children, forever," the word "children" is not used as a word of limitation, in the sense of "heirs," but is a word of purchase.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1298, 1299; Dec. Dig. § 591.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

Error to Circuit Court, Monroe County.

Condemnation proceedings by the Interior & West Virginia Railroad Company against W. A. Epling and others. From the order, defendant W. A. Epling brings error, and the other defendants file cross-assignment of error. Cross-assignment sustained, and order reversed.

Rowan & Meadows, for plaintiff in error.
R. L. Clark, for defendants in error Pence.
J. H. Crosier, for defendants in error Williams' Heirs.

ROBINSON, J. The controversy grows out of the condemnation of a parcel of land for railroad right of way. No question, however, arises as to the direct condemnation proceedings. It is conceded that the land has been regularly taken and the money therefor paid into court. The question now submitted is: Who is entitled to the money paid for the land taken?

The answer to the question turns on a construction of the will of Andrew D. Crosier, made in 1878, and probated in 1886. He devised all his property to his wife for her natural life, and then further devised: "After the death of me and my wife my real & personal property is to be equally divided between my three daughters, Susan H. Matics, Paulina Williams & Mary J. Pence and then to their children forever." At the time the will was made, and at the death of the testator, each of the daughters was married and the two that are last named had children. The oldest daughter, Susan H. Matics, never had issue.

After the death of the widow, an equal partition of the land devised was made in pursuance of the will. Paulina Williams was then deceased, having left adult children. Later, deeds were executed by the two living daughters and the children of the deceased daughter, conveying the parcels as laid off in the partition. One parcel was conveyed to Susan H. Matics by Mary J. Pence and the

children of Paulina Williams; another parcel was conveyed to Mary J. Pence by Susan H. Matics and the Williams children; and the remaining parcel was conveyed to the Williams children by the other two parties. These deeds were made in May, 1897. Each of the deeds erroneously recites that the land was devised by Andrew D. Crosler to his wife for life with remainder in fee simple to the daughters as joint tenants. In 1898, Susan H. Matics and husband conveyed to William Epling, the plaintiff in error, the parcel allotted to her by this partition. That parcel is the one from which has arisen the money now in contest. Before the condemnation proceedings were begun Susan H. Matics was deceased, and Mary J. Pence had departed this life, leaving children.

The condemnation proceedings evidently brought to the attention of the Williams and Pence children the claim which they now make. They claim that the three daughters by the terms of the will took only life estates. These children insist that they own the parcel of land which Susan H. Matics purported to convey to Epling. The circuit court held that the Williams and Pence children were entitled to this portion of the land after the death of Susan H. Matics. But the court seems also to have held that the Williams children were estopped by their deed in partition, and that, therefore, Epling had their interest in the land. An order was made giving to Epling, in the right of the Williams children, four-sevenths of the money, and to the Pence children three-sevenths thereof. Epling, insisting that he is entitled in fee simple to the land conveyed him by Susan H. Matics, has prosecuted this writ of error.

[1] By the plain import of the will, Epling must be denied any interest in the land. Susan H. Matics had only a life estate to convey to him and that life estate has now terminated. The will speaks for itself. We must give it the effect which the words used demand. The intention of the testator must be drawn from these words. There is no apparent ambiguity in the will to need clearing by resort to extrinsic evidence. The situation and surroundings of the testator as disclosed by the record do not tend to establish a meaning other than that disclosed by the words of the will.

[5] Nothing in the will indicates that the word "children" is used in a sense other than that which usually belongs to it. Nothing indicates that it is used as a word of limitation, in the sense of "heirs." It is ordinarily a word of purchase. The ordinary significance of the word is not changed by anything appearing in this case. 13 Enc. Dig. Va. & W. Va. 810.

The will gave to each daughter a life estate in the parcel that should fall to her in the equal division which the testator directed should be made among them. As to the parcel so allotted each daughter for life, her

children were to take in remainder. What other import can reasonably be given the words "to be equally divided between my three daughters * * * and then to their children forever?" After an estate in each daughter ended, the land in which she enjoyed that estate was *then* to go to her children. The children of the daughters were *then* to take the parcels of their mothers, respectively. When the equal division of the land to the daughters had served them for their lives, *then* that division was to serve their children *forever*, or in fee. Clearly, remainders in the children are devised by the will. And clearly, those remainders reasonably refer to the parcels of land as allotted to the daughters. Since remainders in fee are given, the daughters could take only for life. The use of the word *then* bespeaks the ending of life estates in the daughters.

[2,3] The Williams and Pence children were living at the death of the testator. So they took, as a class, respectively, vested remainders in the parcels that should be allotted to their mothers. As to the Susan H. Matics parcel, however, the remainder was a contingent one, since she had no children at the death of the testator. The vesting of the remainder in the portion that should be allotted to her was contingent on her leaving issue. This remainder failed at the termination of her life estate, because she died childless. As to the parcel of the land which she took for life under the will, a remainderman never came into being. When her life estate ended, there was no one to take as the will devised. The will contained no residuary clause. The statute says that, in such event, the estate as to which the remainder fails shall go to the heirs-at-law of the testator. "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will; and if there be no residuary devise therein, such real estate or interest shall go to the heirs-at-law of the testator, as if he had died intestate." Code 1906, c. 77, § 18. Since the contingent remainder relating to the estate for life to Susan H. Matics failed, that estate went to the heirs-at-law of the testator. During all her life there was possibility of issue. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650. The remainder, contingent upon her producing issue, did not fail until she died childless. When it did fail the estate to which it pertained became property as to which the testator was intestate. Until the failure of the contingency, the testator was testate as to that property. He did not die intestate as to it. He devised it by his will. That devise happened to fail after his death. The presumption against intestacy does not apply in this particular, nor argue against the construction which we have given the will.

Now, the heirs-at-law of Andrew D. Crosier, to whom the Susan H. Matics parcel descended when the contingent remainder in relation to it failed, were the Williams and Pence children—his grandchildren. Both of the other daughters died before the failure of this remainder. Their children were then the only heirs-at-law of Andrew D. Crosier. The land as to which the remainder failed descended to them. They were entitled to take per capita. "Whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or by person." Code 1908, c. 78, § 3. The Williams children were four in number—they were entitled to four-sevenths of the Susan H. Matics land. The Pence children were three in number—they were entitled to three-sevenths of that land. So the proportions of interest which the court below fixed are right.

[4] The court, however, erred in holding that Epling acquired the interest of the Williams children because of their joining in the partition deed to Susan H. Matics. That deed could give her no more than she was entitled to under the will, an allotment of land for life. The partition, though erroneously viewed by the parties, had no further effect than that which the will justified. Its effect was simply to set off, as the will directed, the land in three parcels for the separate enjoyment of life estates by the daughters, and the vesting of remainders in their children. That which was set off to Susan H. Matics could be so set off to her only for life—the will gave no other estate to her. The deed of the Williams children in partition simply defined what she was to enjoy for life and what was to go in remainder to her children if any she had. That deed must be considered as intended to do only what it could do in view of the provisions of the will. It could transfer nothing in fee, for in the portion of the land allotted to the Williams children by this same partition they retained all the fee title that had been vested in them as remaindermen to the life estate of their mother. Our holding in *Shaffer v. Shaffer*, 69 W. Va. 163, 71 S. E. 111, is here directly in point: "A deed between tenants in common, cotenants or coparceners, by which in an effort at partition, they each convey or quitclaim to the others, the portions allotted to them respectively, conveys no title to the grantee; it amounts simply to a severance of the unity of possession."

Nor does the partition deed estop the Williams children from claiming as heirs-at-law an interest in the Susan H. Matics parcel. Their interest in that land came to them by descent long after they made the partition deed. As we have shown, the deed was not one of conveyance, but one of partition. It did not convey land, but severed the unity of possession in land. Still, if considered a

deed of conveyance, it is not of such character as to estop the grantors from claiming title thereafter acquired in the same land. It purports to convey only such right, title and interest as grantors have. It contains only covenants of special warranty. The title to the Matics land at the date of this deed was in a third party because of no act or default of the covenantors. Under such circumstances the after-acquired title does not vest in the covenantee and the covenantors are not estopped to assert claims thereto. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406.

The cross assignment of error submitted on behalf of the children of Paulina Williams is well taken and must be sustained. The order of the court below will be reversed and set aside. An order will be entered here directing the payment of four-sevenths of the money to the Williams children and the payment of three-sevenths thereof to the Pence children, as heirs-at-law of Andrew D. Crosier, deceased.

(70 W. Va. 33)

BALTIMORE & O. R. CO. v. WHEELING TRACTION CO.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 102*)—ORDER IN EQUITY—STRIKING EVIDENTIAL MATTER FROM ANSWER.

An order in a chancery cause, sustaining exceptions to an answer and striking from it only evidential matter, without eliminating the allegations of defensive rights or denials of controverted averments of the bill, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 102.*]

Appeal from Circuit Court, Marshall County.

Bill by the Baltimore & Ohio Railroad Company against the Wheeling Traction Company. Decree for plaintiff, and defendant appeals. Dismissed.

Erskine & Allison, for appellant. Hooton & Hooton, for appellee.

POFFENBARGER, J. The material question presented by this record is the appealability of the decree complained of, which did nothing more than strike out, upon exception, certain portions of the defendant's answer to the plaintiff's bill, on which a preliminary injunction had been granted. The purpose of the suit is to enjoin the defendant, the Wheeling Traction Company, whose line of railway is constructed and operated on the public road, along a steep hillside, at a place called "The Narrows," between Wheeling and Moundsville, above the line of the plaintiff's steam railroad, located at the foot of the same hillside, from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

throwing earth, stone, timber, and other materials down upon or near the railroad track of the latter. The defense, set up by the answer, is a right, in the nature of an easement, to clear away landslides from said public road by removing the stone, earth, and other materials to the lower side thereof or over the bank and allowing them to pass on down the hill onto the plaintiff's right of way, or track, if need be. Expressing the opinion that denial, by the defendant, of its having interfered with the plaintiff's right of way, as charged, or its acquisition, by contract or prescription, or both, of a right to remove earth and other debris over plaintiff's right of way and track, were the only possible defenses, consistent with admitted rights, the circuit court struck out certain portions of the answer, deemed by it to be in conflict with that opinion.

In setting forth the defendant's claims and contentions, the answer, after having fully described the location and relative positions of the two railroads, detailed the history of the acquisition of their several rights. Originally, the county road occupied the present site of the plaintiff's railway. About the year 1852, that railway was built on said public road, and what is called a trail along the hillside above it was opened by the plaintiff for use in lieu thereof. Some time after this was done, the plaintiff was indicted for having obstructed the public road at the place in question. Then an agreement for arbitration was executed by the plaintiff and the county court of Marshall county. Under the articles of submission, an alternative award was made, giving the plaintiff the right either to pay to the county court \$5,800 in full consideration of all the matters in difference submitted as aforesaid, presumably the estimated cost of acquiring the right of way for a new road and constructing the same, or to build and complete such new road and, in addition thereto, pay to the county \$700, the estimated cost of removing future landslides. The plaintiff elected to do the latter, built a new road, and was relieved from further prosecution. This historical matter is a portion of what the court struck out of the answer. It then struck out matter to the following effect: That the award of \$700 and payment thereof were not intended to relieve the plaintiff from the burden of caring for such slips or landslides, originating above the county road, as might come down upon its right of way or track, or, having lodged in the county road, as might be passed over the bank and afterwards proceed to the foot of the hill; that there was nothing in the agreement or award to indicate that the county authorities, in taking charge of the new road, should be under any obligation to relieve or protect the plaintiff from such slips; that it would have been easier for the plaintiff,

on account of its location, to dispose of these landslides, than for the defendant to do so; that, if the court should require the defendant to replace the landslides, or provide a place or places of storage therefor, the plaintiff would be relieved from a very considerable pecuniary outlay, and given almost complete immunity from interruptions to its traffic resulting from landslides; that the defendant is a common carrier, transporting as many or more passengers than the plaintiff, wherefore the public convenience is interfered with as much by interruptions to its service by landslides as by like interruptions of the business of the plaintiff. All of the balance of the answer, explicitly stating and claiming the right or easement aforesaid, founded upon long-continued user, dating from about the year 1856, and an implied agreement arising out of the conduct of the parties, including assertion and exercise of such right, claimed under the county court of Marshall county, by virtue of a contract giving the defendant the use of the public road for its railway, on condition of its keeping it in repair, and acquiescence therein by the plaintiff for the long period of time aforesaid, was regarded and treated as proper matter of defense, and the plaintiff's exceptions thereto were accordingly overruled. The documentary evidence of the transactions between the county court and the plaintiff, consisting of copies of orders made and entered by said court, reciting the agreement, award, plaintiff's election and performance under the award, and the permission of the defendant to occupy the new county road in consideration of the payment of \$3,000 and its agreement to keep the road in repair, was exhibited with the bill, and none of it was stricken out.

The statutory right of appeal from a decree settling the principles of a cause is not controverted, but the character of this decree has been discussed at very considerable length in the briefs; the appellant regarding it as an appealable one, and the appellee resisting this interpretation of it. Nor does there seem to be any very great difference of opinion among counsel as to what constitutes a settlement of the principles of a cause. Argument of the appellant proceeds upon the theory of the elimination from the answer, by the action of the trial court, of the only defense therein set up. While this claim is denied in the argument for the appellee, the denial is not supplemented by any analysis of the answer as it stood, before portions of it were stricken out, or any interpretation of it as it now is. In our opinion, the claim made in the brief for the appellant is entirely too broad. The eliminated portions of the answer did not constitute the sole defense, nor, indeed, any portion of the defense, set up. All that has been excluded or stricken out is mere matter of evidence and argu-

ment, based largely upon the documents which remain as exhibits filed with the answer. No claim of any right or easement is expressly asserted in the eliminated portions. That appears in those portions as to which the exceptions were overruled. In them is found, not only the assertion of the defendant's alleged right, by way of excuse for the acts complained of and justification thereof, together with the denial of some of the charges of the bill, but also a very full statement of the relevant and material facts.

As the court expressed the opinion in its decree that only certain defenses, hereinbefore stated, can be made, and filed a written opinion in which some of the contentions and claims set up in the answer are disapproved and declared to be untenable, it is probable that, in some subsequent decree, or on the final hearing, they will be partially or wholly disallowed; but the court has not proceeded that far yet. The opinion is accorded entirely too much scope and effect in the argument for the appealability of the decree. Properly considered, it is merely explanatory of the action of the court. It is only the reason given for what the court did, not that which was done. The opinion and the order, read in the light of the answer as it now stands, are not consistent. In other words, the opinion is far broader than the order. The court has not done all it intended to do, if the language of its opinion and order accurately reflects its views. The opinion is revocable and alterable, and the expressions may be retracted. An appealable decree, under the clause of the statute invoked, is one "adjudicating the principles of the cause." A mere declaration of opinion may foreshadow future action of the court, but does not adjudicate anything. For this reason, an order overruling or sustaining a demurrer is not appealable. *Buehler v. Chevront*, 15 W. Va. 479; *Laidley v. Kline*, 21 W. Va. 21; *Watson v. Wigginton*, 28 W. Va. 533. On the same principle, an appeal from a decree referring a cause to a commissioner, or recommitting it, is denied. *Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280. To be appealable, a decree must carry the sentence of the law or will of the court into effect. *Armstrong v. Ross*, 56 W. Va. 16, 48 S. E. 745; *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Corley v. Corley*, 53 W. Va. 142, 44 S. E. 132, 47 S. E. 145.

Another rule, requiring adjudication of all the principles of the cause as a requisite of appealability, would necessitate dismissal of this appeal. If it be conceded that the order goes beyond elimination of evidential matter and actually adjudicates something, it clearly does not settle all the principles of the cause. The answer still

contains defensive matter. That a decree, to be appealable, must settle all the principles of the cause, has been repeatedly decided. *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Hooper v. Hooper*, 29 W. Va. 276, 283, 1 S. E. 280; *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. 914; *Hill v. Als*, 27 W. Va. 215; *Laidley v. Kline*, 21 W. Va. 21; *Camden v. Haymond*, 9 W. Va. 680; *Steenrod v. Railroad Co.*, 25 W. Va. 133; *Buehler v. Chevront*, 15 W. Va. 479.

Having been improvidently awarded, the appeal will be dismissed.

(70 W. Va. 12)

PRICE v. HOSTERMAN LUMBER CO.
et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS
(§ 312*) — CLAIMS PROVABLE — SECURED
CLAIMS.

Where a debtor makes a general assignment of all his property for the benefit of all his creditors, a secured creditor is entitled to prove and receive dividends upon the face of his claim as it stood at the time of the assignment, or declaration of insolvency, without crediting the value of his security or the proceeds of the sale thereof, made in a suit brought by the assignee to convene the creditors and wind up the affairs of the debtor's estate.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 913-917½; Dec. Dig. § 312.*]

Poffenbarger, J., dissenting.

Appeal from Circuit Court, Pocahontas County.

Suit by Andrew Price, trustee, against the Hosterman Lumber Company and others. From the decree, Uriah Hevener appeals. Reversed.

W. A. Bratton and F. R. Hill, for appellant. Price, Oseinton & Horan, for appellee.

MILLER, J. The point of the syllabus is fairly supported by our case of *Williams v. Overholt*, 46 W. Va. 340, 33 S. E. 226; but more particularly by *Merrill v. National Bank*, 173 U. S. 136, 19 Sup. Ct. 360, 43 L. Ed. 640; *Aldrich v. Chemical National Bank*, 176 U. S. 639, 20 Sup. Ct. 498, 44 L. Ed. 611; *Bank v. Armstrong*, 59 Fed. 380, 8 C. C. A. 163, 28 L. R. A. 231; *Bank v. Williametta, etc., Co. (C. C.)* 80 Fed. 227; *Doe v. N. W. Coal & Transp. Co. (C. C.)* 78 Fed. 72; *Central Trust Co. v. Richmond, etc., Co.*, 68 Fed. 99, 15 C. C. A. 273, 41 L. R. A. 458; *Bank v. Trigg*, 106 Va. 327, 56 S. E. 153.

Applying this rule of these cases to the case at bar the decree below, appealed from, in so far as it deprives the appellant Uriah Hevener, a vendor creditor, and a general creditor, of his right to share in the distribu-

tion of general fund belonging to the debtor's estate, on the basis of the entire debt proven and decreed in his favor, including his debt for purchase money, must be reversed, and corrected in accordance with the rule promulgated in the syllabus.

POFFENBARGER, J. (dissenting). The rule applied here is purely technical and artificial, and wholly fails to produce an equitable result. For that reason, I am unable to agree to it. The authorities are divided upon the question, and, in the federal Supreme Court, there was a division as nearly equal as possible. *Merrill v. Bank*, 173 U. S. 181, 19 Sup. Ct. 360, 43 L. Ed. 640. The dissenters were Justices White, Harlan, McKenna, and Gray. Some of the state courts have since followed the views of the dissenters and rejected those of the majority. *Bank v. Duncan*, 84 Miss. 467, 36 South. 690; *Chemical Co. v. Edwards*, 186 N. C. 73, 48 S. E. 568. The attempt to justify the rule upon the theory of a legal right in the creditor beyond power of control by a court of equity is well answered in *Bank Commissioners v. Trust Co.*, 70 N. H. 536, 49 Atl. 113. In some states, the so-called chancery rule never has been recognized. *Bell v. Fleming's Ex'rs*, 12 N. J. Eq. 13; *Washburn v. Tisdale*, 143 Mass. 376, 9 N. E. 741; *Bank v. Bank*, 138 Mass. 515; *Bank v. Woodward*, 137 Mass. 412; *Hale v. Leatherbee*, 175 Mass. 547, 549, 56 N. E. 562.

Our case of *Williams v. Overholt*, 46 W. Va. 340, 33 S. E. 226, may well be distinguished. The collaterals held by the creditor there were not brought into the suit nor reduced to money. Their value was unknown and no doubt insusceptible of certain proof. Here the security has been reduced to money and applied on the debt. This done, there remained really due the creditor comparatively a small part of the original debt.

Finally, the rule has been abolished by statute in many cases because of its unjust results.

(70 W. Va. 38)

GOOCH v. GOOCH et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. RIGHT OF ACTION—PERSONAL REPRESENTATIVES.

Is a personal representative given exclusive right over creditors, for six months after qualification, to bring the suit provided for by section 7, c. 86, Code 1906, to subject real estate of a decedent to payment of debts?

2. BILL IN EQUITY—SALE OF REALTY—SUFFICIENCY OF PERSONAL ESTATE.

Must a bill in equity under section 7, c. 86, Code 1906, to subject real estate of a decedent to debts, allege the insufficiency of his personal estate to pay his debts?

3. CONTRACTS (§ 79*)—CONSIDERATION—MORAL OBLIGATION.

When there is by law no enforceable obligation to pay, a promise made afterwards to pay wants legal consideration, and is not enforceable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 357-381; Dec. Dig. § 79.*]

4. BILLS AND NOTES (§ 92*)—CONSIDERATION—PAST PAYMENTS.

A promissory note given by a son to his widowed mother for money paid by her for his board while at college and his college education, after such expenditure, without promise or expectation of repayment on the part of either, at the time of such expenditure, wants legal consideration, and is not enforceable.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 166-212; Dec. Dig. § 92.*]

5. CONTRACTS (§ 76*)—CONSIDERATION—MORAL OBLIGATION.

A merely moral obligation, though not illegal, is not a consideration for a promise to make that promise enforceable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 357-381; Dec. Dig. § 76.*]

6. SUBROGATION (§ 3*)—PRINCIPAL AND SURETY—RIGHT TO CONTRIBUTION.

A codebtor, not principal debtor, paying a debt secured by a deed of trust executed by both on their land, may have subrogation to the right of the creditor for contribution against his codebtor.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 8-11; Dec. Dig. § 3.*]

7. SUBROGATION (§ 41*)—EFFECT OF LIMITATIONS.

A deed of trust binding land of several debtors for a debt paid by one not principal debtor, and released by the creditor, is kept alive in equity to give contribution to the debtor paying against a codebtor, notwithstanding such release, and though action at law for contribution is barred by the statute of limitations. Laches, not statutory limitation, may bar such subrogation.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 109-118; Dec. Dig. § 41.*]

8. INTEREST (§ 39*)—ITEMS—INTEREST ON JUDGMENT.

It is error to give interest on the sum of principal and interest computed to a date prior to decree. Interest on the sum of principal and interest at date of decree should be given from date of decree.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 83-89; Dec. Dig. § 39.*]

(Additional Syllabus by Editorial Staff.)

9. EXECUTORS AND ADMINISTRATORS (§ 444*)—ACTIONS—PARTIES.

In an action against decedent's estate, where the bill names one of the defendants as executrix, and alleges that she was nominated as executrix by the will and in pursuance of such nomination had been acting as such, the bill is not subject to demurrer on the ground that the qualified personal representative is not before the court, though it does not state that she qualified by giving a bond and taking the oath prescribed by law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1813-1841; Dec. Dig. § 444.*]

10. SUBROGATION (§ 41*)—NATURE OF REMEDY—EQUITY JURISDICTION.

A bill alleging that plaintiff and others executed a deed of trust on land, and that the plaintiff paid the debt secured, and has been repaid no part thereof by the other parties exe-

cutting the deed of trust, and seeking to recover contribution and to subject the real estate covered by the trust deed in possession of a decedent's estate, is within the jurisdiction of equity.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 41.*]

**11. EXECUTORS AND ADMINISTRATORS (§ 325*)
—ACTIONS—SALE OF REALTY.**

An executrix and sole devisee who refuses to present her accounts as executrix as demanded by a decree cannot complain that it was not ascertained whether the personal estate would pay indebtedness before a sale of realty was had.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1339-1341; Dec. Dig. § 325.*]

**12. EXECUTORS AND ADMINISTRATORS (§ 346*)
—SALE—DECREE—ASSIGNMENT OF DOWER.**

It is error to decree the sale of land of a decedent's estate subject to dower, instead of assigning dower therefrom.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 346.*]

Appeal from Circuit Court, Summers County.

Suit by Ellen A. Gooch against Josephine L. Gooch and others. From a decree for plaintiff, defendant Josephine L. Allen (née Gooch) appeals. Reversed and remanded.

McGinnis & Hatcher, O. P. Fitzgerald, Jr., and Brown, Jackson & Knight, for appellant. T. N. Read and R. F. Dunlap, for appellee.

BRANNON, J. Ellen A. Gooch brought a chancery suit against the executrix and other representatives of the estate of her dead son, J. A. Gooch, to compel a settlement of the accounts of said executrix, and sell the real estate owned by her son to pay debts due her. A decree was entered in favor of the plaintiff for her demands against the estate and subjecting certain real estate of the dead son to sale. Josephine L. Allen, the widow, executrix, and devisee of J. A. Gooch, appeals.

[1] There was a demurrer to the bill. One ground of demurrer is that section 7, c. 86, Code, gives six months preference after qualification to the personal representative to bring a suit to administer the real assets of a decedent before a creditor can do so, and that this bill does not say whether a suit had or had not been brought by the executrix, or when she qualified. Is a creditor thus compelled to wait for six months after the qualification of a personal representative before he can bring a suit to subject the realty of a dead man to his debts? As we hold this to be a suit to enforce subrogation, we do not decide this point. Speaking only for myself, it does seem that the statute gives the personal representative preference for six months, and delays the creditor. The creditor could always sue the personal estate in equity. Then, when the statute made land liable for the debts of the dead man, he could sue the land for the same reason that he

could sue the personalty—that is, that he has a debt for which the land is liable—but the lawmakers saw proper to give a time to the administrator to see whether the personalty would pay debts, without recourse to the land, as he would know best as to this. This is given as a reason for this preference in the Underwood Case, 22 W. Va. 306. It was not intended that any creditor should sue the realty until a reasonable time had been given the administrator to ascertain as to sufficiency of the personal assets, and gives him exclusive right of suit for six months. It was further intended to protect the estate from loss by numerous suits, and give the personal representative power, for a time, to bring suit for all creditors. I incidentally express this opinion in Rowan v. Chenoweth, 49 W. Va. 290, 38 S. E. 544, 87 Am. St. Rep. 796. I submit that Judge Snyder and Woods so construed section 7. Reinhardt v. Reinhardt, 21 W. Va. 76; Broderick v. Broderick, 28 W. Va. 385. Judge Dent so construed those cases in Poling v. Huffman, 39 W. Va. 320, 19 S. E. 421. The last case and Hale v. White, 47 W. Va. 700, 35 S. E. 884, seem contra. But are they? Judge Dent admits the rule above stated, but seems to place those cases on special facts taking them out of the rule. What is the plain import of section 7? So, I would say that a bill filed under section 7 should show that six months had elapsed after the qualification of the personal representative, and that no suit had been brought by him.

[2] It is also urged that the bill does not state that the personal assets are not sufficient to pay debts, and that it is therefore bad on demurrer. Section 7, c. 86, gives a suit to charge lands with debts "when the personal estate of a decedent is insufficient for the payments of his debts." Remember that this statute recognizes the rule that land shall not be made liable to debts of a dead man except when the personalty is inadequate. Therefore I would say without hesitation that a bill under section 7 must aver that the personalty is inadequate. Such inadequacy is a condition precedent to such suit. But we do not so decide, because this is a suit for subrogation, not one resting on section 7.

[3] Another ground of demurrer is that the qualified personal representative must be before the court. That is so; but she is. This point is made on the fact that the bill named as a defendant "Josephine L. Gooch, executrix." The bill alleges that she was nominated as executrix by the will, "and in pursuance of said nomination has been acting as such." It is claimed that the bill ought to say that she qualified by giving bond and taking the oath prescribed by law. We do not think this point substantial. It is technical. True, the statute says that an exec-

utor shall not have powers as such until he qualify by taking oath and giving bond; but we think the presumption would be that the executrix has so qualified as it is averred that she was acting as such.

[10] Next subject. Has equity jurisdiction of this case? We answer that it has. The bill says that J. A. Gooch, C. H. Gooch, and the plaintiff Ellen A. Gooch made to Fox a note of \$850 to raise money to pay off debts owing by B. P. Gooch, husband of Ellen A. Gooch, and father of J. A. Gooch and Charles Gooch, and secured it by deed of trust on the real estate left by B. P. Gooch, which deed of trust was on the real estate sought to be subjected in this suit, which deed of trust is an exhibit of the bill, and that the plaintiff as one of the makers of the note paid the note, and that J. A. Gooch never paid the plaintiff his part of the note, and that the plaintiff was entitled to have contribution from his estate of one-third of the sum paid by her, and claimed the right to subject the real estate covered by the trust deed, the third descending to J. A. Gooch from his father, for his portion of the debt. It is claimed that the bill does not sufficiently aver the facts authorizing subrogation. We think, as the bill alleges the execution of the deed of trust and exhibits it, that it is sufficient in this respect.

[8] It is claimed that there is no right of subrogation or subrogation in favor of a debtor against a codebtor, as this deed of trust was released. We believe it is not claimed that a surety may not have contribution against a cosurety. That he has is well established. *Sheldon on Subrogation*, § 140; *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; 27 Am. & Ency. L. 223; opinion in *Sands v. Durham*, 99 Va. 263, 38 S. E. 145, 54 L. R. A. 614, 86 Am. St. Rep. 884, and note. But the claim is that, as the deed of trust was released, the deed of trust was dead, and there could be no subrogation, that the release reverted the title to the maker of the trust, and, until that release should be set aside by a legal adjudication, there could be no subrogation. Some authorities support this position; but it is untenable under our law and a great weight of authority. A release does not prevent subrogation. 27 Am. Eng. Ency. L. 213; *Sheldon on Subrogation*, § 14. When payment is made, or release is made, the debt is dead in a court of law; but equity keeps it alive for the benefit of the surety or cosurety. A judgment paid is ended at law, but equity keeps it alive for the benefit of the surety. What is the difference between a receipt in full and a release? A multitude of authorities say that payment does not satisfy the judgment or other lien as between the debtor and surety. Therefore we hold that the plaintiff is entitled to subrogation under the deed of the trust.

[7] But it is said that, though there was once a right to subrogation, it is lost by the

statute of limitation of five years, the period applicable to the case of a surety demanding payment or contribution of his principal or cosurety. True, action at law would be barred; but this case is governed by the principle of subrogation. The party claims the right in equity under a deed of trust. A deed of trust has no limitation by statute. It is only subject to laches. Presumption of payment in 20 years bars it, unless repelled by evidence. The creditor has that limitation. He is not sooner barred. The surety takes the creditor's shoes, and can avail himself of the creditor's rights. So can the codebtor. The statute of five years does not apply. We are referred to *Thayer v. Daniels*, 110 Mass. 346. That is no authority, as it was an action at law, and I have said above that a law five years would bar; but we have a suit in equity for subrogation. The other case referred to is *Junker v. Rush*, 136 Ill. 179, 26 N. E. 499, 11 L. R. A. 183. That does support the contention, but contrary to a great volume of authority. It is a well-known principle that a note secured by a deed of trust may be barred, but that fact does not bar the lien of that deed, the note being one thing, the mortgage another; the one dead, the other yet alive. The creditor could not maintain action on the note, but could resort to his mortgage, though his note is barred. The surety takes the shoes of the creditor, and, as long as the creditor's right would not be barred, neither would the right of the surety. *Criss v. Criss*, 28 W. Va. 388; *Evans v. Johnson*, 39 W. Va. 209, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912. It is claimed that the trustee and creditor under the deed of trust should be parties, but are not. Why so? The deed of trust has been paid so that the creditor has no right. The deed of trust has been released, and the title has been divested from the trustee and reverted to the vendor or his heirs. What right has either involved in this suit? So we conclude that the plaintiff is entitled to contribution under the deed of trust for the Fox debt.

[4] Another subject. Another demand of the plaintiff against the estate of J. A. Gooch is based on a promissory note made by J. A. Gooch to his mother for \$2,000. This has been to me the only serious aspect of the case. It is claimed that this note rests on no binding consideration. The plaintiff herself states under oath that she paid out money for the education at college of her son J. A. Gooch without any contract or understanding that he would repay her, and that she did not expect any repayment. Years afterwards, in consideration of money which she had so paid, he voluntarily gave her this note. That is really the consideration. Is that binding to make the note enforceable? We have several times decided in effect that, where a son claims for service rendered the father, he cannot recover, unless he proves an express contract or the facts clearly show an

expectation or intention on the part of the father to pay for the service. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569; *Harris v. Orr*, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815. I cite here the many cases found in 7 *Ency. Digst. Va. & W. Va. Reports* 304, for the proposition that the law does not raise or imply a promise to pay for services or maintenance or education of a son by a parent on which an action can be based. There was not even a moral obligation on the part of the son to pay the mother for money paid for his education. There was no promise made at the time.

[5] "A moral obligation, though coupled with an express promise, will not constitute a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is a precedent consideration, that an express promise will create or revive a cause of action." *Daniel on Nego. Instruments*, § 182.

[3] I lay down the proposition that to support an action on a contract there must be a consideration enforceable at law, and that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute. 39 Am. St. Rep. 735. In that great work, *Page on Contracts*, § 319, p. 484, we read as follows: "Past services when rendered under such circumstances as to create no legal liability are not a consideration for a subsequent promise. Illustrations of such services are those rendered by father to son; past services rendered to a father by his daughters without any agreement for compensation; services rendered by a niece living in the family; support furnished a minor daughter by her mother, or medical attendance rendered to an adult." The same work, in section 310, says that, "if the promise invoked as a consideration is itself unenforceable for some reason outside the form of promise, it cannot be enforced." Where a father made an advancement to a child, and later the child gave the father his note for its repayment, the note was held not good. *Page on Contracts*, § 319. There we find that past consideration is no consideration under circumstances not creating liability. I would cite for these principles 9 *Cyc.* 356; *Stoneburner v. Motley*, 95 Va. 788, 30 S. E. 364; *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; *Shugart v. Shugart*, 111 Tenn. 174, 76 S. W. 821, 102 Am. St. Rep. 779; *Ogden on Notes*, 60. As will be seen in the notes in 39

Am. St. Rep. 735, there has been conflict of authority on this subject, older English decisions holding such promises valid; but later English decisions and the great current of American authority holding such consideration as is present in this case is not good for a subsequent promise. This note was given years after the mother had spent money for her son's education without any promise or expectation, at the time, on the part of either of payment. The mother states, also, that she was distressed about not being able to dispose of a house, and the son said to her to sell it, and he would give her the note. It is not distinct what this meant. But this constitutes no shadow of consideration. So we must conclude that this note is not enforceable, and it was error to decree it against the estate of J. A. Gooch.

[11] Josephine Gooch cannot complain that it was not ascertained whether the personal estate would pay indebtedness. She refused to present her accounts as executrix as demanded by decree, and would not reveal the personalty, and, being sole devisee and the only appellant, cannot complain of this.

[12] It is complained that sale was decreed subject to the dower of Ellen A. Gooch, widow of B. P. Gooch. This is error. Provision as to it should have been made. *Sommerville v. Sommerville*, 26 W. Va. 484. Nor was any provision made as to dower of Josephine Gooch.

[8] There is error in decreeing interest from 1st day of October, 1907. Interest on principal should have been brought down to date of decree, and interest given on total from that date.

Too much was decreed for taxes paid by Ellen A. Gooch; but this was not excepted to.

We reverse the decree, and remand the cause for further proceeding.

(70 W. Va. 26)

WILSON et al. v. BUSH.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 480*)—OPERATION—FIRES—PRESUMPTIONS AND BURDEN OF PROOF.

In an action for damages by fire alleged to have been caused by the negligence of a railroad company, proof of communication of the fire from an engine of the company raises a presumption of negligence, which the defendant must repel by showing proper construction, equipment, and operation of the engine, to escape liability.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1716; Dec. Dig. § 480.*]

2. RAILROADS (§ 454*)—OPERATION—FIRES—INSTRUCTIONS.

It is error to instruct the jury in such a case that the defendant must prove its engine was equipped "with the best approved appliance for preventing the escape of fire."

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1668-1671; Dec. Dig. § 454.*]

3. RAILROADS (§ 484*)—OPERATION—FIRES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

An owner of lumber depositing it on premises of a railway company adjacent to its right of way, in common with others, primarily for shipment and incidentally for storage and preparation for shipment, in conformity with a license, usage, and practice of long standing, at a place at which no railway agent is maintained, and at which rubbish and debris have accumulated on the track, the vacant strip alongside of it and the ground on which the lumber has been placed, and a dilapidated shed and platform, used for storage and loading stand, is not guilty of contributory negligence as matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

4. RAILROADS (§ 459*)—OPERATION—FIRES—CONTRIBUTORY NEGLIGENCE.

Assuming evidence of negligence on the part of the defendant, the plaintiff's right to recover, in such a state of the evidence of contributory negligence, is tested by the inquiry whether he exercised such care and caution as a reasonably prudent and careful man would have exercised under like circumstances in placing his lumber upon the premises without providing for its care by some person.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1677-1684; Dec. Dig. § 459.*]

(Additional Syllabus by Editorial Staff.)

5. RAILROADS (§ 485*)—OPERATION—FIRES—INSTRUCTIONS.

In an action for fire caused by the operation of a railroad, an instruction that the railroad company had the right to operate its trains by the use of fire for the generation of steam, that plaintiffs must prove negligence in respect to its engines as a requisite to liability, and that plaintiffs assumed all risk of loss if the defendant operated its engines in a lawful manner and with reasonable care and skill, was erroneous in omitting the element of duty of the railroad company as to care of its track and right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1747-1756; Dec. Dig. § 485.*]

Error to Circuit Court, Randolph County.

Action by Mark S. Wilson and another, partners under the firm name of Wilson Bros., against B. F. Bush, receiver. Judgment for plaintiffs, and defendant brings error. Reversed and remanded for new trial.

Benj. A. Richmond and E. A. Bowers, for plaintiff in error. Talbott & Hoover, for defendants in error.

POFFENBARGER, J. Wilson Bros. recovered a judgment for \$935 against B. F. Bush, receiver of the Western Maryland Railroad Company, as the value of certain lumber destroyed by fire, occasioned by alleged negligence of the defendant.

[1] The refusal of the court to give defendant's instruction No. 2, placing upon the plaintiffs the burden of proving failure of the defendant to use ordinary care and prudence in selection of spark arresters for the engines from which the fire originated and in operating said engines and keeping the spark arresters in repair, is assigned as error. This instruction was properly refused

for two reasons. It does not correctly propound the law. After a fire has been shown to have started from sparks emitted by an engine of a railroad company, the burden is upon the defendant to show that its engine was in good repair, properly equipped, and operated. *Jacobs v. Railway Co.*, 68 W. Va. 618, 70 S. E. 369. Inconsistent doctrine is not enunciated in *Snyder v. Railroad Co.*, 11 W. Va. 14. The clause in the third proposed instruction in that case, found in the syllabus thereof and relied upon here, was there disapproved. If it were a sound proposition, it was given as a part of defendant's instruction No. 5, and also substantially given in his instruction No. 3. Instructions need not be repeated. The defendant thus appears to have had more favorable rulings, upon the subject-matter of his instruction No. 2, than he was entitled to.

[2] As an instruction, given at the instance of the plaintiffs over the objection of the defendant, pertaining to the duty of the latter in respect to the equipment of his engines, and made the subject of an assignment of error, stands closer in logical connection to the one just disposed of than any of the others, it will be now considered. By it the jury were told the defendant was under a duty to equip his engine "with the best approved appliances for preventing the escape of fire." In some instances courts have defined the duty of railroad companies in this connection by the use of the terms "best approved" and "most approved," but these expressions have been qualified by additional terms, such as "in common use," "of practical use," or "which has been approved by actual test." *Railroad Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833; *Mills v. Railroad Co.*, 116 Ky. 309, 76 S. W. 29; 33 Cyc. 1333. This qualification gives the jury some measure or standard by which to determine whether the equipment is the "best approved" or "most approved." Without it they may determine it in such manner as may seem to them right and just, but in so doing they may adopt an entirely erroneous test. It is well settled, even in those states in which this measure of responsibility is adopted, that a railroad company is not bound to accept and use or experiment with every new invention, or one which is accorded preference in the opinion of mechanics or other experts. The element of test by experience is a necessary one. In those jurisdictions in which the rule above stated obtains this instruction would be apparently bad for omission of the limitation we have mentioned.

Most of the decisions in which this strict rule is observed are governed to some extent by statutes defining the duties of railroad companies in respect to equipment. There may be some instances in which it rests

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

solely upon supposed common-law principles; but the great weight of authority throughout the country requires of railroads no more than reasonable and ordinary care in the equipment of their engines. "As a general rule, it is the duty of a railroad company to use reasonable precautions to provide locomotives so constructed and equipped as to avoid the unnecessary communication of fire to premises adjoining its road." 33 Cyc. 1332. The requirement of such a degree of care plainly does not impose duty to adopt the utmost precautions against injury, nor make the railway company an insurer against damage to property on its right of way or premises adjoining it. Accordingly, courts generally hold railroad companies not absolutely bound to use the safest and best appliances to prevent the escape of sparks. "It is the duty of railway companies to adopt and use on their locomotives approved appliances in general use to prevent the escape of sparks and fire. * * * A railway company is not bound to adopt any particular kind of appliances or machinery for the prevention of fires, and it cannot be held guilty of negligence for failing to adopt a different kind or pattern of appliances than that which it has adopted, if it has exercised reasonable care in the selection and the latter is approved and in general use." Elliott on Railroads, § 1224; Railway Co. v. Reese, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; Railway Co. v. Thompson-Hailey Co., 79 Ark. 12, 94 S. W. 707; Clisby v. Railway Co., 78 Miss. 937, 29 South. 913; Flinn v. Railroad Co., 142 N. Y. 11, 36 N. E. 1046; Bottoms v. Railroad Co., 136 N. C. 472, 49 S. E. 348. This rule is in accord with the general principle applicable to persons using fire upon their own premises. Nothing beyond reasonable care and prudence under the circumstances of the particular case is required. Mahaffey v. Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263. What amounts to reasonable and ordinary care is not determinable by any arbitrary rule, of course. As the use of fire is attended by varying conditions of duration, weather, and exposure, the exercise of ordinary care includes the adoption of methods and measures of safety, determinable by such conditions. One who uses fire constantly would naturally fall under a higher degree of duty than one who uses it only casually and to a limited extent. But "reasonable care" is all that can be required under any circumstances, and the adoption by a railroad company of those inventions and mechanisms generally used for the purpose of preventing the escape of fire, reasonably well adapted to the purpose and efficient, as shown by the test of experience, is obviously the exercise of such care. As to what is the best approved appliance, reasonable men though qualified by experience in the use thereof, might differ in opinion, and jurors might differ from the uniform opinion of

such persons, and all might well agree that the appliances, subjected to the comparative test, are all reasonably well adapted to the prevention of fire and in extensive use by railroad companies, all honestly differing in opinion on the question of relative merit. We are therefore of the opinion that this instruction was clearly erroneous, in that it propounded a wrong test or measure of duty and also may have confused and misled the jury.

[3] The rejection of defendant's instructions Nos. 6 and 7 is complained of. On the right of way and the yards upon which the lumber had been placed there was an accumulation of inflammable rubbish, due to the storage and loading of lumber, pulp wood, tan bark, and other products of the forest at that point. Besides, an old shed and platform, standing near the railroad, were in such condition from dilapidation and decay as to render them likely to ignite easily. In the shed the plaintiffs had stored about 12,500 feet of cherry lumber, and, outside of it, stacked about 40,000 feet of maple lumber. The latter had been sold and was awaiting shipment, but the other had not. Years before the occurrence of this fire, the shipment of lumber from that point had been heavy, and the railway company then operating the road maintained a regular station there with an agent in charge; but for a considerable period of time prior to the occurrence of the fire the company had ceased to maintain an agent at that point. However, lumber was still brought there for storage and shipment in smaller quantities than it had been in previous years. The shed and platform, though on the railway company's premises, it being the owner of a large tract of land through which the railway ran, but not on the portion thereof used for a right of way, had been built by the lumber company. That company, having completed its large operations, left these structures standing on the premises, and they had ever since been used by the plaintiffs and others for shipping and storing lumber with the acquiescence of the railway company. Defendant's instruction No. 6 was based upon these facts as constituting evidence of contributory negligence on the part of the plaintiffs in placing their lumber upon these premises, with knowledge of the conditions and without adopting any measures to protect it from fire. It proposed to submit to the jury, upon the evidence, the question of the existence of these conditions, and have the court tell them their verdict must be for the defendant, if they should find such facts, even though there was some evidence of negligence on the part of the defendant. As the defendant acquiesced in the use of the premises for the purposes aforesaid by the plaintiffs and others engaged in the lumber business at that place, his title to the premises seems to be an immaterial matter. In making such use of the property plaintiffs

were not trespassers. They were licensees, making a use of the property which bore some relation to the defendant's own business. They brought their lumber there for shipment. This was the main purpose. Storage and preparation for shipment were subordinate and incidental uses. As long as the defendant permitted such use and accepted lumber at that point for shipment, such occupation and use of the premises may well be deemed to have rested upon invitation.

[4] The relation of the parties, therefore, was analogous to that subsisting between a railroad company and an owner of adjacent property, each of whom is under some degree of duty. The owner of land adjacent to a railroad may rightfully make use of his property. *Fair Ass'n v. Railway Co.*, 42 Neb. 105, 60 N. W. 330; *Murphy v. Railway Co.*, 45 Wis. 222, 30 Am. Rep. 721; *Railway Co. v. Pennell*, 94 Ill. 448. In doing so, however, he must observe and consider the hazard or danger of fire incident to the operation of the railroad, and, if he does an act or omits a precaution, which will obviously result in injury to his premises or movable property thereon, he cannot recover. In the use of his property he must respect the right of the railroad company to make reasonable use of its property. *Coates v. Railroad Co.*, 61 Mo. 38; *Brown v. Railroad Co.*, 41 Wash. 688, 84 Pac. 400; *Murphy v. Railway Co.*, 45 Wis. 222, 30 Am. Rep. 721; *Railroad Co. v. Owen*, 25 Kan. 419; *Railroad Co. v. Pennell*, 94 Ill. 448; *Railway Co. v. Crabb* (Tex. Civ. App.) 80 S. W. 408. And, on the other hand, railway companies must exercise reasonable and ordinary care not to injure the adjacent property. Each has the right to use his own property, and is bound to abstain from conduct which will obviously and necessarily injure that of his neighbor. Nevertheless, the great diversity of facts and circumstances entering into the question of risk or hazard deprives the courts, in most instances, of the power to say as matter of law that certain facts established by the evidence impose liability or defeat recovery. The probability of danger arising out of a given condition or state of facts is generally a practical question about which reasonable men may differ in opinion, and in such cases the question of negligence on the part of the defendant or contributory negligence on the part of the plaintiff generally lies within the province of the jury, and not of the court. Whether the plaintiffs assumed the risk of danger to their lumber or must be deemed to have known they were taking upon themselves a hazard depends upon the imminency of that danger and the probability of injury. Their right to recover, therefore, depends upon the exercise or nonexercise by them of such a degree of care and prudence, as ordinarily cautious and prudent men would have exercised under like circumstances. The instruction requested omits this vital element. If

given, it would have told the jury they must hold the plaintiffs guilty of contributory negligence if they found certain facts, not if they should be of the opinion, in view of the facts found, that the plaintiffs had neglected the exercise of the degree of care above defined. Hence we think the court did not err in refusing the instruction. This conclusion is probably justified by another omission, if its theory were correct. It does not include the important element of long use of the yard without a loss from fire. For years other people had done just what these plaintiffs did without loss, and this circumstance in evidence bears directly upon the nature and extent of the hazard.

[5] Instruction No. 7 was properly refused because it unduly narrowed the duty and responsibility of the defendant. Properly asserting the right of the railway company to operate its trains by the use of fire for the generation of steam, and asserting necessity of proof of negligence in respect to its engines as a requisite to liability, it said the plaintiffs assumed all risk of loss of their lumber, if the defendant operated its engines in a lawful manner and with reasonable care and skill. It thus omitted the element of duty on the part of the defendant respecting the care of its track and right of way. In other words, all that it assumes as matter of law as likely to be established by the evidence in the opinion of the jury might be true, and yet the defendant would be liable for failure properly to care for its track. In view of a large amount of lumber piled up in close proximity to its road, upon its invitation and with its consent, and knowledge of its exposure to injury by reason of the non-maintenance by the owner of any caretaker or protector, the defendant could not justly nor consistently with law allow an accumulation of rubbish on its right of way likely to be ignited by such sparks as necessarily escape from engines and to carry the fire from the right of way to the lumber or to other rubbish which would convey it to the lumber. "As it is impossible to entirely prevent the escape of sparks and coals of fire from railway locomotives, and as the sparks and coals that do escape usually fall on the right of way, it is held that it is the duty of a railway company to keep its track and right of way free from dry grass, weeds, and other combustible materials which are liable to be ignited by sparks and coals of fire and thus communicate fire to the premises of others, and, if it fails to discharge this duty and permits the fire to escape to adjoining premises, it may be found guilty of negligence." *Elliott, Railroads*, § 1226. This text, as well as some not here quoted, is sustained by abundant authority. In view of the acquiescence of the defendant in the use of the adjacent premises for the purposes for which they were used, establishing for all practical purposes the relation which subsists between a railway company and the

owner of adjacent premises, we think the principle clearly applicable here and fully justified the court in refusing this instruction.

In holding the question of contributory negligence to be one for jury determination, in passing upon the propriety of the rejection of defendant's instruction No. 6, we have incidentally decided the only remaining questions, namely, whether the court erred in refusing a request to direct a verdict in favor of the defendant and in overruling a motion to set aside the verdict. In this conclusion we decline to follow the decision in *Post v. Railroad Co.*, 108 Pa. 585, relied upon by the plaintiff in error. Comparison of the opinions will reveal the difference in views leading to diverse results. Hence comment is unnecessary.

For the error in giving plaintiffs' instruction No. 1, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

(70 W. Va. 48)

WALTON v. CHEROKEE COLLIERY CO.
(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 319*)—INJURIES TO THIRD PERSON—INDEPENDENT CONTRACTORS.

Generally, if one let work, lawful within itself, to a contractor and retain no control over the manner of its performance, he is not liable on account of negligence of the contractor or his servants. But, if the work is intrinsically dangerous, or is of such character that injury to third persons, or to their property, might reasonably be expected to result directly from its performance, if reasonable care should be omitted, the employer is not relieved from liability by delegating the performance of the work to an independent contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1259, 1260; Dec. Dig. § 319.*]

2. INDEMNITY (§ 3*)—EXPRESS CONTRACT—VALIDITY.

A contractor who engages to perform such work can bind himself by a promise to indemnify his employer against liability to third persons.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 2-6; Dec. Dig. § 3.*]

3. INDEMNITY (§ 11*)—EXPRESS CONTRACT—RIGHT OF ACTION.

The employer may settle, without suit, the damage against which he is indemnified, and recoup the same in an action brought by the contractor for the price of the work, provided, however, the amount paid does not exceed the damage actually suffered. A settlement thus made between the indemnitee and the party injured is not conclusive on the indemnitor.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

Error to Circuit Court, McDowell County.

Action by Samuel Walton, trading as Walton & Luck, against the Cherokee Colliery Company. Judgment for plaintiff, and de-

fendant brings error. Reversed and remanded.

Anderson, Strother & Hughes, for plaintiff in error. D. El French, for defendant in error.

WILLIAMS, P. Plaintiff sued defendant in assumpsit to recover a balance alleged to be due on contract for the construction of a piece of railroad and the building of coke ovens for defendant at a stipulated price, and recovered a judgment in the circuit court of McDowell county for \$481.85. Defendant sued out this writ of error.

The evidence is not made a part of the record. Defendant tendered a notice of recoupment, which the court rejected, but which it made a part of the record by its order. The notice alleges that plaintiff undertook to build a certain piece of railroad track and to construct a number of coke ovens for a fixed price; that the piece of railroad was to be built over certain premises belonging to the Ashland Coal & Coke Company; that there was an express agreement between plaintiff and defendant that plaintiff was to perform the work of grading the railroad and building the coke ovens "without damaging or injuring in any manner or form the premises adjacent to and near by the lands on which said railroad and coke ovens were constructed, and were bound to save harmless this defendant from all damages or claim for damages on account of any and all injury and damage done to the property of third parties during the performance by said plaintiff of the said work." The notice also avers that plaintiff injured a barn and other buildings owned by the Ashland Coal & Coke Company, and otherwise did damage to the property of said company by casting stone, dirt, timber, and other debris upon its premises, and that, on account of such injury, defendant was compelled to pay, and did pay, to the Ashland Coal & Coke Company the sum of \$401.84. The court rejected this notice, and denied defendant the right to recoup the damages which it had paid to the Ashland Coal & Coke Company.

[1] Ordinarily when a person employs an independent contractor to perform a piece of work, which is lawful within itself, and retains no control over the manner in which the work is to be done, he is not liable for the negligence of the independent contractor, or his servants, in the performance of the work. But this rule is subject to this important exception: If the work is intrinsically dangerous, and is of such character as will likely produce injury to third persons, if proper care should not be taken, the owner cannot avoid liability by delegating its performance to an independent contractor. 1 Shear. & Red. on Negligence, § 175. The

Supreme Court of Ohio in *Railroad Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701, thus states the rule: "One who causes work to be done is not liable ordinarily for injuries that result from carelessness in its performance by the employes of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an employe of an independent contractor." In that case *R. P. Willis & Son* had contracted to plumb the railroad company's depot, and said company knew that it was necessary to dig a ditch across one of the public streets of the town to receive one of the pipes. The ditch was dug, and was left open and unguarded by any sign of warning, and *Morey* fell into it in the nighttime without fault on his part. The court there held the railroad company liable, notwithstanding it had no control over the manner of performing the work.

In *City of Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17, the Supreme Court of Illinois applied the same rule to a municipal corporation, and held the city liable for injury to the property of one of its citizens occasioned by a blast which was necessary to be made in the construction of a sewer by *O'Riley*, an independent contractor, notwithstanding the blast was made in a manner apparently "secure and skillful." The court there held that the doctrine of respondeat superior did not apply, because the work was intrinsically dangerous however skillfully performed. To the same effect are the following authorities: *Pye v. Faxor*, 156 Mass. 471, 31 N. E. 640; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *Covington, etc., Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, 7 Am. Neg. Rep. 154. In the report of the case in the volume last cited, the editor has appended numerous notes and citations of other cases which support the rule.

[2] If the construction of the railroad and the building of the coke ovens in the present case necessitated the blasting of rock which would, within reasonable contemplation, subject the buildings of the *Ashland Coal & Coke Company*, situated near the work, to the risk of danger, defendant could not relieve itself from liability by employing plaintiff to do the work. In such case plaintiff could make a binding contract of indemnity. Defendant had a right to prove

that the work was of such character as would cause it to be primarily liable for injury to third parties from its performance, but the court, by rejecting its notice of recoupment, cut off its right to introduce evidence on the question. Defendant also had a right to prove that the promise of indemnity was supported by a valuable consideration, if such is the fact.

[3] The notice further avers that defendant was compelled to pay, and that it did pay, damages to the *Ashland Coal & Coke Company*. If defendant was liable in law to the *Ashland Coal & Coke Company*, it was not bound to wait until it was sued, and a judgment recovered against it, before making payment. It had a right to settle the matter without suit. But the amount paid in settlement of the alleged damage, of course, is not conclusive against plaintiff. He has a right to controvert the amount. 22 Cyc. 92, and cases cited in note 73; 16 A. & E. E. L. (2d Ed.) 177.

The notice also avers that the promise of indemnity was made at the time plaintiff undertook the work. If this is so, it was a part of the contract on which plaintiff sues, and entitles defendant to recoup damages flowing from its breach. *Logie v. Black*, 24 W. Va. 1; 34 Cyc. 658.

The judgment will be reversed and the case remanded for further proceedings to be had therein according to the law as herein stated, and further according to law applicable to such cases.

(39 W. Va. 773)

WILSON v. VALLEY IMPROVEMENT CO.
(Supreme Court of Appeals of West Virginia.
Nov. 21, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§§ 106, 124*)—INJURY TO SERVANT—LIABILITY OF MASTER—PREMISES OF THIRD PERSON.

A master, having contracted temporarily to perform labor, by and through his servants, upon premises owned and fully controlled by another person, and having no knowledge of danger to his servants from defectiveness of the premises or machinery and appliances of such third person, incidentally and casually to be occupied and used by them for the purpose, and not having guaranteed the safety or suitability thereof, is under no duty to inspect the same, nor liable for an injury to his servant, occasioned by defects therein.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 106, 124.*]

Error to Circuit Court, Randolph County.

Action by *Percy H. Wilson*, by his next friend, against the *Valley Improvement Company*. Judgment for plaintiff, and defendant brings error. Reversed, and judgment for defendant.

E. A. Bowers, *W. E. Baker*, and *J. B. Somerville*, for plaintiff in error. *Talbott & Hoover* and *J. L. Wamsley*, for defendant in error.

POFFENBARGER, J. The defendant in error, a minor, suing by his next friend, recovered a judgment for \$1,941.67 against the plaintiff in error as damages for a personal injury upon a legal theory which presents a case differing from any heretofore decided by this court. Though the servant of the defendant below, he was a special servant of a third party at the time of the injury, and incurred it on the premises and in the service of the special, not the general, master. Under such circumstances, recovery is ordinarily sought from the former, but in this instance the injured servant has sued the latter, charging liability upon the legal hypothesis of an obligation on his part to furnish a safe place in which to work on premises not under his control, or duty to inspect the same and warn the servant of any danger that would have been disclosed by such inspection as reasonable care and prudence demanded.

The Valley Improvement Company was engaged in the generation and distribution of electricity to consumers thereof, and also in the installation of wires and other appliances in buildings and factories for the utilization of its product, in which work it employed Wilson. On the occasion of his injury, Wilson and one Ray Smith were wiring a building owned by the Elkins Refrigerator & Fixture Company, having been sent there for the purpose by the Valley Improvement Company, and, in doing so, they used a scaffold, erected by servants of the former, and composed of boards, called "hangers," nailed to and suspended from an overhead beam, called a "purlin," and pieces of boards nailed across the lower ends of the hangers on which other boards were laid horizontally for a platform. The perpendicular boards were rather thin and of soft wood, bass or lynn, and the cross-boards on which the floor rested were spruce or hemlock. After this scaffold had been used for wiring one part of the building, the refrigerator company servants moved it to another place. This was done in the forenoon of the same day on which it gave way, about 3 o'clock in the afternoon, and injured Wilson and Smith. The hangers, or some of them, broke loose from the overhead beam, and precipitated the occupants to the floor, a distance of 20 to 25 feet, among a lot of machinery, and broke both of Wilson's legs.

Respecting the terms of the contract, which was informal and verbal, and the incipient relations and circumstances, the evidence is not as clear as it should be; but the contract does not seem to have imposed any obligation upon the electric company to furnish or construct any scaffold, since the compensation for its work was to be measured by the wages paid its men and the cost of its materials, with an additional 10 per cent. as profit, and the servants were directed to call upon the refrigerator company for scaffolds, if any should be needed. The wiring had been commenced by another party and abandoned,

and it seems the scaffold in question had been erected for, and used by, the predecessors of Wilson and Smith.

The principal assignment of error raises a question of law, going to the very foundation of the case. Conceding all the evidence proves or tends to prove, it denies liability, saying that, for the purposes of the case, Wilson was the servant of the refrigerator company, and not of the electrical company. A servant sent by his master to perform work upon the premises and among the servants of a third party is sometimes regarded as the special servant of the person to whose premises he is sent, and among whose servants he works. That he was sent there by his general employer, and receives compensation from him for his services, is not incompatible with the relation of master and servant between him and such third person, and, if he is injured by the negligent act of another servant of the person on whose premises he is working and sues such person for such injury, he cannot recover for the reason that his injury was occasioned by the act of a fellow servant. To this effect the authorities are uniform. *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; *Killea v. Faxon*, 125 Mass. 485; *Johnson v. Boston*, 118 Mass. 114; *Rourke v. Colliery Co.*, 2 C. P. D. 205; *Saunders v. Coleridge* (D. C.) 72 Fed. 676; *Ewan v. Lippincott*, 47 N. J. Law, 192, 54 Am. Rep. 148. Likewise, if the servant so loaned inflict injury upon one of the men among whom he is working by a negligent act, he is regarded as a fellow servant, and there is no liability upon his master. *Donovan v. Syndicate*, 1 Q. B. D. (1893) 629. In this case the general master sent not only the servant to work for a third party, but also a crane which he was to manage, and in the operation of the crane he negligently inflicted injury upon one of the servants of the special master. In delivering the opinion, Lord Esher, M. R., said: "It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the order of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority."

Though our inquiry arises upon a different state of facts and pertains to an injury resulting from an alleged breach of a nonassignable duty of a master, failure to furnish the servant a safe place in which to work or safe appliances with which to work, it becomes necessary to determine whose servant the man was. One theory would impose upon the general master duty to inspect the premises to which he contemplates sending his servant temporarily for a special pur-

pose, and requiring the owner of the premises to make them safe before sending the servant to work in them, or, on his failure to do so, refuse to send the man. In other words, the general master would be under the same obligation to his servant as if he were working on his own premises. Logically this obligation would extend not only to the provision of safe and suitable machinery and appliances, but also to the exercise of care in providing and retaining competent servants and a sufficient number of them, and the establishment and enforcement of rules and regulations for the conduct of the service necessary to the protection of the servants from injury. All these duties relate to the safety of the place of work. *Jackson v. Railroad Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Madden v. Railroad Co.*, 28 W. Va. 617, 57 Am. Rep. 695. This theory would carry the relation of master and servant beyond and outside of any place or conditions provided by the master himself for permanent service, and extend it to conditions which cannot be reasonably said to have been actually provided by the master at all, since both the place and the appliances are furnished and controlled by a third party. At the most, he could be deemed only to have adopted and treated them as his own. The other theory would absolve the general master from liability for an injury so occasioned and place it upon the special master, who by an act of commission or omission causes the defect or imperfection in the premises, machinery, or appliances which actually produces the injury, and has the best opportunity to discover and remedy it, and also unlimited and unrestrained power to do so.

Unless there is some arbitrary and unyielding rule or principle which forbids it, we may consider and give effect to this difference in the conditions and circumstances, in determining which of the two masters shall be regarded as the master for purposes of liability or indemnity for the injury. No statute forbids it, nor do we perceive any inhibitory principle of the common law. For the servant's wages the general master is liable. He contracted to pay them. The special master is not liable therefor, because he did not agree to pay them. But the obligation to indemnify for injury is not imposed by the contract of service. In this connection the force and effect of the contract is to bring the parties into a relation under which the law imposes duty on the one in favor of the other, and this duty is founded upon reasons of public policy, not upon the terms of the contract, which are silent upon the subject of duty and the obligation to indemnify. Nothing in the law says a servant of two masters shall have a right to indemnity against both in case of his injury by the negligence of one, nor is there any reason or consideration of public policy which requires it. The ends of justice are attained by provid-

ing one source of indemnity, and that source is naturally indicated by the particular facts working the injury. The policy of the law is to fix liability with reference to that cause which stands closest to, and in most immediate connection with, the injurious result. The law books abound with instances of discrimination between remote and proximate causes in fixing liability for negligence. All persons concerned in a series of negligent acts, resulting in injury to some person, are not required to make reparation. The requirement of immediate and direct connection with the last or proximate act of negligence is universal. That policy which accords indemnity to the injured person, whether a servant or a stranger, does not exclude those equitable and just considerations which naturally suggest the direct and immediate author of the injury as the proper source from which to exact the indemnity. This is illustrated by the operation of the fellow servant rule. Notwithstanding the relation of master and servant, the negligence of a fellow servant imposes no liability upon the master. We are not to be understood as asserting that the law never gives two sources of indemnity, but only that it does not do so when the immediate cause of the injury is the act of only one person. There are no doubt circumstances under which two or more persons, joint participants in the negligent act constituting the proximate cause of the injury, can be jointly or severally liable.

Perceiving no legal obstacle to a rule absolving the general master from liability to his servant for injury resulting from unsafety of a place to work or machinery and appliances furnished by a third party, when the servant is lent to him or sent upon his premises temporarily, to perform a special service with the machinery and appliances found there, and imposing the liability upon the special master, under circumstances ordinarily inflicting it, we proceed to a consideration of the facts and circumstances which naturally suggest the source of indemnity. As has been stated, the special master either causes or suffers the defect to exist. The appliances and premises in which they are found belonged to him. He has the power of convenient, thorough, and constant inspection. His ownership and control enable him to remedy the defects economically and with a free hand. He may make such alterations as he sees fit. As to the competency and sufficiency of servants and the provision and enforcement of rules, he likewise has full and unrestrained opportunity for knowledge and power to control. On the other hand, to require these duties of the general master is to burden him with that which is often beyond his power and ability and always inconvenient. He can neither inspect the premises and machinery nor test the competency of the servants nor determine the efficiency of the rules and regulations, nor

remedy any defects, without the consent of the owner of the premises. In many instances he is unable to determine any of these questions with safety to himself or his servant, if allowed to undertake it, because of his unfamiliarity with the business conducted on the premises. The manager of a concern, installing electrical wires and appliances, could not safely determine whether to send his servant to do special work in a rolling mill, a cotton mill, a shoe factory, or an automobile factory, or a locomotive works or car shops or a railway yard, unless he was skilled and proficient in the conduct and management of such a plant, and yet his business necessitates the sending of his servant from time to time into all of them. To require him to determine whether it is safe to do so is to impose duty and responsibility beyond the limits of reason and power of performance. His inability to determine the question of safety, because of his lack of knowledge of the business done upon the premises, would often inflict upon a cautious man an enormous loss or hazard, for the rule would require him to undertake the work or refrain from it at his peril. If, under the impression of safety and suitability of the premises and appliances, competency of servants, and efficiency of rules and regulations, he sends his servant and injury results, he is required to make reparation in damages; and if, on the contrary, under a misapprehension he thinks the premises defective or the servants incompetent or the rules and regulations inadequate, or if, unable to determine whether they are or not, he refrains from undertaking the work, and it turns out that he was mistaken, he loses the business and suffers financial loss. Moreover, the inconvenience to which this duty would subject the general employer largely outweighs the consideration upon which it is supposed to rest, the mere technical relation of master and servant. If all the places in which he proposes to do special work through his servants were open to him, and he were allowed to correct defects and charge the expense thereof, and he possessed the requisite knowledge, ability, and skill to make the alterations, the discharge of that duty would carry him widely beyond the scope of his business territorially as well as otherwise. Employers often send their servants great distances to do special work upon premises that could not be inspected otherwise than at the expense of both time and money. Upon all these considerations and others that readily suggest themselves, we are of the opinion that the duty rests upon the special master. If he can be made the master, so as to apply the doctrine of fellow servancy, and he is, it is perfectly consistent to make him the master so far as to require him to provide a safe place for the work of the special servant.

Apparently inconsistent decisions involving or suggesting this question may be recon-

clled, we think, by a classification thereof, based upon the character of the occupancy of the premises. When the master sends his servant temporarily upon the premises of a third person to perform a special service, he is regarded as the servant of the owner of the premises and not of his general employer; and, in those instances in which the servant's ordinary and permanent place of work is upon the premises of a third party, the duty and liability are imposed upon his employer, and he is not regarded as the servant of the owner of the premises. For the purposes of the business carried on under such circumstances, the premises are regarded and treated as those of the employer, though he does not own them, and has by contract absolved himself from any duty to keep them in repair.

In all of the following cases, absolving the general employer from liability for injuries occasioned their servants upon the premises of third persons by defects therein, the servants were sent upon the premises temporarily and to perform special work. Though the distinction between temporary and permanent service upon premises, not owned by the employer, is not adverted to in the opinions, the occupancy was in fact temporary or sporadic and for a special purpose. *Whallon v. Elevator Co.*, 1 App. Div. 264, 37 N. Y. Supp. 174; *Hughes v. Gas Light Co.*, 168 Mass. 395, 47 N. E. 125; *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 654; *Channon v. Sanford Co.*, 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200, 68 Am. St. Rep. 133. In the last of these cases the court declares the doctrine we have adopted in the following terms, and, in part, upon the following considerations: "Then, again, this general rule (imposing liability upon the master for injury resulting from unsafety of the place in which the servant works) is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or place where the servant may be at work. The general rule is based upon such possession, use, and control by the master of the premises where he puts his servants at work for him; and, speaking generally, his duty to use due care to make and keep such place reasonably safe flows from, and is measured by, such possession, use, and control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use, and control of such premises. This being the reason of the rule, when the reason does not exist, the rule is inapplicable."

In the following cases and many others, imposing duty and liability upon the employer for injury occasioned by a defect in the premises upon which the servant was working, but which were owned by third parties,

the employers used the premises regularly and permanently, as if they owned them, and, in some, if not all of them, the character of the occupancy was expressly made the basis of liability. *McGuire v. Telephone Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Story v. Railroad Co.*, 70 N. H. 364, 48 Atl. 288; *Doyle v. Railroad Co.*, 127 Mich. 94, 86 N. W. 524, 54 L. R. A. 461, 89 Am. St. Rep. 456; *Railroad Co. v. Ross*, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; *Smith v. Railroad Co.* (C. C.) 18 Fed. 304; *Stetler v. Railway Co.*, 46 Wis. 497, 1 N. W. 112; *Harding v. Transfer Co.*, 80 Minn. 504, 83 N. W. 395; *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320, 42 S. W. 1009. In *McGuire v. Telephone Co.* the servant employed by the Bell Telephone Company of Buffalo was injured by a defective pole of the Rochester Gas & Electric Company, on which the telephone company had rightfully placed its wires along with those of the other company. In the opinion the court said: "But in the present case the plaintiff was employed to work on a line already erected constituting the permanent plant of the defendant. * * * I do not think the fact that the defendant did not own the pole which fell relieved it from the duty of reasonable inspection to see that the pole was safe. The pole formed part of the permanent line of the defendant through the streets of the city of Rochester. * * * By using the pole as part of its line, it adopted it as its own." Distinguishable from this case upon the ground above indicated is the decision in *Dixon v. Telegraph Co.* (C. C.) 68 Fed. 630, in which the servant was injured by a defective pole which did not belong to his employer, and was not used by it as a part of its line. Denying right of recovery, the court observed: "The pole in question, however, did not belong to the defendant. The use of it was casual, and incidental to the nature of the service in which the plaintiff was employed." In *Murch v. Railway Co.*, 29 N. H. 9, 61 Am. Dec. 631, the court said: "By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume toward those whom they had agreed to receive as passengers all the duties resulting from that relation as to the road." In *Engel v. Railroad Co.*, 160 Mass. 263, 35 N. E. 548, 22 L. R. A. 283, the court said: "The duty of a railroad corporation to furnish for its employes safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case its duty is the same when the tracks * * * are hired, or used under a license from others, as when they are owned by the employer." In all these and other cases of their class the employers used the premises or works of the third party for

usual, ordinary, and permanent places of work for their servants. No doubt absolute control and dominion over the premises by the employer for the purposes of his business, though temporary in character, would make him liable for injury resulting from defects in the premises. Such occupancy would be consistent with the theory of ownership for the time being. At any rate, it would be a transaction or use radically different from a mere casual, incidental entry, without any dominion or control at all. So, also, is the employer liable for injury resulting from a defective appliance belonging to a third party which he uses in his business, provided he has control of it. By using it he adopts it as his own for the purposes for which it is used and naturally falls under the same duty to the servant as if he had purchased or had it made for that purpose. *Bridge Co. v. Goodnight* (Ky.) 60 S. W. 415.

Though the relation of master and servant between the owner of the premises and the servant of a third person sent upon them to perform work for the owner may be assumed as the basis of legal duty on the part of the owner, as we have already shown, it is probably consistent with legal principles to say that, independently of such relation, the ownership and control of the premises imposes a duty in favor of one who comes there upon his invitation. One who invites another expressly or by implication to come upon his premises must use ordinary care and prudence to render the premises reasonably safe for the visit. *Sesler v. Coal Co.*, 51 W. Va. 218, 41 S. E. 216; *Williams v. Coal Co.*, 55 W. Va. 84, 46 S. E. 802; *Smith v. Parkersburg Ass'n*, 48 W. Va. 232, 37 S. E. 645. Of course, a bare licensee, one who comes upon the premises of another, without invitation or by mere permission, for purposes of his own in which the owner has no interest, occupies very much the same position as a trespasser. The owner owes him no duty other than abstention from willful or wanton injury. But one who comes upon the express or implied invitation of the owner holds a different status. The invitation carries with it a representation or guaranty of the exercise of reasonable care for his safety while upon the premises. The owner of a mill, or other place of business, in requesting another person to send his servants there to perform work beneficial to the owner, extends an invitation to such persons as are sent in obedience to the request, and, when they arrive, they are there on business for the owner of the property, as well as their master, and are therefore entitled to exact the same sort of duty from the owner of the premises as if they were in fact his own servants.

Our conclusion that the relation existing between the plaintiff and the defendant imposed no duty upon the latter in respect to the safety of the premises upon which the former was hurt, in the absence of additional facts or circumstances, seems to be well

sustained by *Coughtry v. Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387, and *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. In the first of these cases the owner of a mill contracted with a builder to put a cornice on it; the owner agreeing to erect a scaffold for the purpose free of cost. The builder sent his servant upon the scaffold to do the work, and it fell and killed him. The owner of the mill was held liable. A part of the reasoning of the court was as follows: "At the time of the injury the scaffold belonged to the defendant, had been erected by it, was in its possession and was being used on its premises, with its permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided. The only operation which the contract has in the case is to preclude the defendant from setting up that the defective structure was not its own but that of the contractors. Being conceded to be its own structure furnished by it for use, the duty of due diligence in its construction arose, not merely out of the contract to furnish it, but from the fact that the defendant did actually furnish it for the express purpose of enabling and inducing the men who were to do the work to go upon it." In the other case, the master, a painter, having contracted to paint the interior of a dome, employed an experienced scaffold builder to erect a first-rate scaffold in the building to enable him, the painter, to do his work. A servant of the painter having gone upon the scaffold, it gave way and caused his death, while at work upon it in his master's employment. Both the employer and the builder of the scaffold were sued, and the court held the former not liable and the latter liable.

What has been said thus far is no doubt subject to certain qualifications and limitations. If the general master has knowledge of the dangers and defects into which he is sending his servant and fails to give him any warning thereof, he would probably be liable for any resultant injury. Some of the authorities so hold. It may be possible, too, that an express guaranty of the suitability and safety of the premises and appliances would make the general master liable upon the same principle. *Channon v. Sanford Co.*, 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200, 204, 66 Am. St. Rep. 133. In that case the court said: "The question on this part of the case is whether, if no such duty rested upon the defendant by law, the facts found warrant the conclusion as matter of law that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but this fact, taken either alone or with the other facts found, clearly does not warrant any such conclusion as matter of law. The assurance was given at the very

time that the defendant told the plaintiff about the strong staging that had been already erected and in use in the building, and at the very time when plaintiff was informed Caulfield, and not the defendant, was to see to the staging. What the defendant said to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants."

We have no evidence here tending to prove any undertaking on the part of the defendant for the safety of the scaffold, nor of any agreement that the refrigerator company was to build the scaffold for the defendant. In other words, there is nothing here to indicate that the building of the scaffold was within, or a part of, the defendant's contract. No evidence adduced would warrant a jury in saying the refrigerator company built the scaffold, as the agent of the defendant. All that appears is that its servants did build it, and that the defendant's servants were advised that the refrigerator company people would build it, if needed. Hence we think it clear that no duty was imposed upon the defendant by any special contract or undertaking for the safety of its servants. If there was any such agreement, no evidence of it has been adduced, wherefore we are not called upon to say what its effect would have been, had there been such an undertaking. Nor does the evidence tend to prove knowledge of danger or unfitness on the part of the defendant.

Of course, we do not say the plaintiff is entitled to recover from the refrigerator company. As that company is no party to this litigation, we can decide nothing against it. There may be defenses that will exonerate it from liability, and it is not the purpose of this opinion to preclude or limit them in any respect. What has been said here indicating right to indemnity from that company is mere argument in the process of deduction of the rule or principle by which to determine the question of liability of the defendant in this action.

The case went to the court on a demurrer to the evidence. For the reasons here stated, the judgment will be reversed, the demurrer sustained, and judgment rendered for the defendant.

(90 S. C. 198)

ROBINSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Dec. 19, 1911.)

JUDGMENT (§ 829*)—RES JUDICATA—JUDGMENT OF UNITED STATES COURT—EFFECT IN STATE COURT.

A judgment of a federal court in an action begun in a state court, but removed to the federal court because of the nature of the controversy and the residence of the parties, which adjudges that since the delict occurred in Texas,

and since there is no statute in Texas allowing a recovery for mental anguish, there could be no recovery for the same for failure to deliver telegram is a determination on the merits, and bars a subsequent action in a state court, though the federal court in its opinion stated that it was without jurisdiction of the case; question of jurisdiction not having been raised.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gage, Judge.

Action by T. C. Robinson, Jr., against the Western Union Telegraph Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. J. McSwain, H. H. Harris, and E. Inman, for appellant. John Gary Evans and McCullough & Blythe, for respondent.

JONES, C. J. On May 29, 1909, plaintiff brought an action against defendant in the court of common pleas for Greenville county to recover \$5,000 damages for mental anguish alleged to have been suffered by him as the result of defendant's negligent and willful conduct in failing to transmit and deliver a telegram filed in defendant's office at Norris, S. C., on November 22, 1908, addressed to plaintiff at Houston, Tex., announcing the death of his father. The case was removed to the United States Circuit Court, and on May 2, 1910, trial was begun in that court. After testimony was introduced on both sides, defendant moved the court to direct a verdict in its favor upon the grounds (1) that there was no testimony of willful failure to deliver the message; (2) that, if there was such testimony, there was nothing to show that defendant authorized or ratified the willful misconduct of its agents; (3) that the undisputed testimony shows that the alleged cause of action arose in Texas, and, in the absence of any showing of a statute in Texas giving a right of action for damages for mental anguish, the presumption is that the common law prevails there which denies recovery of such damages in the absence of physical injury; and (4) that the testimony shows that defendant performed its contract, and that there was no testimony to show negligence. The United States District Judge, Hon. William H. Brawley, responding to the motion, directed a verdict for defendant, stating his reasons therefor, which are incorporated in the record of this case, and were substantially that there was no evidence of any delict in this state; that the delict occurred in Texas, and that the action should have been brought in that state; that, it not appearing that there was any statute in Texas allowing damages for mental anguish, the federal court would follow the general law which denied recovery for mental anguish not accompanied with bodily pain, the concluding words of the order being: "This court feels without juris-

diction in the case, and it follows that it must instruct the jury to find a verdict for the defendant." Judgment was duly entered upon the verdict, and no appeal was taken.

The present action, renewed in the state court, is upon the same cause of action and between the same parties, and the defendant interposed the judgment of the federal court as a bar. Judge Gage in a clear and concise opinion sustained the plea in bar and dismissed the complaint. The exceptions of appellant make the point that the judgment of the federal court was not upon the merits, but that the case, in effect, was dismissed for want of jurisdiction, and therefore the judgment was not a bar to the present action. There is no doubt that the federal court did actually have jurisdiction, tested by the nature and amount of the controversy, the residence of the parties, the appearance and answer of the defendant, and the actual removal from the state court. The jurisdiction of the federal court was in no wise affected by consideration of the place where the cause of action arose. Having jurisdiction, the court exercised it, and meant to exercise it, in a most solemn and effective way by directing a verdict and entry of judgment thereon, and this action must speak louder than the mere expressions in the language of the court giving reasons for the judgment rendered. No question of jurisdiction was raised in the grounds of the motion to direct a verdict, and all these grounds were upon the merits.

The meaning and effect of the decision in the federal court was that as the delict occurred in Texas, and as there was shown no statute of Texas allowing recovery for mental anguish, the court followed the rule of the common law denying recovery for mental anguish not accompanied with bodily injury instead of following the decision of this court in *Brown v. Telegraph Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914, upon which the plaintiff was relying. This was a determination upon the merits.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 180)

DU PRE v. LEXINGTON COUNTY.

(Supreme Court of South Carolina. Dec. 19, 1911.)

1. COUNTIES (§ 204*)—CLAIMS—JURISDICTION OF COUNTY BOARD—"ANY OTHER MATTER." Civ. Code 1902, § 808, providing for the auditing and payment by the county board of accounts for "labor performed, fees, services, disbursements or any other matter," covers a claim for injury to an automobile resulting from a defective highway, and confers jurisdiction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the county board to act judicially in the matter when presented to it.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 204.*

For other definitions, see Words and Phrases, vol. 1, p. 436.]

2. COUNTIES (§ 208*)—CLAIMS—JURISDICTION.

Civ. Code 1902, § 1347, authorizing a person injured in person or property through a defective highway to recover damages in an action against the county, does not give exclusive jurisdiction to the magistrate or circuit court, but gives concurrent jurisdiction with that conferred on the county board by section 806, and one electing to submit his claim to the county board is bound thereby, and his remedy on an adverse decision is by appeal, and not by an independent action before a magistrate or before the circuit court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322-330; Dec. Dig. § 206.*]

Appeal from Common Pleas Circuit Court of Lexington County; G. W. Gage, Judge.

Action by Ernest M. Du Pre against Lexington County. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

J. B. Wingard and Efrd & Dreher, for appellant. W. W. Hawes, for respondent.

JONES, C. J. In October, 1909, plaintiff filed with the county board of commissioners of Lexington county an itemized and verified claim of \$99.75 against the county for damages to his automobile, alleged to have been caused by collision with a stump in the public highway. The county board in January, 1910, passed upon the claim, and disapproved it. No appeal was taken from this action of the board, but on April 2, 1910, plaintiff brought suit in a magistrate's court for the said amount claimed as damages due to the negligence of the county in leaving the stump in the public highway. The defendant, in addition to a general denial, set up the judgment of the county board of commissioners on the claim filed with it as a bar to the action. This last defense was overruled, and judgment was had for the plaintiff, which was affirmed on appeal to the circuit court.

The question presented is whether this action *ex delicto* could be prosecuted in the magistrate's court in view of the filing of the claim with the county board in October, 1909, and the action of the board thereon, from which no appeal was taken.

With respect to ordinary claims against the county, this court has often held that the county board acts judicially in passing upon them, and that the only method of review is by appeal to the circuit court. *Jennings v. Abbeville County*, 24 S. C. 546; *Bank v. Goodwin*, 81 S. C. 424, 62 S. E. 1100; *Cunningham v. Clarendon County*, 81 S. C. 202, 62 S. E. 212; *People's Bank v. Greenville*, 85 S. C. 297, 67 S. E. 296.

[1] The provision of section 806 of the Civil Code of 1902 providing for the auditing

and payment by the county board of commissioners of accounts for "labor performed, fees, services, disbursements, or *any other matter* * * *" is broad enough to cover a claim for injury to an automobile resulting from a defect in a highway, and to confer jurisdiction on the county board to act judicially in the matter.

[2] The provision of section 1347 of 1 Civil Code, giving the right to a person receiving damage in person or property through a defect in or negligent repair of a highway to recover actual damages therefor *in an action against the county*, does not place exclusive jurisdiction in the magistrate or circuit court, but gives these courts concurrent jurisdiction. The plaintiff may have elected originally to bring his action in the magistrate's court; but, having elected to submit his claim to the jurisdiction of the county board, he is bound thereby, and should have appealed from the action of the board. It may seem strange that the Legislature should be regarded as conferring upon the county board jurisdiction to pass upon a matter involving its own negligence, but the same consideration could be urged against the admitted right of the county board to pass upon its liability under its own contracts. The right of review in the circuit court is ample, and there is advantage in having a uniform rule with respect to all claims submitted to the county board.

The judgment of the circuit court is reversed, and the complaint dismissed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

HODGE v. ATLANTIC COAST LUMBER CORP. (two cases).

(Supreme Court of South Carolina. Dec. 19, 1911.)

On petition for stay of remittitur and for rehearing. Stay of remittitur revoked, and petition for rehearing dismissed.

For former opinion, see 71 S. E. 1009.

PER CURIAM. After consideration we discover no ground for rehearing. It is therefore ordered that the petition herein be dismissed and the stay of remittitur heretofore granted be revoked.

(90 S. C. 249)

MILLER v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. Dec. 21, 1911.)

1. MASTER AND SERVANT (§ 87*)—INJURED EMPLOYÉ—ACCEPTANCE OF BENEFITS—REPEAL OF STATUTE.

Act Feb. 23, 1903 (24 St. at Large, p. 79), providing that the acceptance of benefits by an injured employé of a railroad company main-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

taining a relief department shall not bar a recovery by the employé of damages for the injury, is not repealed impliedly by Act March 7, 1905 (24 St. at Large, p. 962), containing substantially the language of the act of 1903, but extending it so as to apply to any corporation, firm, or individual maintaining a relief department for employes, and which merely declares that all acts inconsistent with it shall be repealed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 87.*]

2. MASTER AND SERVANT (§ 87*)—REGULATION OF EMPLOYMENT—STATUTES—APPLICABILITY.

Act March 7, 1905 (24 St. at Large, p. 962), providing that the acceptance of benefits by an employé of an employer maintaining a relief department for employes shall not bar a recovery by the employé for the injuries sustained, is a reasonable regulation within the police power of the state, and is applicable to a contract between an employer and an employé made before the passage of the act, and providing that the acceptance of benefits shall operate as a release of any right of action, and an employé injured after the passage of the act may rely on its provisions, though the contract of employment was made prior to its passage.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 87.*]

3. COURTS (§ 97*)—DECISIONS—FEDERAL QUESTIONS.

The decisions of the federal Supreme Court on federal questions are conclusive on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

4. CONSTITUTIONAL LAW (§ 89*)—MASTER AND SERVANT (§ 11*)—FREEDOM TO CONTRACT—POLICE POWER—EMPLOYÉ'S RELIEF FUND—ACCEPTANCE OF BENEFITS.

Act March 7, 1905 (24 St. at Large, p. 962), providing that the acceptance of benefits by an injured employé of an employer maintaining a relief department for employes shall not bar a recovery for the injuries sustained, is not an unreasonable interference with the right of contract, and is not violative of the fourteenth amendment of the federal Constitution or Const. art. 1, § 5.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89.* Master and Servant, Dec. Dig. § 11.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by James A. Miller against the Atlantic Coast Line Railroad Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Best & Cunningham, L. D. Jennings, and J. H. Clifton, for appellant. P. A. Willcox, Mark Reynolds, and L. W. McLemore, for respondents.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff on the 18th of October, 1909, in the discharge of his duties as engineer while in the employment of the defendant Atlantic Coast Line Railroad Company through its negligence and wantonness. The defendants denied the allegations of negligence and wantonness, and set up the defense that the plaintiff and said railroad company entered

into a contract, whereby it was agreed that the plaintiff should become a member of its relief department, and receive a specified sum in case of injury, which sum when accepted by the plaintiff should operate as a release of all claims against the railroad company arising out of said injury; that the plaintiff in pursuance of said contract accepted the sum to which he was entitled as a member of the relief department, and thereby released the railroad company from all further liability for said injury. The plaintiff, replying to this defense, alleged that the said contract was null and void, and in contravention of the act entitled, "An act to regulate and fix the liability of railroad companies having a relief department, to its employes," approved the 23d of February, 1903, and which was as follows: "That from and after the approval of this act, when any railroad company has what is usually called a relief department for its employes, the members of which are required or permitted to pay some dues, fees, moneys or compensation to be entitled to the benefits thereof; upon the death or injury of the employé, a member of such relief department, such railroad company, be, and is hereby, required to pay to the person entitled to the same, the amount it was agreed the employé or his heirs at law should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employé, or his personal representatives, from recovering damages of such railroad company, for injury or death caused by the negligence of such company, its agents or servants, as now provided by law; and any contract or agreement to the contrary shall be ineffective for that purpose." 24 St. at Large, p. 79. Also of the act entitled, "An act to fix and declare the liabilities of any corporation, firm, or individual operating a relief department, to employes, and to regulate the operation of the same," approved the 7th of March, 1905, and which was as follows:

"Section 1. That when any corporation, firm or individual runs or operates what is usually called a relief department for its employes, the members of which are required or permitted to pay fees, dues, money or other compensation, by whatever name called, to be entitled to the benefit thereof, upon the death or injury of the employé, a member of such relief department, such corporation, firm or individual, so running or operating the same, be, and is hereby, required to pay to the person entitled to the same the amount it was agreed the employé, his heirs or other beneficiary under such contract, should receive from such relief department; the acceptance of which amount shall not operate to stop, or in any way bar the right of such employé or his personal representatives, from recovering damages of

such corporation, firm or individual, for personal injury or death caused by the negligence of such corporation, firm or individual, their servants and agents, as are now provided, by law; and any contract or agreement to the contrary, or any receipt or release given in consideration of the payment of such sum, is and shall be null and void.

"Sec. 2. That all acts inconsistent with this act are hereby released." 24 St. at Large, p. 962.

It appears from the testimony that the plaintiff became a member of the relief department on the 19th of November, 1904, and was still a member when he accepted the amount hereinbefore mentioned. The several drafts delivered to the plaintiff by the relief department after he sustained said injury (omitting dates and amounts) contained these words: "This amount is in payment of benefits for accident disability, for ——— days from ——— to ——— inclusive, and is paid and accepted under the regulations of the relief department." At the close of the testimony, the defendants made a motion for the direction of a verdict, on the ground "that the acceptance by the plaintiff of the benefits under the relief department contract operates as a bar, and as a complete defense to the action, the acceptance of such benefits having operated as a full release, satisfaction, and accord of any right of action that the plaintiff might otherwise have."

His honor, the presiding judge, sustained the motion, and assigned the following reasons for his ruling: (1) Because the act of 1903 was repealed by the act of 1905. (2) Because the act of 1905 was passed subsequent to the time when the plaintiff had become a member of the relief department, and that it was therefore inapplicable to the facts of this case. (3) Because the acts of 1903 and 1905 were in violation of the fourteenth amendment of the federal Constitution, which provides that "no state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction, the equal protection of the laws;" also, that the said acts were repugnant to section 5, art. 1, of the state Constitution (which contains a provision in similar language), on the ground that they were an unreasonable restraint upon the liberty of contract.

The plaintiff appealed from the order directing a verdict, and the first question that will be considered is whether his honor, the presiding judge, erred in ruling that the act of 1903 was repealed by the act of 1905.

[1] The act of 1903 was intended to apply solely to railroad companies, while the act of 1905 was intended, not only to embrace railroad companies, but "any corporation, firm or individual." This is the only difference in the two acts, except a slight variance in their phraseology. It is true the

act of 1905 contains the provision that all acts inconsistent with it are repealed, but it cannot be successfully contended that the act of 1903 is inconsistent with it, since all the provisions of the first are included within the second act. Therefore the act of 1903 was not repealed in express terms, and, if repealed at all, it was merely by implication. Repeals by implication, however, are not favored, and in this case such a rule cannot be successfully invoked. *Buchanan v. State Treasurer*, 68 S. C. 411, 47 S. E. 683. The exception raising this question is sustained.

[2] The next question for consideration is whether the presiding judge was in error, when he ruled that the act of 1905 was inapplicable, for the reason that it was approved after the plaintiff and the defendant railroad company had entered into the contract, whereby the plaintiff became a member of its relief department. This act was intended to have a prospective effect in those cases where its provisions were violated after its passage; and the fact that the contract out of which such violations arose was made before the act went into effect does not prevent it from being applicable. The police power is paramount to the liberty of contract; and, when it is determined in a particular case that a statute is not an attempt to exercise that power arbitrarily, then it cannot be successfully contended that it is an unreasonable restraint upon the liberty of contract. The following language used by the writer of this opinion, in the case of *Sturgiss v. Railway*, 80 S. C. 167, 60 S. E. 939, 61 S. E. 281, throws light upon the evil, which the act of 1905 was intended to remedy, and shows that it was not an attempt to exercise the power of police in an arbitrary manner: "The statute under consideration (act of 1905) was enacted for the purpose of preventing railroad corporations (and other parties therein mentioned) from inaugurating schemes, the ultimate aim and practical effect of which are to enable the railroad company to bring such influence to bear upon its employes as will force them to surrender their claims for damages when they have sustained injury through the negligence of the company, against which it is not allowed by law to contract. When the regulations of the hospital and relief fund are analyzed, it will be seen that they contemplate the result just mentioned. Not only do they provide that the employe who has paid his assessments, and thereby contributed to the creation and maintenance of said fund, shall be barred from recovering damages for negligence, if he accepts the benefit thereunder, but they likewise provide that his representatives shall not be allowed to bring an action for damages caused by the negligence of the corporation, if they accept the benefit of said fund. Membership in the hospital and relief fund creates the relation of trustee and cestui que trust between the company and the employe, and, although the

employé is assessed to maintain the fund, he is not allowed to receive a dollar of the money collected for that purpose, unless he surrenders his claim for damages, when he has been injured through the negligence of the corporation. The fiduciary relation established between the company and the employé places him practically at the mercy of the corporation; for it is a well-known fact that the employés are not persons generally of large means, and frequently are dependent entirely upon their salary or wages for a support. What is the condition of the employé when he is injured through the negligence of the company? He realizes the fact that he has a beneficial interest in a trust fund, and, being in need of the money, he is anxious to get it. He is informed, however, that he must surrender all other claims against the corporation. At this time he, perhaps, is suffering great mental and physical pain, his mind is not so clear as when in health, and the opportune time contemplated by the corporation has arrived when he can be easily persuaded to relinquish his claim for damages arising out of negligence. Public policy demands that the corporation shall not have the opportunity of taking advantage of its employés through the fiduciary relations established between them with that end in view. We only desire to say in conclusion that, if the hospital and relief fund is successfully operated, the practical result will be that the railroad company will be enabled to liquidate claims for damages arising out of its negligence, with sums of money contributed in the main by its employés—an indirect way of contracting against its negligence."

To the same effect is the following language of the court in *McGuire v. Railway*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706: "The average railway employé is not a man of wealth. More often than otherwise, his total possessions, if any, are represented by a modest home, and he depends upon his wages to meet his current living expenses. If he has a family, they, too, are dependent upon his earnings. If severely injured, the pain from his wounds, the anxiety for his dependent family, the pressure of his immediate needs, are not conducive to calm and businesslike reflections upon what may prove to be a matter of great importance to him and those who look to him for support. The immediate aid which the relief department offers may under such circumstances assume an exaggerated importance to his eyes, and in his weakness and distress, lead him to accept a benefit inferior to that which he might otherwise be entitled to recover. Moreover, the Legislature may well have believed that, while membership in the relief department was entirely voluntary in the legal sense of the word, it was still possible for the employer, by making the tenure of service more secure to those who became members, to bring to bear

an influence in that direction, savoring of moral coercion." These views are recognized in the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, in which the following language is used: "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and, when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'" The case of *Railway v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, shows that the act of 1905 cannot be construed as an arbitrary exercise of the police power; and that the fact that the contract was made before its passage does not render it inapplicable in this case.

The exception raising this question is sustained.

[3,4] The last question to be determined is whether the presiding judge erred in ruling that the acts were obnoxious to the fourteenth amendment of the federal Constitution, and to section 5, art. 1, of the state Constitution, on the ground that they are an unreasonable interference with the right of contract. Before proceeding to determine this question, we desire it understood that the proposition whether the provisions of said acts would be regarded as in restraint of the right of contract if parties enter into a new and independent contract subsequent to the injury, but during the time the injured party is a member of the relief department, is not before the court, and, of course, will not be adjudicated. The very able opinion of Mr. Justice Hughes in *Railway v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, is conclusive of the question now under consideration; and, as this court must conform its decisions to those of that court on federal questions, we will quote somewhat at length from the opinion in that case, as follows:

"The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this respect that the question arises as to the restriction of the liberty of contract. * * * There is no absolute freedom to do as one likes, or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern. * * * It is subject, also, in the field of state action to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. * * * The principle involved in these decisions is that where the legislative action is arbitrary, and has no reasonable relation to a purpose, which it is competent for government to effect, the Legislature transcends the limits of its power in interfering with the liberty of contract; but, where there is reasonable relation to an object within the government authority, the exercise of the legislative discretion is not subject to judicial review. * * * If the Legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and, if the power exists to accomplish the latter, the interference is justified, as an aid to its exercise. * * * Having authority to establish this regulation, it is manifest that the Legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power the Legislature was not limited, with respect either to the form of the contract or the nature of the consideration, or the absolute or conditional character of the agreement. It was as competent to prohibit contracts which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability, which would otherwise exist, as it was to deny validity to agreements of absolute waiver. * * *

If the Legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment under the contract? The asserted distinction is sought to be based upon the fact that under the contract of membership the employé has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts in any case where it exists necessarily implies legislative control over the transaction in spite of the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy, which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and HYDRICK, J., concur.

WOODS, J. I concur on the authority of *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328.

(90 S. C. 187)

PHILLIPS v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. Dec. 19, 1911.)

1. CARRIERS (§ 368*)—CARRIAGE OF PASSENGERS—FORFEITURE OF RIGHT—STATUTORY PROVISION.

Civ. Code 1902, § 2134, which makes it the duty of a carrier to stop at advertised stations a time sufficient for receiving and letting off passengers, refers merely to passengers beginning or ending passage at such station, and cannot be construed as requiring a carrier to receive as a passenger one who had been expelled for misconduct affording ground for ejection from the train which he is seeking to re-enter.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 868.*]

2. CARRIERS (§ 368*)—CARRIAGE OF PASSENGERS—RULES OF RAILROAD.

While at common law a carrier must accept passengers who present themselves in a proper manner, and are ready and willing to comply with the reasonable rules of the company, the carrier may enforce a reasonable rule preventing a passenger who has willfully re-

fused to pay his fare and provoked expulsion from re-entering the train from which he was expelled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 368.*]

3. CARRIERS (§ 368*)—CARRIAGE OF PASSENGERS—DAMAGES FOR EXPULSION—RELATION OF PASSENGER.

Where a person ejected from a train at a station for a refusal to pay fare with a warning that he would not be allowed to re-enter sought to re-enter and offered to pay full fare, but was refused by the conductor and forcibly ejected when he attempted to so re-enter, there was no such re-establishment of the relation of passenger as would entitle him to damages for the second ejection.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 368.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by Lucius B. Phillips against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

F. L. Willcox, Mark Reynolds, and L. W. McLemore, for appellants. Lee & Moise, for respondent.

JONES, C. J. The plaintiff boarded defendant's train at Florence, S. C., as a passenger for Marion, S. C., on February 14, 1910, and was ejected at Mars Bluff, a regular station, for nonpayment of fare. Before putting plaintiff off, the conductor informed him that, if he was ejected, he would not be allowed to re-enter the train. As soon as plaintiff stepped on the ground, he offered to pay full cash fare from Florence to Marion, but was informed by the conductor that he could not get on the train, and when plaintiff got upon the first steps of the platform to re-enter the train, he was forcibly prevented. This action was brought to recover actual and punitive damages for the second ejection or exclusion. The contention of the plaintiff, sustained by the circuit court in the charge, was that a passenger lawfully ejected for willful refusal to pay fare has the right to re-enter the same train as passenger upon tender of the full cash fare from the beginning of the trip, if the ejection was at a regular station. The judgment was for plaintiff for \$850.

The point has not been ruled in this state, although the writer in his concurring opinion in *Weber v. Railway Co.*, 65 S. C. 378, 43 S. E. 888, expressed the view that one who had been rightfully expelled from a train for nonpayment of fare could not again enter the same train and acquire right to passage by tendering the fare, if his refusal to pay in the first instance was fractious or willful. The great weight of authority supports that view. *Hoffbauer v. Delhi, etc., Ry.*, 52 Iowa, 342, 8 N. W. 121, 85 Am. Rep. 278; *Louisville, etc., Ry. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 672; *Texas &*

Pac. Ry. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532; *Pickens v. Richmond, etc., R. R.*, 104 N. C. 812; 10 S. E. 562; *Pease v. Delaware, etc., R. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; *Georgia Southern, etc., R. R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, and note; *Missouri, etc., R. R. Co. v. Smith*, 152 Fed. 608, 81 O. C. A. 598, 10 Am. & Eng. Ann. Cas. 939, and note.

We cannot think that this sound and salutary rule has no application to lawful ejection at a station where the train is accustomed to stop, and is limited to ejection between stations. The practical effect of such a limitation would be to abrogate the rule, or to cause ejections to be generally made between stations. This last would entail greater loss and inconvenience both upon the carrier and the ejected passenger, as well as delaying the other passengers. The mere wear and tear of stopping and starting a train would often exceed the fare demanded. The place for landing between stations would generally be more unsafe than at stations, because of the absence of provisions for safe landing usually made at stations. The passenger ejected between stations might often be left in darkness, without shelter, and without means to reach a station. Frequent stoppings between stations would seriously interfere with the train's schedule. Would it not be safe and wise to permit and encourage the carrier, when exercising its right of ejection, to do so at a station, so as to subject all parties concerned to the least inconvenience and injury without thereby impairing the right. The case of *O'Brien v. Boston, etc., R. R. Co.*, 15 Gray (Mass.) 20, 77 Am. Dec. 347, was a case of lawful ejection between stations, but the primary reasons given for denying the passenger's right to re-enter the car upon tender of the fare after an expulsion for nonpayment were as follows: "Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay the fare after his ejection. They were not bound to accept a performance after a breach. The right to demand the complete execution of the contract by the defendant was defeated by the refusal of the plaintiff to do that which was either a condition precedent, or a concurrent consideration on his part, and the non-performance of which absolved the defendants of all obligations to fulfill the contract. After being rightfully expelled from the train, he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. The right to refuse to transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party who had hitherto refused to perform the contract by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

paying his fare when duly demanded could immediately re-enter the cars and claim the fulfillment of the original contract by the defendants." It is conceded by practically all the courts that make a distinction between expulsion at stations and between stations that the tender must be for the fare from point where the passenger first boarded the train, not from the station where re-entry is sought, which shows an unwillingness to recognize that a new relation is created by tender of fare for the same train and trip at the station of expulsion. Such belated tender of fare as a performance of the original contract cannot fully restore the status, for the passenger has willfully subjected the carrier to the trouble and risks involved in a forcible ejection, and is usually smarting under humiliation and irritation because of the expulsion, and there is reason for apprehending that he might again refuse to pay and resist ejection when returned to the place and witnesses of his humiliation. Conductors usually busy with other duties at stations ought not to be subjected to the duty of accepting fares before the passenger is admitted to the train, and he can have no assurance that trouble would not again occur when the fare was demanded in the ordinary way of the recalcitrant passenger who had just previously fractiously refused to pay.

[1] We do not regard section 2134, Civ. Code, as applicable to the discussion as that merely to the duty of the carrier to stop at the advertised stations a time sufficient for receiving and letting off passengers, referring to passengers beginning or ending passage at such station. It cannot be construed as requiring the carrier to receive as a passenger one who had been expelled for conduct amounting to a forfeiture of his right to a continuation of his trip on that particular train.

[2] While the common law makes it the duty of the carrier to accept passengers at its stations for that purpose who present themselves in a proper manner and are ready and willing to comply with the reasonable rules of the company, it does not deny to the carrier the right to enforce such a reasonable rule as one which prevents a passenger who has willfully refused to pay his fare and provoked expulsion from re-entering the same train. *Pease v. Railroad*, supra, was a case of expulsion at a station, where fare was tendered on the platform near the car door, which point the passenger had reached in the process of expulsion.

[3] It was held that the tender could not have the effect of making a further expulsion unlawful, and that the fact the expulsion occurred at a station was immaterial. The

court *inter alia* used this language: "In such a case as this we think a passenger who resists the lawful requirement of the company to the extent of provoking a breach of the peace and the exhibition of violence in the presence of other passengers cannot as a matter of law demand a passage upon the train where such an exhibition has been made." Referring to the case of *O'Brien v. Railway*, 80 N. Y. 236, the court stated that it held "that, if the stoppage of a train is rendered necessary to expel a passenger therefrom for a fractious refusal to pay fare, he does not by offering to pay it before expulsion become entitled to continue the trip." And, further referring to the *O'Brien* Case, the court said that it decides nothing further than that after arrival at a station and while there, and before force has been applied to effect expulsion, tender of fare would render expulsion unlawful. It is thus made clear that in these cases the fact that the train was at a station was only material in determining when the process of expulsion began. Since the train must stop at a regular station in any event, it cannot be said that the stopping was the beginning of process to expel the passenger, whereas between stations the stopping of the train, if for the purpose of expulsion, is a process in the expulsion. We cannot conceive that an expelled passenger at a station may enter into a new relation by purchasing a ticket entitling him to board the train at that point on the theory that the carrier has made a new contract. Even in that event, the authorities, with an exception or two, appear to hold that the passenger must pay the fare from the initial point of the trip. *Swan v. Manchester, etc., R. R.*, 132 Mass. 116, 42 Am. Rep. 432. It may be also that, if the expelled passenger with the knowledge and acquiescence of the conductor had re-entered the car with intention to comply with the reasonable rules of the company, there would be evidence of a restoration of the original relation, which would prevent another expulsion, if timely tender of fare was made.

The case before us presents no such circumstances. The plaintiff, although warned beforehand that he would not be allowed to return to the train if ejected, immediately after ejection endeavored to re-enter the train, notwithstanding the ejection and interposition of the train officials. There should be a new trial.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

(90 S. C. 189)

TROWBRIDGE v. CHARLESTON & W. O. RY. CO.

(Supreme Court of South Carolina. Dec. 19, 1911.)

1. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF JURY.

Where, on the trial of a cause, the testimony on a material fact was conflicting, a charge that, where testimony is contradictory, it is the province of the jury to solve the difference and give a reasonable solution of the matter, is not improper as a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

2. TRIAL (§ 143*)—PROVINCE OF JURY.

Where, in an action for damages, it is claimed that the testimony of the plaintiff is contradictory, it is the province of the jury to solve the contradiction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342-343; Dec. Dig. § 143.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORING APPELLANT.

Where, in an action for damages, there is proof on the part of the plaintiff of one sum as the amount of the damage, and there is no evidence tending to reduce the amount, proof of such sum necessarily includes a smaller amount, and an award of a smaller sum is not open to objection by defendant that the verdict is not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. CARRIERS (§ 132*)—INJURY TO GOODS—NEGLIGENCE—BURDEN OF PROOF—PERISHABLE GOODS.

While a carrier is not liable for loss caused by inherent defects in perishable goods, it is liable for damages resulting from failure to use due care in view of the nature of the goods, so that, in an action for damages to fruit delivered to a consignee in a damaged condition, it is incumbent upon the carrier to show that its negligence did not contribute to bring about or hasten the deterioration, especially where the bill of lading specially provided that the burden should be on the carrier, in case of loss, to prove freedom from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582; Dec. Dig. § 132.*]

Appeal from Common Pleas Circuit Court of Anderson County; Thos. S. Sease, Judge.

Action by J. W. Trowbridge against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bonham, Watkins & Allen, for appellant. Hood & Sullivan, for respondent.

JONES, C. J. This appeal is from a judgment in favor of plaintiff against defendant for \$190 as damages to a car load of bananas shipped to plaintiff at Anderson, S. C., from New Orleans, La. The testimony for plaintiff tended to show that the bananas were delivered to the initial carrier at New Orleans on June 13, 1910, in good green condition; that on June 15th the bananas were inspected in Atlanta, Ga., and found in good, green condition with about 25 bunches slightly turning; that the bananas arrived at An-

derson, S. C., on Saturday night, June 18th; that three days were a reasonable time for the shipment of fruit from New Orleans to Anderson; that plaintiff inquired of defendant's agent at Anderson on Friday, 17th, and Saturday, 18th, of June, and was informed that the bananas had not arrived; that on Saturday night plaintiff was informed of the arrival of the car; that he could not unload the car on Saturday night; that on Sunday morning the bananas were in an overripe condition, and, when the car was delivered on Monday morning, they were found to be in an unsalable condition, with the exception of 85 bunches out of the car load of 800 bunches. The testimony for the defendant tended to show that the bananas arrived at Anderson at 5 p. m. Friday, June 17th; that plaintiff was notified and saw the bananas that afternoon and unloaded the car on Saturday morning, June 18th; and that no notice was given it of damage to the bananas until two or three days afterwards.

[1] Judge Sease charged the jury that, when testimony is contradictory, it is the peculiar province of the jury to solve the difference and give a reasonable solution of the matter. This was clearly correct and was not a charge upon the facts, as the testimony was contradictory.

[2] It was also the province of the jury to solve the alleged contradiction in the testimony of the plaintiff himself.

[3] The contention that it was error to refuse a new trial because there was no testimony to sustain the verdict cannot be sustained.

The point made here by appellant is that the plaintiff claimed \$297.07 as the amount of the damages, and that it was not disputed that, if plaintiff was entitled to recover at all, he was entitled to recover the whole amount claimed, whereas the jury only awarded \$190. As proof of the larger amount necessary included the smaller, surely the appellant has no ground to complain of the favorable consideration of the jury.

The court instructed the jury in substance that, when a carrier delivers fruit in a damaged condition, the presumption is that the damage occurred while in the possession of the delivering carrier, and that the burden of proof is upon the carrier to show that the condition of the fruit was not due to its negligence. Appellant contends that the charge improperly placed the burden of proof.

[4] The bill of lading in this case stipulated that the burden to prove freedom from negligence was upon the carrier. Moreover, the instruction given was in accord with the following statement of the rule in *Trakas v. Railroad*, 87 S. C. 206, 69 S. E. 209: "When the goods are perishable, the carrier should exercise care in view of that fact,

and, when perishable goods are delivered by the carrier in a damaged condition, the presumption makes it incumbent on the carrier to show that its negligence did not contribute to bring about or hasten the deterioration. While the carrier is not liable for losses caused by the inherent nature of the goods, it is liable for damages which result from its failure to exercise due care in view of the nature of the goods."

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 262)

WOODWARD v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina. Dec. 21, 1911.)

1. RAILROADS (§ 400*)—INJURIES TO PERSONS ON OR NEAR TRACK—ACTION—EVIDENCE—SUFFICIENCY.

In an action for the death of a person struck by a railroad train, evidence held to require submission to the jury on the question as to whether the deceased was drunk and asleep on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

2. RAILROADS (§ 359*)—INJURIES TO PERSON ON OR NEAR TRACKS—DUTY TO TRESPASSER.

A railroad company owes a trespasser on its track the duty of so operating its trains as not to injure him wantonly or by such gross negligence as indicates a reckless disregard of human life.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1238; Dec. Dig. § 359.*]

3. RAILROADS (§ 400*)—INJURIES TO PERSON ON OR NEAR TRACKS—ACTION—EVIDENCE—SUFFICIENCY.

In an action for the death of a person struck by a railroad train, evidence as to the method of running defendant's train held sufficient to go to the jury on the question as to whether the running of the train was in reckless disregard of human life.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

4. RAILROADS (§ 397*)—INJURIES TO PERSON ON OR NEAR TRACKS—NEGLIGENCE—FAILURE TO GIVE STATUTORY SIGNALS—EVIDENCE.

In an action for the death of a person struck by a train, the failure to give the statutory signals is competent testimony on the question as to whether the conduct of the employees of the defendant amounted to recklessness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1344-1355; Dec. Dig. § 397.*]

Appeal from Common Pleas Circuit Court of Aiken County; R. W. Memminger, Judge.

Action by Mrs. Lizzie Woodward, as administratrix of the estate of Hamp Woodward, deceased, against the Southern Railway, Carolina Division. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. B. Salley, for appellant. Hendersons, for respondent.

JONES, C. J. This is an appeal from an order of nonsuit in an action for damages for death of plaintiff's intestate caused by alleged negligence of defendant. It appears that Hamp Woodward on Sunday morning, September 6, 1908, was found dead lying on the north side of defendant's track 820 yards east of its depot at Montmorenci in Aiken county. The deceased was lying on his back, his body at right angle with the track and across the path alongside the track and his head between the ends of two cross-ties, about on a level with the ties, some inches from the out edge of the rail. There were two wounds upon his head, one from the middle of the forehead cutting off much of the right side of the head and breaking the skull. The other was a three-cornered wound on the left side near back of the head fracturing the skull. These two wounds were separate. The left side of the face was in a blood shot condition, and the back of the body was dark blue. The hat of deceased was found some feet from the body in the direction of Montmorenci with the crown in a torn condition in front and on right side. The deceased lived near defendant's track about one mile east of Montmorenci where he conducted a farm, and he also carried on a fish and butcher business in Montmorenci. On the night of September 5th he left Montmorenci to go home a short time before the arrival of the defendant's passenger train from Charleston to Augusta due at Montmorenci about 9:30 p. m. He was last seen alive talking to the section master in the public road not far from Montmorenci depot eight or ten minutes before the arrival of the train, when he started for home on the public road. The night was cloudy, dark, and rainy. Between the depot and the spot where the body was found there was a low place where the water settled, which caused the public road paralleling the railroad to become wet and sloppy, which pedestrians could avoid by using the railroad track. There was a public road on both sides of the railroad, and on each side of the track there was a smooth, well-beaten path. There was some testimony tending to show that the place where deceased met his death was a thickly settled country community on the edge of Montmorenci, and that the public since the building of the railroad in 1830 had been accustomed to use the track as a pathway, notwithstanding the signboards placed at the crossings by the defendant some years previous to the death of intestate forbidding such use.

There was testimony that the engine was being operated that night without a headlight, having run from Whitepond by Montmorenci to Aiken, 27 miles, without such

light, and that at Alken the engineer placed a lantern in front for a light on the protest of a policeman. It was in testimony, also, that the train was running behind schedule time, and that the speed near the place where the body was found was 45 miles an hour, and that no signal was given at Humphrey's crossing, not far east from where the body was found. For a considerable distance before reaching this spot the track was straight and downgrade. It is alleged that the train struck plaintiff and killed him as he was walking alongside of the track in a populous community, where the public has been constantly using the track as a walkway, while running its train at a reckless speed on a dark night without headlight and without giving the signals required by statute. The defendant, besides a general denial, alleged that, if deceased was killed by contact with the defendant's train, he brought it about by his own negligence in going upon the track of defendant in an intoxicated condition and lying down thereon.

In granting the nonsuit, Judge Memminger held that there was no evidence of negligence on the part of defendant, that there was no evidence that the absence of a headlight was the proximate cause of the injury, that the deceased was a trespasser, and defendant owed him no duty except not to injure him willfully or wantonly after discovery on the track, and they owed him no duty to discover him. Further, that the facts show that the deceased was drunk and asleep on the track, and that his own negligence was the cause of his injury.

The testimony as to deceased's intoxication was meager. The witness Shuler testified that he saw Woodward that afternoon, but was not right near him, and that he seemed as if he had been drinking, judging by his talk and the fact that he staggered a little, or was not steady in his walk. This was a number of hours before the time of his death. On the other hand, there was testimony that the deceased was seen talking to the section master in an ordinary way eight or ten minutes before the arrival of the train, just before he started for home. His body was found 820 yards from the depot and 700 yards from his home. So that on a dark rainy night he walked nearly a half

mile to the spot where he died, and the train ran from that spot to the depot all in eight or ten minutes. Can it be said that the evidence is conclusive that deceased was drunk and asleep on the track? If he was asleep with his head between the cross-ties, as when found, is it conclusive that the train could have struck him, if his head was level with the cross-ties, as one witness testified he was found lying?

[1] We think the court was clearly in error in basing the nonsuit on the ground that the evidence showed conclusively that deceased caused his own death by being drunk and asleep on the track.

[2] It was much debated in argument whether the testimony showed that the deceased was a trespasser or a licensee. Let us waive that question, and for the purpose of this appeal assume that deceased was a trespasser. The rule of law generally applicable in such case is that the railroad company owes to a trespasser on its track the duty of so operating its trains as not to injure him wantonly or by such gross negligence as indicates a reckless disregard of human life. *Smalley v. Railroad Co.*, 57 S. C. 243, 35 S. E. 489; *Haltiwanger v. Railroad Co.*, 64 S. C. 8, 41 S. E. 810.

[3] We think the testimony was sufficient to carry the case to the jury on the question of recklessness. The speed of the train on a dark night running without headlight and without regarding the statutory signals, through a thickly settled community, with the knowledge that many people were accustomed day and night to use the track as a walkway, would seem to warrant submission to the jury to determine whether the conduct of defendant's employes was merely inadvertent, or was in reckless disregard of human life. *McKeown v. Railroad Co.*, 68 S. C. 488, 47 S. E. 713.

[4] The failure to give the statutory signals is competent testimony on the question of recklessness. *Goodwin v. Railroad Co.*, 82 S. C. 327, 64 S. E. 242; *Rowe v. Railroad*, 85 S. C. 25, 66 S. E. 1056.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(137 Ga. 196)

OWLS CLUB et al. v. TALBOT et al.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***INTERLOCUTORY DECREE.**

There was no abuse of discretion on the part of the trial judge in granting the interlocutory decree, under the evidence in this case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. W. Talbot and others against the Owls Club and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Madison Bell and Mark Bolding, for plaintiffs in error. Cox & Cloud, Anderson, Felder, Rountree & Wilson, and Geo. P. Whitman, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 184)

EDWARDY v. MOORE et al.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***DENIAL OF INJUNCTION.**

Under the facts and pleadings disclosed in the record, the court did not err in granting the order denying the prayer for injunction and receiver.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. T. Edworthy against W. L. Moore and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Burton Smith, for plaintiff in error. Jackson & Orme and King, Spalding & Underwood, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified, and HILL, J., not presiding.

(137 Ga. 196)

DANIEL v. McDONALD & WEAVER.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

No error of law is complained of, and the evidence supports the verdict.

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action between J. G. Daniel and McDonald & Weaver. From the judgment, Daniel brings error. Affirmed.

Calhoun & Rambo, for plaintiff in error. Hawes & Pottle, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(137 Ga. 188)

HAYGOOD v. STATE.

(Supreme Court of Georgia. Dec. 12, 1911.)

*(Syllabus by the Court.)***1. ASSAULT AND BATTERY (§ 66*)—JUSTIFICATION—ABUSIVE LANGUAGE.**

Opprobrious words or abusive language, which may, under the provisions of the Code of this state (Pen. Code 1910, § 108), be given in evidence as a justification for an assault, or an assault and battery, are such as are used by the person assaulted or beaten, at the time of the assault, or assault and battery.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 95; Dec. Dig. § 66.*]

2. JUSTIFICATION OF ASSAULT.

Upon review of the decisions in Mitchell v. State, 41 Ga. 527, and Berry v. State, 105 Ga. 683, 31 S. E. 592, this court declines to overrule them, as to the point above decided.

Certified Question from Court of Appeals.

J. W. Haygood was convicted of an assault, and brings error. Questions certified from the Court of Appeals. Questions answered.

The Court of Appeals certified to the Supreme Court the following question: "In a prosecution for assault and battery, can the accused give in evidence, as a justification of the alleged assault and battery, opprobrious or abusive language written and published of him by the person upon whom he made the alleged assault and battery? In this connection counsel for the plaintiff in error requests the Court of Appeals to call the attention of the Supreme Court to the cases of Mitchell v. State, 41 Ga. 527, and Berry v. State, 105 Ga. 683, 31 S. E. 592, for the purpose of having the decisions in these cases reviewed and overruled."

J. T. Hill, for plaintiff in error. A. J. McDonald, Sol., for the State.

LUMPKIN, J. The question propounded by the Court of Appeals is concluded by the decisions in Mitchell v. State, 41 Ga. 527, and Berry v. State, 105 Ga. 683, 31 S. E. 592. In the latter case the ruling made in the former was reviewed, but the members of the court were equally divided in opinion as to whether it should be overruled, and so it remained of force, as, under the statute, the concurrence of five Justices was required to overrule a decision made by three Judges prior to the increase in the number of Justices upon the Supreme Bench. The request is again made to review and overrule those decisions. After consideration, we decline to overrule them as to the point now before us. The argument in their favor was clearly stated in the opinion of Mr. Justice Little in the Berry Case.

[1, 2] At common law opprobrious words or abusive language did not justify an assault. The Legislature of this state saw fit to modify the common-law rule to some extent. Section 103 of the Penal Code of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

1910 reads as follows: "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury." The question before us turns upon the proper construction of the expression that the defendant "may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten," upon the trial of an indictment for an assault, or an assault and battery, as matter of justification, to be determined by the jury. When does the statute contemplate that such words must have been used, in order for them to be introduced in evidence as matter of justification? Only two possible constructions can be placed upon it—either that it means words used at the time of the assault, or assault and battery, or else words used at any time whatsoever, though it may have been years before. There are no words in the section of the Code from which a construction fixing a time between these two limits could be derived. The court cannot say that words used a day or a week or a month before the transaction may be proved, and amount to a justification in the determination of the jury; but words used 5 years, 10 years, or 20 years before will not do so. In Alabama a somewhat similar statute has been passed, but it authorizes proof of words used at the time of the battery or reasonably near thereto. There are no such words in our statute. If the construction is adopted that the word "used" by the person assaulted or beaten means words used at the time of the assault or battery, it gives to opprobrious or abusive words at the time of the transaction a status as a part of such transaction, leaving their effect as to justification to be determined by the jury. If the other construction is adopted, it means that the Legislature intended to confer upon the jury the right to declare a battery justified for any such words used at any indefinite time in the past. The language of the section quoted seems also to be more applicable to spoken words than to published libel.

Again, the general theory of the criminal law which justifies the use of force upon the person of another is for protective purposes, not for revenge, or to allow an individual to take into his own hands the punishment of past wrongs. The construction which is placed upon the statute under consideration puts it in harmony with this general principle of criminal law, except that it recognizes that passion may be inflamed by opprobrious or abusive words used in the presence of another to such a degree that the jury may

fairly treat them as in the nature of verbal acts, or as the equivalent of an assault by the person using them upon the other party, justifying a use of force by the latter not disproportioned to the circumstances of the case. To place upon the words of the statute the other construction mentioned would be to attribute to the Legislature the intention of allowing each individual to avenge or punish past wrongs done to him by the use of opprobrious or abusive words, however long after they were uttered, leaving the jury to say whether he was authorized to inflict such punishment. We recognize the sense of anger, of wrong, even of outrage, which may arise from opprobrious and abusive words, or from libelous publications. But we do not think that the Legislature intended to authorize each individual to punish one guilty of a past wrong so inflicted, and yet prohibit him from executing punishment or vengeance for wrongs which may be of even a graver character. All the Justices concur, except FISH, C. J., disqualified.

ATKINSON and HILL, JJ., concur specially, because they are bound by the former decisions, which cannot be overruled, as the necessary number of Justices do not concur in so doing, though, as an original proposition, they might hold otherwise.

(70 W. Va. 68)

PARDEE et al. v. CAMDEN LUMBER CO.
et al.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1911.)

(Syllabus by the Court.)

1. INJUNCTION (§ 52*)—INJURY TO GROWING
TIMBER—ADEQUATE REMEDY AT LAW.

As growing timber is part and parcel of the land on which it stands, wrongful destruction thereof is an injury to the land itself, not adequately remediable by an action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

2. INJUNCTION (§ 52*)—PROTECTION OF OWNER
OF STANDING TIMBER.

An owner of land with standing timber thereon has a legal right, not sustained by legal remedies, to keep the timber in its natural state until such time as he may see fit to alter its character and incidents by severance, wherefore equity, upon a proper application therefor, will interpose its remedies for protection thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

3. INJUNCTION (§ 52*)—CUTTING STANDING
TIMBER—PLEADING.

To obtain an injunction to prevent such a trespass, it is not necessary to allege the insolvency of the trespasser nor any other circumstance rendering an action at law futile or unavailing as a remedy for the injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

4. INJUNCTION (§ 38*)—CUTTING TIMBER.

When the title to land is in dispute, and an action of ejectment has been, or is about

to be, instituted by the claimant out of possession, he may enjoin the other from cutting timber on the land pending the determination of the question of title in the law court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

5. INJUNCTION (§ 163*)—DISSOLUTION.

In such case a verdict for the defendant in the law action, not carried into judgment, does not justify dissolution of the injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 163.*]

6. CONFLICTING DECISIONS.

In so far as they conflict with the principles here declared, the following decisions and others of their class are disapproved and overruled: *Marcum v. Marcum*, 57 W. Va. 285, 50 S. E. 246; *Curtin v. Stout*, 57 W. Va. 271, 50 S. E. 810; *Stephenson v. Burdett*, 56 W. Va. 110, 48 S. E. 846, 10 L. R. A. (N. S.) 748; *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112; *Cresap v. Kemble*, 26 W. Va. 603; *Schoonover v. Bright*, 24 W. Va. 698; *Cox v. Douglass*, 20 W. Va. 175; *Western M. & M. Co. v. Callen Coal Co.*, 10 W. Va. 250; *McMillan v. Ferrell*, 7 W. Va. 223.

Appeal from Circuit Court, Webster County.

Bill by Barton Pardee and others against the Camden Lumber Company and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

Haymond & Fox and Morton & Wooddell, for appellants. W. S. Wysong, Linn & Byrne, and B. P. Hall, for appellees.

POFFENBARGER, J. This appeal from an order dissolving an injunction awarded to prevent the cutting of timber on a tract of land, the title to which is in dispute, pending an action of ejectment to determine the title, would necessarily and inevitably fall under a rule or principle often declared by this court, if we should adhere to it. Unless the trespass itself constitutes irreparable injury, none is shown, for there is no allegation of insolvency of the trespasser nor of any other circumstance precluding recovery of such compensation in money as the law gives for the injury done and threatened by an action.

[1] In 1874, in the case of *McMillan v. Ferrell*, 7 W. Va. 223, this court prescribed, as being essential and indispensable to a bill to prevent the cutting of timber, averments of good title in the plaintiff, trespass by the defendant, and the insolvency of the latter or some other circumstance, rendering an action for damages futile or unavailing, and that doctrine has been uniformly maintained ever since. *Curtin v. Stout*, 57 W. Va. 271, 50 S. E. 810; *Marcum v. Marcum*, 57 W. Va. 285, 50 S. E. 246; *Stephenson v. Burdett*, 56 W. Va. 110, 48 S. E. 846, 10 L. R. A. (N. S.) 748; *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112; *Cresap v. Kemble*, 26 W. Va. 603; *Schoonover v. Bright*, 24 W. Va. 698. However, this rule seems not to have commanded uniform approval by the public, nor by the members of the legal profession, and in later

years, under conditions greatly enhancing the value of timber and altering, to a considerable extent, the method of handling it, the dissatisfaction has grown in extent and intensified in degree. Out of the great disfavor into which the rule has thus fallen, an insistent demand for its abolition has brought forth earnest, able, and laborious inquiry as to the soundness of the reasoning upon which it was established, resulting in increased dissatisfaction, which has extended even to members of this court, as will appear from official expressions of personal disapproval of the doctrine or principle of the line of decisions just mentioned.

Under these circumstances, we feel it our duty to re-examine the proposition and thoroughly test its soundness by the application of legal and equitable principles. The chief restraint or limitation upon the overruling of decisions is the inexpediency and injustice of disturbing property rights. Hence it has been said that a line of decisions enunciating a principle which has become a rule of property, or under which property rights have vested by reason of its observance and adoption in contracts, will not be overruled. Here there is no such limitation. To abolish the rule or principle under consideration neither destroys nor impairs any property right or incident. On the contrary, the abolition thereof will conserve and protect such rights and incidents, for no man can be said to have a property right in that which amounts to a trespass against his neighbor or a stranger. The effect will be to give the admitted and acknowledged property owner a more complete remedy for the vindication of his property rights. We regard the rule as one pertaining to remedy only as regards the trespasser who is the sole beneficiary thereof. Hence, if the application of the test above mentioned shall disclose its unsoundness, we shall feel entirely free to abrogate it. Having created or ordained it, this court may consistently discard it, without injury to any person and to the great relief of property owners.

Supposed adequacy of the legal remedy for the cutting of timber, regarded as a mere trespass upon land, constitutes the basis of the rule. If the legal remedy is not adequate, the whole doctrine necessarily fails. Whether it is must be determined by reference to the general policy of the law as disclosed by its application in analogous and related cases. In other words, we must see to what extent the remedies afforded by courts of law and equity protect and vindicate the right of an owner of property to keep it in such condition as he desires. If we find the general object to be the maintenance of this right, respecting all other kinds of property, we must necessarily say it ought to extend to the right of an owner

of timber to allow it to stand upon his land in its natural state as long as he desires it to do so. Timber cut down and converted into mere logs and lumber is plainly not the same thing as standing timber. It is equally manifest that the legal remedies are wholly inadequate to reconvert logs and lumber into live, standing, growing trees. Our rule permits a mere trespasser to utterly destroy the forest of his neighbor, provided he is solvent and able to respond in damages to the extent of the value thereof. It can neither restore the forest, nor prevent its destruction. It allows the property to be wholly altered in nature and character, or converts it into a mere claim for damages. After the timber has been cut, the owner may recover possession thereof by an action of detinue, or, waiving that, may recover its value, but this does not in either case restore the property to its former state, nor replace it by the return of an equivalent. The general principles of English and American jurisprudence forbid such a result. They guarantee to the owner of property the right, not only to possession thereof and dominion over it, but also its immunity from injury, unless it be of such character that it may be substantially replaced. On the theory of adequacy of the legal remedy an injunction to prevent the sale or destruction of certain kinds of personal property will be refused, but the principles upon which this conclusion stand cannot be extended to all forms of property either real or personal, and the courts do not attempt so to extend it. Compensation in damages is adequate in all those instances in which the property is injured or destroyed may be substantially replaced with the money recovered as its value. For instance, the world is full of horses, cattle, sheep, hogs, lumber, and many other articles. Ordinarily, one of these may be replaced by another just as good. This principle is applied in a proceeding for specific performance of contracts for the sale of corporate stocks. If the stock belongs to a class found generally in the market for sale, equity refuses specific performance of the contract, because other stock of the same kind can be purchased with the money recovered as damages. If, on the other hand, the stock is limited and unobtainable in the market, specific performance will be enforced. Similarly, as no two pieces of land can be regarded as equivalent in value and character in all respects, equity will always enforce specific performance of a valid contract for the sale thereof. If personal property possesses a value peculiar to its owner, or, as it is generally expressed, has a pretium affectionis, equity will vindicate and uphold the right to the possession thereof and immunity from injury by the exercise of its extraordinary powers. We observe, also, that the law gives a remedy for the possession of personal property, however trivial

its value or character may be. It does not limit the owner to a claim for damages, unless the property has gone beyond the reach of its process. As equity follows the law, and, as far as possible, supplies omissions therein, so far as may be necessary to the effectuation of substantial justice, it vindicates the right of an owner to enjoy his property without injury or molestation by the exercise of its preventive powers; but, harmonizing with the great divine rule of help to those who help themselves, equity goes no further than is necessary. Therefore, if a man threatens to take away or kill his neighbor's horse, a court of equity will not interfere by injunction, because the owner may recover the value of that horse and buy another in the general market of substantially the same kind or value. For the same reason, it refuses to enforce specific performance of a contract of sale of a horse. But, if a man is about to destroy his neighbor's heirlooms, things having a peculiar value and insusceptible of replacement by purchase in the market, the legal remedy is not adequate, and a court of equity will, therefore, protect the possession and title of the owner by the exercise of its extraordinary powers. Again, the owner of a fund misappropriated or diverted by a trustee or other custodian thereof, or the owner of a fund representing the proceeds of property wrongfully taken from him, may in equity follow that fund up and charge the amount thereof upon property into which it has been invested, even though he has a right of action at law against the trustee, custodian or wrongdoer. So a creditor, having a lien upon a particular fund or particular property for his debt, may charge that fund in equity, and will not be turned away merely because he has a right of action in a court of law against the debtor. In all these cases, the remedy by law is inadequate, because it does not enforce the right of the injured party to the full extent thereof. Such being the general policy of the law, do we not violate it by denying to the owner of standing timber his clear and indisputable legal right to have it remain upon his land until such time as he shall see fit to convert it into a different kind of property? Moreover, standing timber is everywhere regarded as part of the real estate upon which it grows. The cutting thereof converts it into personal property, and wholly changes its legal nature and incidents. Being a part of the land itself, it has no legal equivalent in nature or value, for no two pieces of land are alike in all respects, nor is a piece of land, stripped of its timber, with a right of action for the felled timber or for damages, the equivalent of the same land with the timber on it. Courts universally hold that all contracts relating to real estate are subjects of equitable cognizance, because they relate to real estate. A distinction is made between contractual

rights respecting real estate and liability growing out of trespasses thereon. Because of the relation of landlord and tenant, a court of equity will always prevent such misuse of the property by the tenant as amounts to waste and injury to the freehold. Nevertheless, this court and others have denied the same sort of relief in cases of like injury by trespassers. The wrong done by a tenant and that done by a stranger being of the same character and of equal gravity, courts of equity grant relief in the one case, and deny it in the other, upon the theory of adequacy of the legal remedy in the one and inadequacy thereof in the other. This difference rests, to some extent, upon reason and legal principle. A landlord cannot sue his tenant in ejectment or unlawful detainer, and recover possession while the term lasts. In the case of a stranger he may sue at any time. It does not follow, however, that the legal remedy against the stranger is adequate. The argument amounts only to this: That there is a legal remedy in the one case, and none in the other. It does not extend to the question of adequacy of the remedy in the case in which there is one for the reasons we have stated. Of course, the legal remedy is adequate, if the trespass amounts to nothing more than the trampling of the grass or throwing down of the fences, acts in no way affecting the substance of the estate, but the adequacy of the remedy in such cases does not argue efficacy in those cases in which part of the real estate is actually severed and carried away, to the injury and detriment of the inheritance. In *Whitehouse v. Jones*, 60 W. Va. 680, 690, 55 S. E. 730, 734 (12 L. R. A. [N. S.] 49), Judge Brannon condemned the rule now under consideration in the following terms: "It seems to me that this doctrine is now, always has been, unsound. Timber is of such inestimable value for building and repairing houses and fences, for fuel, and other purposes. It takes half a century or more to regrow it when once removed. A trespasser, without title, cuts it to-day, to-morrow, and on. Must you sue him in suit after suit for each day's or week's depredation? Or will you wait until he gets through, then have a long lawsuit? The timber is gone forever. The party has become insolvent. The remedy is not full and adequate."

Upon the principles and considerations here stated, we are of the opinion that the adoption of this rule was a deviation from fundamental principles of our jurisprudence. It is no doubt attributable to a lack of appreciation of the true character of timber, due to its former abundance and comparative worthlessness. In early days it was regarded as an incumbrance and burden upon lands. Having nothing but forests, the chief object or purpose of landowners everywhere was to get rid of the forests, and prepare their lands for agriculture. There was an abundance of timber, and no market for it.

The soil was unillable because of the timber. Hence it was a common practice for owners to cut down the finest of timber, faultless oak, poplar, pine, walnut, and hickory, and burn it upon the premises in log heaps, upon the theory of a disposition of an incumbrance and obstacle to the growth and development of agriculture as a pursuit. Anybody who desired to cut a tree on his neighbor's land in the pursuit of wild animals or the search for deposits of honey had a tacit permission to do so. Forest fires were not regarded as evils, unless they happened to destroy fences, buildings, or other improvements or agricultural implements or products. Timber was not regarded as anything more than an ordinary commercial article, and almost worthless because of its abundance. The prevalence of this estimate of its character was naturally calculated subtly to influence the minds of the judiciary, for the judges were men then, as they now are and always have been, mingling with the populace, and insensibly and unconsciously absorbing, to a greater or less extent, the prevailing sentiment of the people. The error, thus born, has been revealed by the great change of conditions. Timber having become scarce and of great value, the layman, lawyer, and judge has in recent years given the subject more careful, critical, and profound consideration, with the result that the error is practically admitted everywhere.

[2] Violative of principle, as we think, the rule is also contrary to the great weight of authority. In the general struggle for relief from it, courts have in some instances based distinctions upon the relative values of the timber and the land, saying the cutting of timber, constituting the chief value of the land, will be enjoined, but we think a clear case of trespass by the cutting of timber should always be enjoined. In one sense a small quantity of timber on land is more indispensable to its enjoyment than a large quantity. As to the weight of authority, see 5 Pom. Eq. Jur. § 495; 22 Cyc. 832; High, Inj. §§ 671-679. Our conclusion, treating growing timber as part of the real estate and placing it on the basis of minerals, applies the law enunciated in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, allowing an injunction to prevent irreparable injury pending the determination of a dispute as to title by an action at law. This suit for an injunction was ancillary to an action of ejectment pending between the parties for that purpose.

[4] On the motion to dissolve the injunction, a verdict in favor of the defendants in the action of ejectment was read, and it is here invoked in justification of the decree appealed from. In our opinion it has not such force and effect.

[5] The order recording it is interlocutory. Though the verdict constitutes a basis for judgment, it is not a judgment. Besides,

it may be set aside, and thus wholly fail. It is said a motion to set this verdict aside was pending, but that, as it was not incorporated in this record, it cannot be considered. Deeming nothing short of a judgment conclusive of the question of title, we refrain from discussion of the question of practice. We know, as matter of law, the verdict alone is not a final adjudication, and are not at liberty to forecast the final action of the trial court. Presumptively the verdict is right, but, to be effective as a matter of adjudication, it must be carried into judgment.

For the reasons here stated, the decree complained of will be reversed, the injunction reinstated, and the cause remanded.

BRANNON, J. This note does not evince any dissatisfaction with the opinion prepared by Judge POFFENBARGER. I write it only to give a short personal reason why I agree to overrule many decisions denying equity jurisdiction by injunction against cutting timber, in addition to those given by Judge POFFENBARGER. I am averse to overrule decisions; but the rule of those decisions is so bad that it ought not to stand. I expressed my dissatisfaction with the rule denying injunction on page 690 of 60 W. Va. 55 S. E. 730, 12 L. R. A. (N. S.) 49, in case of *Whitehouse v. Jones*. I write this note to say that a strong rule or argument to justify a court in overruling an erroneous decision is this: That, when the continued operation of the erroneous decision will do more harm than would its overruling, it should be overruled. I referred to this rule in my opinion in *Weston v. Ralston*, 48 W. Va. 180, 36 S. E. 446. I find the case of *Calhoun Co. v. Ajax Co.*, 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17, laying down that position. It holds: "A wrong decision should not be followed unless it has been a rule of action so long, and relied upon to such an extent, that greater injustice and injury will result from a reversal, though wrong, than to observe and follow it." The erroneous decisions overruled in this case have been running on doing mischief all the time. Overruling them will avoid that mischief and do no harm, especially as it only relates to remedy.

(70 W. Va. 83)

PITTSBURG HYDRO-ELECTRIC CO. v. LISTON.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1911.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 35*)—CONDEMNATION FOR ELECTRIC COMPANIES—PUBLIC USE.

The Legislature may authorize the taking of private property for public use, upon making provision for just compensation therefor, by electric power, heat, light, and traction companies. Clause 6 of chapter 13, Acts [Ex.

Sess.] 1907 (Code Supp. 1909, c. 42, § 2, cl. 6), amending and re-enacting section 2, cl. 6, c. 42, Code 1899 (Code 1906, c. 42, § 2, cl. 6), is not an unwarranted exercise by the Legislature of the power of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 80; Dec. Dig. § 35.*]

2. EMINENT DOMAIN (§ 67*)—PUBLIC PURPOSE—EXPEDIENCY.

Whether it is expedient, appropriate, or necessary to provide for a public service of a particular kind or character is a legislative, not a judicial, question.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165-167; Dec. Dig. § 67.*]

3. EMINENT DOMAIN (§ 67*)—JURISDICTION—PUBLIC USE.

Courts are limited in their inquiry to the question whether the particular service provided for is a public service.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165-167; Dec. Dig. § 67.*]

4. EMINENT DOMAIN (§ 10*)—EXERCISE OF RIGHT—AGENCIES.

The Legislature may select the agencies through which it will exercise the right of eminent domain, including foreign corporations.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

5. EMINENT DOMAIN (§ 10*)—FOREIGN ELECTRIC POWER COMPANIES.

Section 30, c. 54, Code 1906, confers upon foreign electric power, light, heat, and traction companies that have complied with the conditions of law entitling them to do business in this state, and that propose to serve the public, equal right of eminent domain with like domestic companies, and subjects them to the same regulations, restrictions, and liabilities.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 10.*]

(Additional Syllabus by Editorial Staff.)

6. EMINENT DOMAIN (§ 1*)—DEFINITION.

"Eminent domain" is the right or power of a sovereign state to appropriate private property to particular use, for the purpose of promoting the general welfare. It is an inherent, inalienable, sovereign right, and lies dormant in the state until the Legislature sees fit to exercise it, either directly, or by investing some corporation, or individual, with the power to exercise it.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2362-2366; vol. 8, p. 7649.]

Error to Circuit Court, Preston County.

Action by the Pittsburgh Hydro-Electric Company against Elizabeth Liston. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Trotter, for plaintiff in error. P. J. Crogan and A. Bliss McCrum, for defendant in error.

WILLIAMS, P. Elizabeth Liston has obtained a writ of error to an order of the circuit court of Preston county, made in a condemnation proceeding against her by the Pittsburgh Hydro-Electric Company, investing said company with title to 15.45 acres of her land at the fork of Cheat river and Big Sandy creek in Preston county, W. Va., upon

payment to her, by it, of the sum of \$500, ascertained by commissioners appointed in the manner provided by law to be a just compensation therefor.

[1] Condemnation proceedings were instituted by virtue of chapter 13, Acts [Ex. Sess.] 1907, amending and re-enacting section 2 of chapter 42, Code 1899. That portion of the act applicable to this case is as follows, viz.: "Sec. 2. The public uses for which private property may be taken or damaged, are as follows: * * * Sixth. For telegraph and telephone companies and electric power, heat, light and traction companies, when for public use. That telephone and electric light, heat, traction and power companies desiring to extend their lines in this state may place poles and wires along any county road, by and with the consent of the county court through which such lines may pass; provided, that all such poles and wires shall be placed and erected so as not in any way to interfere with the public use of such road or with any fruit or shade trees or with any private property; and provided, further, that when any such company desires to erect its poles along any street of any incorporated city, town or village, the consent of the council of such city, town or village shall first be obtained. Provided, that any power company using or occupying any highway under this act, shall furnish to any person, company or corporation, along, upon or near its line or lines desiring the same, every kind of service at the minimum charge for like services charged to any other person, company or corporation for like service, and upon the same terms, if amount of power consumed and conditions and expenses to such power company be the same; should at any time the power generated by any power company be insufficient to furnish all persons, companies and corporations the amount of power desired, such power company shall first serve municipal corporations having contract therefor; second, persons, companies or corporations engaged in manufacture or transportation; and third, individual customers. Any violation of any provisions of this clause shall work a forfeiture of all rights acquired under it."

The constitutionality of this statute is assailed by counsel for Mrs. Liston, on the ground that it authorizes the taking of private property for private use, which is in violation of the spirit of the Constitution. The authorities uniformly hold that the eminent domain exists only for the public welfare, and that private property cannot be lawfully taken for private uses. The exercise of the sovereign power for such a purpose would be an usurpation of power never delegated to the state by the people, an unwarranted invasion of the rights of private property which has always been a right sacred in the eyes of the English common law, and still held sacred by the laws of

all the states of the Union. An owner of property can only be compelled to surrender it to subserve the public good, and even then only when just compensation is paid to him, or secured to be paid. No court, so far as we know, has ever held that private property can be taken for private use. And, on the contrary, none of them hold that a state cannot lawfully take private property for public use.

[8] Lewis, in his excellent work on Eminent Domain (section 1), defines "eminent domain" to be "the right or power of a sovereign state to appropriate private property to particular use, for the purpose of promoting the general welfare." It is an inherent, inalienable, sovereign right, and lies dormant in the state until the Legislature sees fit to exercise it, either directly, or by investing some corporation, or individual, with the power to exercise it. It is interesting to note the various purposes for which the Legislatures of the states have successively exercised the power of eminent domain, as discovery and invention would bring about new social and economic conditions calling for its exercise in relation to some matter not theretofore thought of. In the early history of our country the needs of the public were few, and the eminent domain was exercised in respect to a very limited number of subjects. Gristmills and highways were about the first, and for some time the only, material things in which the public had a common use. But since the advent of steam and electric power, many water mills which once flourished, served large communities, have passed into disuse. And while the old mill acts are still retained as part of the law of this state, they are seldom, if ever, invoked in condemnation proceedings. At first public roads, turnpikes, canals, and navigable streams furnished the only means for travel and commerce; but later on, when steam began to be used as a motive power, the eminent domain was applied in the promotion of railroad development, as another means of serving the public. The following are some of the many subjects which the Legislatures of many of the states have deemed of sufficient public utility to justify the taking of private property, viz.: Gristmills, public roads and turnpikes, steam and street railroads, canals, pipe lines for carrying water, oil, and gas, sewers and drains, public buildings including schoolhouses, mining privileges, irrigation of arid lands, and drainage of swamp lands. And the courts have uniformly held that the taking of private property for such purposes was a lawful exercise of the state's power. In more recent years the discovery of that hidden, magic force known as electricity, and all the varied uses to which it has been applied to serve the wants and conveniences of mankind, have again called forth the exercise, by the state, of the right of eminent domain, for a purpose not there-

tofore contemplated. Until the discovery of this new force, and the invention of means by which it could be transmitted, controlled, and applied, so as to give light, heat, and power, only a limited use could be made of the natural waterfalls which abound in this state. It is not practicable to transmit water power a very great distance, and, in order to utilize the waterfalls as a direct motive power at all, mills and factories would have to be erected near by, and very many of such waterfalls are found in sections remote from railroads. But these waterfalls, however remote from railroad development, may be utilized to develop electricity, and electricity possesses the quality of being separated and transmitted by means of wire over hill and valley for a long distance, without a very great diminution of its force. By this means water power can be converted into electric power, and transmitted over a wide area, and be made to serve the uses of a greater number of people than any other physical force yet discovered. Moreover, electricity possesses the combined qualities of heat, light, and power, and is therefore capable of supplying more of man's wants and needs than any other natural force now known. For some, or all, of these different purposes, it is now in almost universal use in every civilized country on the globe. But electricity is not self-generating; some other force or power is necessary to produce it. Either steam or water power must be employed in the first instance before this subtle and indescribable force, known as electricity, is developed. And the Legislature, realizing that the numerous natural waterfalls in the state could be made to serve the public through the means of "electric power, heat, light, and traction companies," invested them with the right of eminent domain. They are authorized to take the lands of private persons upon making just compensation therefor, when their purpose is to serve the public. Is there such a general demand for electricity, for heating and lighting, and as a motive power, as to warrant the Legislature in extending the right of eminent domain to companies created for the purpose of supplying it? This is a legislative, not a judicial, question, and the Legislature has answered it affirmatively by the passage of the act in question. Its answer is conclusive on the court.

[2] The expediency, or propriety, of extending the right of eminent domain to any particular subject, provided each member of the community is given equal right and privilege with respect thereto, is a question for the Legislature only, and with it the courts have nothing to do. *Railroad Co. v. Railroad Co.*, 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534.

[3] The only question which the courts are authorized to determine is whether or not the use intended is, in effect, a public use.

This is conceded to be a judicial question. 1 *Lewis on Em. Dom.* (2d Ed.) § 251; *Varner v. Martin*, supra. But it is often a perplexing question. A public use has been variously described, but never comprehensively defined, by the courts and by text-writers. Judge Cooley, in his excellent work on *Constitutional Limitations* (7th Ed. p. 766), says: "We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use." It is not every kind of benefit that a community may derive from an enterprise which is proposed to be located in its midst that will justify the taking of private property. A merely indirect and collateral benefit is not sufficient. The public must have some direct and certain right or interest in it, or control over it. Each case, however, must be determined by the application of certain general and well-recognized principles.

Light, heat, and power are essential to the comfort and convenience of the people of a community, and electricity is capable of supplying them. It can be distributed to each member of a community in such quantity as he may need. It may not only be applied in operating street railways, and in the running of large factories, but the farmer can, if he wants to, utilize it in lighting his house, and in operating machinery to saw wood and grind grain for his family and cattle. He could also relieve his wife of much labor by using it to operate the washing machine, the sewing machine, and the churn. But it is not necessary that all the people of a community should take a portion of the electric current in order to constitute the use a public one. It is sufficient if each member of the community has an equal right to a portion of it on equal terms with every other member. That some of the residents of a city do not use gas for lighting or heating, or that some elect not to have their houses supplied with water from the public reservoir, or that some refuse to avail themselves of the general convenience afforded by the telephone, affords no reason for holding telephone, gas, water, and electric power and light companies not to be public service corporations. All the residents of the city have the right to these conveniences, on the same terms with those citizens who do enjoy them, and that is sufficient to determine the service to be a public, and not a private, use.

Many states have passed statutes similar to our own, conferring the right of eminent domain upon electric companies chartered for the purpose of furnishing light, heat, and power to the public, and these statutes have been generally upheld by the courts as constituting a proper exercise of the right of eminent domain. 1 *Lewis on Em. Dom.* § 268, and numerous cases cited in note 70. We have examined nearly all of those cases, and cite the following specially as supporting

the constitutionality of such statutes: *Jones v. Electric Co.*, 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122; *Light & Power Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; *McMeekin v. Power Co.*, 80 S. C. 512, 61 S. E. 1020, 128 Am. St. Rep. 885; *Manufacturing Co. v. Light & Water Co.*, 76 S. C. 95, 56 S. E. 664; *Stoy v. Hydraulic Power Co.*, 166 Ind. 316, 76 N. E. 1057; *Improvement Co. v. Pier*, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538; *Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; *Matter of Niagara, etc., Power Co.*, 111 App. Div. 686, 97 N. Y. Supp. 853; *Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567; *Electric Co. v. Drake*, 46 Or. 243, 78 Pac. 1031; *Walker v. Power Co.*, 160 Fed. 857, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725. This last case involved the constitutionality of an act of California.

The provision in our statute granting electric power, heat, light, and traction companies, when for public use, the right to erect their poles and stretch their wires along public roads, by and with the consent of the county court, and, if in a city, town, or village, by and with the consent of the authorities thereof, does not invalidate the act. Neither is the act invalidated by the provision which requires such companies to furnish service to persons along and near its line, when it occupies a public highway, and which classifies the public to be served into three classes, giving the preference: First, to municipal corporations; second, persons, companies, and corporations engaged in manufacture or transportation; and, third, individual customers, in the event there is not sufficient current developed to supply all. Such classification is clearly within the legislative jurisdiction, and does not constitute the use a private one.

We think the statute is constitutional, and shows wisdom on the part of the Legislature. The recent discoveries and inventions by means of which electricity has been made to serve the wants of man have created a demand for much of the water power of this state, which heretofore could be of little use, was of comparatively small value, and which for ages past has been allowed to go to waste. It requires more capital to build electric plants and string wires for distributing the current to supply the needs of the people than is generally possessed by the individuals who happen to be the owners of much of the water power, now made valuable because of its new possible use, and, in order that it may be utilized to serve the public, the Legislature has seen fit to clothe such corporations as are chartered for the purpose of supplying such current to the public with the right of eminent domain. A heretofore wasted natural power can thus be made to supply a public need, and the state still retain the right to prescribe reasonable regula-

tions for the protection of the public. For no public service corporation, or company can escape this inherent sovereign power which is always reserved to the state. 1 *Lewis on Em. Dom.* § 246; *Munn v. Illinois* 94 U. S. 113, 24 L. Ed. 77; *Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

That there is now no statute regulating the charges which such companies may make for services to be rendered is immaterial. It is time to prescribe regulations when the company is ready to perform the services. Moreover, it would not be possible to determine, correctly, in advance of the erection of the company's plant, and the ascertainment of the cost of furnishing the light, power, heat, etc., what would be a fair and reasonable charge therefor to the public.

It is insisted that condemnor's petition is bad because it does not aver that it has a contract to supply any municipality, or company. This omission is immaterial. It would certainly be reversing the usual order of things to require a company to obtain a franchise, or contract, to supply the public at a certain fixed rate, before it acquired the land on which to erect its plant, and before it could know whether it would ever be in a position to comply with its agreement. After the company obtains the necessary land on which to build its plant, and the easements necessary for erecting its poles, or towers, and stringing its wire, it may then be able to know at what price it will be able to serve the public. Before this is accomplished a contract as to price would be much a matter of speculation, and one in which the public would likely be the loser. *Harlan v. Centralia, etc., Electric Railway Co.*, 42 Wash. 634, 85 Pac. 344, 7 L. R. A. (N. S.) 198. The condemnor's right depends, not upon contract to supply at a certain price made in advance, but upon the law, and the provisions of its charter. It is bound by law, being a public service corporation invested with the right of eminent domain, to use the property taken for the purposes set forth in its petition, and the order of the court; any other use, when the public needs and demands the service, would be a perversion of its privilege and a violation of its right.

There is nothing in the condemnor's petition which would indicate that it desires to make private use of the electricity which it proposes to generate. It alleges that it wants the land "for the purpose of the supply, storage, and transportation of water and water power and electric power for commercial and manufacturing purposes, and for public purposes and public uses for cities, towns, counties, and other municipal corporations, and for electric street and interurban railways to be operated for public purposes and for other internal improvement companies in Preston county and elsewhere in the state of West Virginia, and for all public purposes and public uses." And further

that it desires to proceed at once in Pleasant district in Preston county to erect and construct reservoirs and water power and electric power plants, for the storage and transportation and supply of water and water power and electric power for the aforesaid purposes. All of these purposes are certainly consistent with the public uses declared by the statute. It should not be presumed that it wants the land for a private use when it alleges that its purpose is to serve the public. It will be time enough for the state to interpose for the protection of the rights of the public when the company begins to pervert the use, if it should ever do so, to the neglect of the public which it proposes to serve. That the petition denominates one of the uses a commercial use does not necessarily mean that the commerce is private. A sale of electric light or power to the public, whether sold to the individual members composing it, or to a municipality for their benefit, is commerce.

[4, 5] The order shows that evidence was produced at the hearing, but the record contains none of it, not even a copy of condemnor's charter. We must therefore assume that the allegations of the petition were properly proven, and that the company is duly authorized by its charter to engage in the business proposed. It was chartered under the laws of the state of Pennsylvania; but the law of this state (section 30, c. 54, Code 1906) extends to it the same rights, powers, and privileges that are conferred upon a domestic corporation created for the same purpose, on compliance with the provisions of law relating to foreign corporations desiring to do business in this state, and subjects it to the same regulations, restrictions, and liabilities that are imposed upon like corporations created by this state. This gives it the right of eminent domain, to be exercised, however, for the public use of the citizens of West Virginia. 1 Lewis on Em. Dom. § 310. The Legislature may confer the power of eminent domain upon a foreign public service corporation. 1 Lewis on Em. Dom. § 374, and numerous cases cited under note 52.

It is insisted in brief of counsel for plaintiff in error that no general public necessity is shown to exist for exercising the eminent domain for the purpose in question. This is not a judicial question, but a legislative one. 1 Lewis on Em. Dom. §§ 255, 596. In undertaking to pass on this question is where a few of the courts of the country have fallen into error.

Whether the necessity for taking the land in question exists in favor of the condemnor is largely a matter for its own determination. Id., § 597.

The order of the lower court will be affirmed.

(70 W. Va. 76)

DOLAN et al. v. DOLAN et al.
(Supreme Court of Appeals of West Virginia.
Dec. 5, 1911.)

(Syllabus by the Court.)

1. DEVISE OF LAND.

Quere, what does the word "surface" alone, without qualifying words, in a devise of land mean? Does it pass minerals in the land?

2. WILLS (§ 584*)—CONSTRUCTION—MINERALS.

The will in this case confers upon Michael P. Dolan the land devised to him, including minerals, except coal.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 584.*]

Robinson, J., dissenting.

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"SURFACE."

Where testator devised to his son the surface of his farm, excepting coal underlying the same, the word "surface" is more limited than the word "land," and prima facie means only "vestimenta terra," but may be used in a secondary sense to denote the whole of the soil down to the center of the earth, except the coal, and, when land is purchased with the exception of mines and minerals, the purchase includes, not merely the surface, but the whole of the subsoil which does not consist of mines and minerals, and surface means not the mere plane surface, but all of the land except mines.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 6813.]

Error to Circuit Court, Harrison County.

Action by John J. Dolan and others against Michael Dolan and others. Judgment for plaintiffs, and defendants bring error. Reversed, and judgment rendered.

Charles Powell, Kemble White, and J. E. Law, for plaintiffs in error. Davis & Davis and Osman E. Swartz, for defendants in error.

BRANNON, J. Patrick Dolan died owner of a very considerable landed and personal estate, leaving five children, John J. Dolan, Mary, Catherine, Anna J., and Michael P. Dolan. He left a will. Its fourth clause reads as follows: "I will and devise to my son, Michael P. Dolan, in fee the surface of my farm at Wolf Summit containing three hundred and seventeen acres, also six acres of the coal underlying said three hundred and seventeen acres to be located around the dwelling houses and buildings on said three hundred and seventeen acres, so as to preserve and protect the said buildings when the residue of the coal underlying the said three hundred and seventeen acres is at any time hereafter mined or removed." In clause 7 is the following language: "I further will and devise to my said daughter Catherine all the coal underlying the said tract of three hundred and seventeen acres of land hereinbefore devised to my son Michael P. Dolan, with the exception of six acres of the coal hereinbefore reserved and devised to my said son Michael P. as hereinbefore mentioned." By

other clauses he made bequests and devises. To his wife his furniture during life, with remainder to Anna J. and Catherine Dolan, and \$1,000 money; and to John J. Dolan 289 acres of land; to his daughter Mary \$1; to Michael P. Dolan all live stock and farming utensils; to Catherine Dolan \$2,000, to be paid by John J. Dolan; to Catherine Dolan a note on Robert Hoggsett for \$2,510.33 and horses; to Annie J. Dolan a like note on Hoggsett; to Anna J. Dolan a brick house in Clarksburg, and a frame house in Wilsonburg; to a son of John J. Dolan a farm of 100 acres and a lot of live stock; to Catherine and Annie J. all money in bank after payment of \$1,000 legacy to his wife.

Michael P. Dolan, claiming to own the oil and gas in the tract of 317 acres devised to him by the fourth clause of the will, leased the same to the South Penn Oil Company for the production of oil and gas, and this company transferred to the Hope Natural Gas Company the gas right estate under the lease. Thus the right to develop oil under lease is vested in South Penn Oil Company, and right to develop gas is vested in the Hope Natural Gas Company. John J. Dolan, Mary Flanagan, Catherine Dolan Burns, and Annie J. Coleman, four of the children of Patrick Dolan, deceased, claiming right to oil and gas in the tract of 317 acres devised to Michael P. Dolan (except a part which they quitclaimed to him), made a lease to John W. Davis for development of oil and gas in a tract of 180 acres, that part of the 317 acres not quitclaimed, and Davis transferred such lease to the Washington Gas Company. Later John J. Dolan, Mary Flanagan, Catherine Dolan Burns, Annie J. Coleman, and the Washington Gas Company brought an action of ejectment against Michael P. Dolan, South Penn Oil Company, and Hope Gas Company to recover the oil and gas in that 180 acres, and recover verdict and judgment for the same, and those defendants come to this court by writ of error.

Did Michael P. Dolan take the oil and gas under his father's will? If he did, the plaintiffs have no title to them. What does the word "surface" in a will mean? Or, rather, what does it mean as used in this particular will, for that is our question?

[3] Briefs of counsel upon this and other questions show great ability and research, but cite a legion of diverse authority confusing and bewildering to the mind. It is said that there is no subject of law on which cases are less useful than wills, as no two are alike, and the particular intent of each, under its own provision, must be the guide. As to this word "surface," a brief says that the English and law dictionaries give it no definition useful in construction of legal writings. It will not do to define it by geometry, "a magnitude that has length and breadth, without thickness, superficies, as a plane surface or a spherical;" nor to define it as does the Standard Dictionary, "the exterior part of

anything that has length, breadth and thickness, the outside of a body." These definitions will not help in this case. They would not give the word "surface" in this will a depth of one inch in soil. Nor do the law authorities definitely define its legal meaning as applicable to land conveyance. Counsel for the plaintiff would limit the effect of the word to the arable or agricultural surface, the depth of the ploughshare. Does it go down to the center of the earth, taking all minerals under the maxim, "Cujus est solum, ejus est usque ad coelum et ad inferos"? I would say that a conveyance of surface of land, without more, means all the solum or land except minerals. Why not minerals? Because the word "land" is not used. If it were, it would take in minerals. The word "surface" is used, more limited, and the courts have said it excepts minerals. The testator has used this particular word never used in ordinary conveyances, which almost invariably use the word "land," which passes everything. Something is meant by the word "surface." McSwinnay on Mines, § 33, says: "'Surface' or 'superficies,' *prima facie*, means, of course, nothing more than mere *vestimenta terra*. Surface may, however, be used in a secondary sense, to denote the whole of the soil down to the center of the earth, except the mines. *Pountney v. Clayton*, 11 Q. B. D. pages 833, 839, 840." When land is purchased, with an exception of the mines and minerals, the purchase includes, not merely the surface, but the whole of the subsoil, which does not consist of mines and minerals. *Pountney v. Clayton*, *supra*. "'Surface' means, not the mere plane surface, but all the land except mines." *Pountney v. Clayton*, S. R. Q. B. Div. p. 840.

[2] Under this principle, devise to Michael P. Dolan by the fourth clause of the will of the 317 acres would except the oil and gas, and leave them in the testator's heirs. But we must look at other parts of the will in connection with that devise, and especially that provision in clause 7, which says: "I further will and devise to my said daughter Catherine all the coal underlying the said tract of three hundred and seventeen acres of land herein before devised to my son Michael P. Dolan." He took the coal from Michael P. Dolan, but took no other minerals. The fact that he put in this clause taking from Michael the coal except six acres shows that he thought that the devise of the surface carried with it all minerals, and therefore it was necessary to make exception of the coal for Catherine. But, in addition, in this seventh clause, the testator goes back in mind to clause 4, and declares that he had devised by it "the said tract of three hundred and seventeen acres of land," not the surface. He used the words "tract" and "land," words of the broadest import to convey the land and minerals in it. It seems plain, taking these two clauses together, that

the testator intended to give Michael the land and everything in it, minerals and all, except the coal. He made one exception from the devise to Michael, and only one, the coal. Clause 7 interprets clause 4. Intent is the controlling guide in a will. Taking these two clauses together, can we think that the testator intended to reserve to himself the oil and gas, and leave it undisposed of by his will to go to his heirs? Can we have any other idea than that he intended to give Michael the land and everything in it, except the coal, and to give that to his daughter?

Another consideration is of great importance upon construction of clause 4; that is, that it is a fixed rule of law that, when a man makes a will, the presumption, in the absence of proofs to the contrary, is that he intends thereby to dispose of his whole estate. *Irwin v. Zane*, 15 W. Va. 646. "In construing wills, words and expressions of doubtful meaning will not be construed, if it can be avoided, so as to create an intestacy. The testator, having made his will, will be presumed to have intended to dispose of his whole estate, unless the contrary shall plainly appear." *Houser v. Ruffner*, 18 W. Va. 244. The Supreme Court of the United States said in *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458, that, where there appears to be a general intent on the testator's part to make by his will a complete disposition of all his estate, such general intent is of weight "in determining what was intended by particular devises or bequests that may admit of enlarged or limited construction." Under this rule so well established in law that it is almost a pole star guiding construction of wills, when we reflect on the numerous devises and bequests made by Dolan among his entire family, wife and children, and that it covered his whole estate personal and real, and left nothing undisposed of, can we say or think for a moment that he had in mind to retain oil and gas out of the tract given Michael P. Dolan, and leave them undisposed of, and die still owning them? Can we say that he had such intention when he did not know of their presence? It is plain that he intended to give his son that tract of land clear and clean, reserving only coal.

Another forcible argument in favor of this holding lies in the fact that Patrick Dolan by his will, though disposing of his whole estate, cut off his daughter Mary with only \$1. There is inconsistency between the position that he intended to except all minerals in the tract willed to Michael and the fact that the father intended to cut off Mary from sharing in his estate. The two intents are in conflict; for he must have known that, if he died still owning such minerals, she would share in them by the law of descents, whereas his fixed intent was to deny her a share. This is shown by the will itself in its \$1 legacy to her. But this is enforced by some evi-

dence offered by the defendants, but excluded. This evidence was to be given by the attorneys who prepared the will, John J. and John W. Davis, to the effect that Patrick Dolan specifically directed that the will give Mary only \$1, and that later, before the completion of the will, John J. Davis asked Dolan if he thought he was doing justice to his daughter Mary, when he replied with emphatics that she must be disinherited because she had declared that she was going to marry a certain man against her father's will, showing determined purpose to exclude this daughter. The question is the import of the word "surface." Did the testator intend to reserve minerals? This evidence was meant to show that he did not design to retain minerals because that would defeat his purpose to disinherit Mary Dolan. Why say she should have only a dollar, and yet retain it may be valuable oil and gas rights in which she would share by descent? I do not think this evidence necessary, because I think the will itself gives the word "surface" meaning plain, and that there is no ambiguity; but, if there is ambiguity, evidence to enable a court to put itself in Dolan's place to show the estate, the family, the motives towards them, circumstances under which he made his will, is admissible. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581; 18 Va. & W. Va. Ency. Dig. 789.

But it is said that our holding is contrary to *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. 214, 60 L. E. A. 795, in its syllabus, which reads: "The word 'surface' when specifically used as a subject of conveyance has a definite and certain meaning, and means only that that portion of the land which is or may be used for agricultural purposes." The plaintiffs rely on that as compelling us to sustain them, while the defense says that the case was wrongly decided, and should be overruled. We concur with neither contention. That case was properly decided. Wilson conveyed Monroe the surface. Under the principle above stated, that a conveyance of surface, without more, excepts minerals, Wilson's conveyance reserved oil and gas. His deed contained no clause qualifying or giving secondary meaning to the word, whereas in this will there is the language above quoted from clause 7 excepting only coal, and declaring that the testator had devised to Michael "the said tract." Moreover, that was a deed, whereas we have a will to deal with. Wilson was making a deed, and was not disposing of all his estate, as in the case of a will, and there was no presumption against intestacy as in the case of a will. In our case, as shown in the detail of devises and bequests, Wilson was not giving to his entire family his entire estate. The above quoted point in the *Williams Case* is inaccurate in expression; but as Wilson conveyed "surface," without anything to di-

vert the word from its primary meaning, the point was meant only to say that such a conveyance, using only the word "surface," would except oil and gas. As the legal construction of the will gives Michael P. Dolan the oil and gas, the verdict is contrary to both law and evidence; and it was error to give a binding instruction to the jury to find for the plaintiffs, and error to refuse a binding instruction to find for the defendants.

Therefore we reverse the judgment, set aside the verdict, and enter judgment in this court for the defendants; the case turning solely on the construction of the will.

ROBINSON, J., dissents.

(157 N. C. 303)

MURCHISON NAT. BANK v. DUNN OIL MILLS CO.

(Supreme Court of North Carolina. Dec. 18, 1911.)

NEGOTIABLE PAPER—BONA FIDE PURCHASER—DEFENSES—POWER OF CORPORATE OFFICERS.

A suit by a bona fide purchaser of a corporate note was defended by the maker on the ground that it had never received any consideration for the same, and that the note, being signed only by the president, instead of by the president and by the secretary as required by the by-laws, was not binding on the corporation. *Held*, that a nonsuit was improperly granted.

Hoke, J., dissenting.

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by the Murchison National Bank against the Dunn Oil Mills Company. Judgment for defendant and plaintiff appeals. Error.

E. K. Bryan and Rountree & Carr, for appellant. J. C. Clifford and N. A. Townsend, for appellee.

CLARK, C. J. The Merchants' & Farmers' Bank of Dunn executed its note to the plaintiff bank for \$10,000 borrowed money, and deposited as collateral security a note which had been executed to it for \$10,000, signed, "Dunn Oil Mills Co., by J. D. Barnes, President." This note was indorsed to the plaintiff before maturity by the Merchants' & Farmers' Bank of Dunn "by E. F. Young, President." The said Merchants' & Farmers' Bank of Dunn failed, and this action was brought against the said oil mills on its said note. The defendant Oil Mills pleads that it received no consideration for the same, and that its president, J. D. Barnes, was not authorized to sign said note.

The defendant relied upon a provision in its by-laws: "All other contracts shall be in writing and signed by the president, or vice president, secretary and treasurer." The

"secretary and treasurer" was one office. A fair construction of the by-law is that the writing should be signed by the president or vice president or secretary and treasurer. This note was signed by J. D. Barnes, president. His honor erred therefore in his intimation that the note in question was not binding upon the Oil Mills Company. But upon the broader question which was argued before us, whether if the by-law meant to require the secretary and treasurer and the president to sign all contracts, whether the company would be bound by a note signed by its president in the absence of proof that the plaintiff had notice of such by-law, we are of opinion that the Oil Mills Company is bound by the promissory note which was issued in ordinary course of dealing and signed by its president. Nothing is more common than for a mercantile and negotiable paper to be signed by the president or secretary and treasurer of a corporation. The well-settled rule of law is that, where one of two innocent parties must suffer by the act of another, that one which has put it in the power of the wrongdoer to commit the act must bear the loss. *Railroad v. Barnes*, 104 N. C. 25, 10 S. E. 83. The Oil Mills Company elected J. D. Barnes its president, and thus put it in his power, according to the usual custom, to sign notes. If he abused his trust, the loss must fall upon the company which selected him, and put him in that situation. For its own protection the company passed the above by-law. If it intended thereby to prescribe that its note should be signed by the secretary and treasurer, as well as by its president or vice president, it was competent for it to make such regulation. But such regulation would not affect the plaintiff bank which took the note for value and before maturity without notice of such regulation, and relying upon the usual custom that mercantile paper can be signed by the president or general manager of a corporation.

In *Davis v. Insurance Co.*, 134 N. C. 60, 45 S. E. 955, this court said that the president was "the general representative of the company," and in *Grabbs v. Insurance Co.*, 125 N. C. 389, 34 S. E. 503, it said that the expression "general agent" implied general powers. It has also been held that a general agent can make contracts for the company. *Grabbs v. Insurance Co.*, supra; *Gwaltney v. Assurance Soc.*, 132 N. C. 925, 44 S. E. 659; *Davis v. Insurance Co.*, supra. It is no defense against a holder for value without notice that the officer exceeded his authority. 7 Cyc. 625. "Where a party deals with the corporation in good faith, the transaction is not ultra vires, and if he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation

is bound by the contract, although such defect or irregularity in the authority exists." *Bank v. Bank*, 10 Wall. 644, 19 L. Ed. 1008. "The bona fide holder for value of notes taken before maturity can recover against the corporation notwithstanding any want of authority of the agent to execute these notes for the purpose for which they were given." *Bird v. Daggett*, 97 Mass. 494. The general rule that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent as the president of a corporation. In such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent. The promissory note of this corporation was not ultra vires. There is no prohibition in the law against such a corporation issuing its promissory negotiable note. In *Hutchins v. Bank*, 128 N. C. 72, 38 S. E. 252, the court held that a contract of guaranty by a bank cannot be avoided on the ground of ultra vires and held that even where a contract is ultra vires, the corporation will be bound if the contract was within the general scope of its powers, and has been wholly or partially executed. In that case this court said, citing *Bank v. Bank*, 101 U. S. 183, 25 L. Ed. 907: "It is to be presumed that the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

The president of a corporation has an implied power to indorse and transfer its negotiable paper. Indeed, in the case of national banks the president is authorized by statute to indorse the paper of the bank. *Daniels, Neg. Inst.* § —. Unlike mining companies, as to which cases have been cited, and who buy very little except machinery, oil mills need considerable quantities of money for the purchase of cotton seed from time to time. Indeed, they have need to issue negotiable bills far more than banks, cotton factories, and railroads. It is a matter of common knowledge that they obtain this money by issuing promissory notes, usually to the banks, as in this case. Besides, the charter of the defendant authorizes it to buy cotton and cotton seed, to gin cotton, to manufacture cotton seed oil, cotton seed meal, to buy and sell cattle, hogs, and other stock, to manufacture cotton seed hulls, to manufacture ice, to buy and sell real estate and personal property, and, in addition, specifically authorizes the defendant "to borrow money in such amounts and at such times to carry on the business of this corporation as the proper officer may deem proper." There is also authority to manufacture, buy, and sell fertilizers. These things certainly authorized the making of negotiable paper in the course of its business. Though the defendant here pleaded that it received no consideration for this paper, this was not shown in evidence. The note sued on was strictly

commercial and negotiable in form under our statute. The plaintiff, a bank in a distant town, is a purchaser for value in due course. The note was put in circulation through the agency of a bank in the town where the Oil Mills were located, and with which the Oil Mills had dealings. It was put in circulation, and signed by the Oil Mills through its chief officer. The purchaser in such case in due course, knowing the course of dealings by Oil Mills in getting money from the banks, was not required to hunt up and read the by-laws of the Oil Mills before purchasing, especially since reference to the charter would have shown that the making of negotiable paper and the borrowing of money was within the scope of the powers of the defendant.

The true doctrine is stated in *Bank v. Bank*, 10 Wall. 64, 19 L. Ed. 1008: "That such acts of an officer of a corporation as are usually performed by that officer are valid as against the corporation in favor of innocent parties, although the act in the particular instance was beyond the authority of the officer." Banks do not usually issue promissory notes or borrow money, yet they are bound by the act of their cashiers in certifying checks falsely. The plaintiff bank in Wilmington in taking this paper, indorsed by the bank of Dunn, with which the Oil Mills at Dunn were in the habit of doing business, was not guilty of negligence in assuming that the paper was signed by the proper officer of the Oil Mills, and was issued in the course of its ordinary dealings with its regular bank. There is nothing in this evidence to show that the Oil Mills did not obtain full value. At any rate, it was the act of the Oil Mills acting through its chief officer that the paper was put in circulation and the plaintiff bank took it in due course for value and without notice, and as such is protected by the statute.

Our conclusion is that, the president of the corporation being its general agent, the promissory note executed by him in its name was prima facie valid, and, being indorsed to the plaintiff before maturity for value and without notice, the corporation is bound by the act of its president, unless it were shown that the plaintiff had notice of a restriction upon the powers of the president as such general agent. In *Watson v. Mfg. Co.*, 147 N. C. 475, 61 S. E. 275, this court quoted with approval the following language from *Thompson on Corporations*, 8556: "A stranger dealing with the corporation is not affected by secret restrictions upon the powers of a general manager of which he has no notice. In short, the powers of one who has been appointed general manager of the business of the corporation are in America generally understood to be coextensive with the general scope of its business. * * * A person dealing with the corporation through him may safely act on the assump-

tion of his possessing the power in the absence of anything indicating a want of it." In *Mereshon v. Morris*, 148 N. C. 52, 61 S. E. 648, this court approves the following language from Judge Thompson (10 Cyc. 1003): "Excluding the operation of express statutes, a very extensive principle of the law of corporations, applicable to every kind of written contract executed ostensibly by a corporation, and to every kind of act done by its officers and agents professedly in its behalf, is that, when the officer or agent is the appropriate officer or agent to execute a contract or do an act of a particular kind in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation, always provided that the corporation itself had the power under its charter or governing statute to execute the contract or to do the act."

The Oil Mills Company had authority to execute promissory notes. The president was *ex vi termini* its general agent. The plaintiff having taken a promissory note executed by the president of said Oil Mills in regular course, before maturity, for value and without notice of any restriction upon the authority of the president to execute said note, the court below erred in holding that said note was not binding upon said Oil Mills Company. Any other ruling would materially affect dealings in negotiable paper executed by a corporation.

Error.

BROWN, J., took no part. WALKER, J., concurs in opinion of CLARK, C. J.

ALLEN, J. (concurring). I concur in the order directing a new trial. The question involved in this case is of the first importance, involving as it does, on one hand, the integrity of paper claimed to be negotiable, and, on the other, the power of the industrial corporation in its by-laws to restrict the authority of its officer to issue paper, and I think it ought not to be decided until the facts are fully developed.

It is material to inquire whether the defendant received any benefit from the paper in controversy in money, the payment of debts, or as a credit, and whether its president habitually transacted business of this character.

The opinion of the CHIEF JUSTICE proceeds largely upon the assumption that these facts do appear; but I do not think so.

HOKE, J. (dissenting). I am unable to concur in the view which has prevailed with the court in this case; and, believing that the decision in so far as indicated and controlled by the principal opinion is subversive of established principles and well calculated to have far-reaching and injurious effect on the business interests of the state

and its people, I consider it proper to make some statement of the reasons for my position. The portion of the by-laws of the defendant, the Dunn Oil Mills, relative to the president's duties and his power to make contracts for the company, are as follows:

"Article 1. The president, with the approval of the secretary and treasurer, shall be empowered to employ a bookkeeper, at a salary to be fixed by the directors.

"Art. 2. The president shall preside at all meetings and shall make annual report to the stockholders' meeting and shall attend to all other duties hereinafter imposed upon him by these by-laws.

"Art. 3. The secretary and treasurer shall be elected by the directors for a term to be fixed by them. He shall at each semiannual meeting of the directors render an account current, showing the assets and liabilities of the company, and shall present his books and vouchers, showing receipts and disbursements of the corporation. He shall enter into a good bond of twenty-five thousand dollars in an acceptable guarantee company, for which the premiums shall be paid by this company.

"Art. 4. The president, secretary and treasurer shall have the power to employ a superintendent, salary to be fixed by them, subject to the approval of the board of directors. All purchases incident to the operation of the work shall be made by the secretary and treasurer, but no purchase shall be made by him without the approval of the president. All other contracts shall be in writing and signed by the president or vice president, secretary and treasurer."

In my opinion these by-laws by correct interpretation clearly require that, in order to bind the corporation by a contract of this character, it must be executed by the president or vice president and the secretary and treasurer, who it will be noted is the responsible officer of the company, acting under a heavy bond for the proper performance of official duty. The president of the Dunn Oil Mills then had no authority to make the corporation's note, and the instrument sued on can only be enforced as an obligation of the company on the ground that the execution of the instrument is within the apparent scope of the president's power, or that the corporation had by its negligent conduct put him in a position that enabled him to perpetrate a fraud, and, on the facts as they appear of record, neither position can be correctly maintained. From these facts it appears that on the 7th of November, 1902, the president of the Dunn bank, being in Wilmington, applied to the plaintiff bank for a loan of \$10,000. The loan was made on the note of the Dunn bank, and with the understanding that collateral should be forwarded to secure the same. Later, on December 11, 1902, the president of the Dunn bank wrote, inclosing collateral, among others the note sued on, purporting to be executed by

the president alone, one J. D. Barnes. The Oil Mills is a local industrial corporation engaged in the business indicated by its title, having a paid-up capital of \$22,700. There are no facts in evidence tending to show that the president of the Oil Mills was accustomed to sign notes for the company, or that he had ever signed one for any purpose, except the note sued on, or that any such custom existed in corporations of this character, or that the company had ever acquiesced in or in any way ratified this or any other transaction of like kind. Nor is there testimony that the note was given for machinery or cotton seed or other material usual or necessary in the construction or operation of the plant. Nor is there any evidence tending to show that the Oil Mills needed this money, or that it has ever received a dollar of it nor any benefit from it. The only evidence even offered on that subject was a statement in a letter of the president of the Dunn bank to plaintiff, tending to show it was for the benefit of the mills, a declaration not made or sanctioned by the Oil Mills or its officers, and therefore excluded by the court. On these the controlling facts relevant to the inquiry, a decision based on the proposition that the president of the Oil Mills, an industrial enterprise, having a paid-up capital of only \$22,700, may without authority and in contravention of its by-laws put in circulation a note for \$10,000, binding as a negotiable instrument, is not grounded on right reason, nor is it sustained by any well-considered authority. Even in the case of banks and officers charged officially with the duties of carrying on its ordinary business, the power to borrow money has been held not within the scope of their authority, real or apparent. *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; *Bank v. Bank*, 47 N. J. Law, 357, 1 Atl. 478.

In the United States decision it was held: "The borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank has special authority." And in the case of ordinary industrial corporations the decided cases and text-books of approved excellence are against the position of the court on the facts as presented in the record. *Craft v. Railroad*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; *Railroad v. Bank*, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282; *Worthington v. Railroad*, 195 Pa. 211, 45 Atl. 927; *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381; *Gould v. Gould*, 134 Mich. 515, 96 N. W. 576, 104 Am. St. Rep. 624; *N. Y. Iron Mine v. Bank*, 39 Mich. 644; *Elwell v. Railroad Co.*, 7 Wash. 487, 35 Pac. 376; *Bocock, Ex'r. v. Coal & Iron Co.*, 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128; *Bank v. Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408; *Cook on Corporations* (6th

Ed.) §§ 716-719; *Clark on Corporations*, p. 495; 21 A. & E. p. 859. To quote from a few of the cases: In *Iron Mine v. Bank*, supra, Cooley, Judge, said: "It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. *White v. Westport Cotton Mfg. Co.*, 1 Pick. [Mass.] 215 [11 Am. Dec. 168], is not an authority for that position, nor is any other case to which our attention has been invited. In *McCullough v. Moss*, 5 Denio [N. Y.] 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors to do so, could not bind the corporation by a note made in its name. *Murray v. East India Co.*, 5 B. & Ald. 204, *Benedict v. Lansing*, 5 Denio [N. Y.] 288, and *The Floyd Acceptances*, 7 Wall. 666 [19 L. Ed. 169], are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent. The issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse to the injury, and indeed to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of direction may determine." In *Worthington's Case*, supra, 195 Pa., 45 Atl., it was held: "The by-laws of a corporation upon their adoption become written into the charter, and put parties who deal with the corporation upon notice, in trading with the officers of the corporation, as to the extent of the power and agency of such officer, and this, whether the specific by-law has been brought home to them or not." In an action against a corporation to hold it liable on an indorsement of a promissory note by its president, binding instructions should be given for defendant where it appears that the president had no authority under the by-laws to make the indorsement, that the corporation received no benefit from it, and that there was no course of dealing between the parties which misled the plaintiff. In the *Arkansas* case the court held among other things: "(a) The president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper, unless such authority is expressly conferred. Such power is not to be presumed simply from the fact that it has been exercised. (b) A corporation is liable on negotiable paper issued by its president and secretary only when express power has been conferred upon them to issue it or when they have habitually issued it, or when their act in issuing it has been validated by the corporation, or when the latter has received the benefit by the transaction."

In *Cook*, § 717, the doctrine is stated as

follows: "The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management. His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize. This is a rule established by the great weight of authority. The board of directors may, of course, expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director. This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below." And, even when the president acts as general manager, this same author says (section 719): "The general manager of a corporation has no power to make and deliver the promissory note of the company nor to indorse the name of the company on commercial paper except possibly in payment of debts," etc. In no jurisdiction has the wholesome doctrine contended for been more clearly stated nor more fully fortified and sustained than with us as evidenced in the case of *Bank v. Hay*, 143 N. C. 328, 55 S. E. 811. In that valuable opinion, Associate Justice Walker in apt and forceful language, and with a wealth of authority, sustains the propositions. "When one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal." "The authority to draw, accept or indorse bills, notes, and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business; that is, if the purpose of the agency cannot otherwise be accomplished." It is no answer to this position to say "that, when one of two innocent parties must suffer by the act of another, that one which has put it in the power of the wrongdoer to commit the act must bear the loss." This is to avoid the issue by begging the entire question. The very question involved here is whether the corporation has acted wrongfully, and whether by reason of the wrong the instrument sued on has become its obligation. What has it done or neglected to do? It has elected a president, and conferred upon him power to preside over the meetings, make annual reports, and, in conjunction with the secretary and treasurer, a bonded officer to the extent of \$25,000, to make the valid and ordinary contracts in-

cident to the business. Under the law, the signing of commercial paper is not within the scope of his authority, real or apparent. The company has done nothing to recognize or ratify his conduct on this or any other occasion, nor has it received any benefit from his act. In such case it would not do to say that the mere electing him president put him in a position to wrong others. Speaking to this question in *Iron Mine v. Bank*, 89 Mich. 644, Judge Cooley says: "While the principle invoked is a very just and proper one, it is one that must be applied with great circumspection and caution. Any person may be said to put another in position to commit a fraud when he confers upon him any authority which is susceptible of abuse to the detriment of others; but, if the authority is one with which it is proper for one man to clothe another, negligence cannot be imputed to the mere act of giving it. Any one who intrusts to another his signature to a written instrument furnishes him with the means of perpetrating a fraud by an unauthorized alteration or other improper use of it. But if the instrument was a proper and customary instrument of business, and has been issued without fraudulent intent in a business transaction, there is no more reason for imposing upon the maker the consequences of a fraudulent use of it than there is for visiting them upon any third person. In other words, it is not the mere fact that one has been the means of enabling another to commit a fraud that shall make him justly chargeable with the other's misconduct; but there must be that in what he has done or abstained from doing that may fairly be held to charge him with neglect of duty."

The position of the court is not strengthened by the fact that this corporation is given in express terms the right to borrow money; very few, if any, industrial companies are without such power, nor by assuming, entirely without supporting evidence, in the record or out of it, so far as the writer is aware, that an oil mill is more accustomed to borrow money than any and every other kind of industrial corporation engaged in business; nor by the proposition advanced that this was commercial paper, put in circulation by the oil company and its agencies. It does not appear that the corporation has borrowed any money, or that it has received any pecuniary benefit from the transaction, and the fundamental question is whether the note sued on was put in circulation through the oil company or its agencies, whether the paper in any way ever became the company's note, and here also, to my mind, the court assumes the very point in dispute. The cases cited and relied upon by the court do not in my view support its position. In the insurance cases cited from this court—*Davis v. Insurance Co.*, and others—the decision proceeded on the theory that the officer was a general agent, representing the company, and

the act in question was within the scope of his powers. In *Bank v. Bank*, 77 U. S. (10 Wall.) 604, 19 L. Ed. 1008, the acts of a bank cashier in pledging the bank's credit by certifying checks were shown to be according to a custom generally prevalent with banks and it was held that there was evidence from which it might be inferred that the custom prevailed at this particular bank and with its knowledge and assent. In *Oliver W. Bird v. Daggett*, 97 Mass. 494, the agent was duly authorized to sign "all notes and business papers," and this was construed as justifying the position that an accommodation note was within the scope of his apparent authority. In *Hutchinson v. Bank*, 128 N. C. 72, 38 S. E. 252, the question was on the power of a banking corporation to act in the premises, and the authority of the officers to charge it or the methods by which they could do it was in no way presented. And the reference to *Thompson on Corporations*, § 85, 5, 6, and 10 Cyc. 1008, as cited with approval in *Watson v. Manufacturing Co.*, 147 N. C. 475, 61 S. E. 273, and *Mershon v. Morris*, 148 N. C. 52, 61 S. E. 647, was on facts widely variant from these appearing in this record. In *Watson's Case* the officer executing the note in question was president and treasurer as well as owner of nearly all the stock, was in absolute control of the corporation, its assets and purposes, and, further, there was ample evidence of ratification. *Africa v. Duluth Co.*, 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424, on similar facts, was to like purport. In the *Mershon Case* the president of a lumber company had given an order for a lot of machinery for use in the company's business, which was delivered under a contract that title should remain in the vendor till the purchase price was paid. The company having become insolvent, vendor claimed a lien under the contract, and the court very properly held that the company or the receiver having control of its assets could not keep the machinery and repudiate the obligation.

But, as far as I am able to interpret them, no authoritative decisions can be found that will uphold this note as a valid obligation of the defendant company on the facts of this case. There is nothing harsh or unreasonable in the position contended for. No well-ordered bank should place \$10,000 with an incorporated company of this character or any other, without looking to the authority for the transaction. No well-ordered bank does do it, or, if they do, they should not be protected in it. It was very little to ask on the part of these injured stockholders that a bank within 60 miles of the company's placing should inform themselves on this vital question. A vast and increasing amount of

business in this country is being undertaken and carried on through these smaller incorporated companies. They are contributing much to the business enterprise and welfare of every section of the state, and afford one of the few opportunities remaining for small investors. A decision which ignores and breaks down the safeguards reasonably devised for their protection, affording opportunity for a faithless, inefficient, or gullible president to wreck his company, and destroy its assets under the persuasive influence of some local bank president, sometimes a friend, and always in a position to extend personal favors, is to be indeed deplored, and in my judgment has no sanction in good reason nor well-considered precedent.

I am of opinion that the order of non-suit should be affirmed.

(157 N. C. 572)

HENRY et al. v. HILLIARD et al.

Appeal of GILMER.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. TRUSTS (§ 315*) — TRUSTEE — COMPENSATION.

Where, by agreement between a trustee and the beneficiaries, made June 30, 1908, it was stipulated that the trustee should receive \$6,500 in full for all services since 1898, and might retain all amounts allowed for services prior to that time, a sale of land made by him in 1900 was covered by such agreement; and hence he was not entitled to make an additional charge therefor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 433-443, 474-479; Dec. Dig. § 315.*]

2. TRUSTS (§ 315*) — TRUSTEE — ACCOUNTS — SERVICES.

Where an agreement in proceedings to settle a trustee's account before a referee provided that the referee's report should be considered correct as to all debts and credits passing through the trustee's hands, "except as modified by the agreement as to charges for services rendered" by such trustee, the beneficiaries were not thereby precluded from objecting to a charge for services for selling certain land, alleged to have been covered by a prior agreement.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 433-443, 474-479; Dec. Dig. § 315.*]

3. TRUSTS (§ 311*) — TRUSTEE — ACCOUNTS — CREDITS.

Where the amount due certain heirs from a trustee was fixed by a decree of distribution at \$5,500, the trustee had no authority to pay them \$8,174.17, and was therefore not entitled to credit in his account for the difference.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 430; Dec. Dig. § 311.*]

Appeal from Superior Court, Haywood County; Cline, Judge.

Judicial settlement of the estate of one Love, deceased. On exceptions to the report of a referee in an action by W. L. Henry and others against W. L. Hilliard and others. From rulings modifying the referee's report, R. D. Gilmer, trustee, excepted and appeals. **Affirmed.**

See, also, 155 N. C. 372, 71 S. E. 439.

Walter Clark, Jr., for appellant. W. T. Crawford, for appellee.

PER CURIAM. This was a civil action involving the settlement of what is termed in the record the "Love Estate." Pending the proceedings, on motion of Hon. R. D. Gilmer, trustee of funds belonging to the estate arising from sale of certain lands in Haywood, Jackson, and adjoining counties, report was made, and, on exceptions filed, the questions involved were referred by order of court to M. W. Bell, Esq., who heard testimony and made report, containing his findings of fact and conclusions of law in the case. Exceptions having been found to this report, present judgment was entered at January term, 1911, and the trustee, as stated, excepted and appealed.

[1] The objections made to the validity of the judgment are, first, that the trustee is charged with the sum of \$669.30, commissions heretofore retained by him on a sale of certain lands in Jackson county made in the year 1900, under and by virtue of a written agreement as to fees had and made between the trustee and two of the beneficiaries of the estate, with the sanction of a majority of the cestui que trusts, in 1894. This item was no doubt charged against the trustee for the reason that under another agreement, entered into between all the parties of record on the 30th day of June, 1908, subsequent to the one before mentioned, it was stipulated that the trustee should receive the sum of \$6,500 in full for all services since 1898, and might retain all amounts allowed him for services before that time. The sale under which this charge is made took place as stated in 1900, and the commissions, therefore, are covered by agreement for \$6,500, and were, therefore, not a proper charge.

[2] It is claimed for the trustee that this objection is not open, because the parties had also agreed that the report filed by the trustee, in which this item appeared as a proper credit, should be taken as correct; but we do not think this a correct position. The agreement, in the particulars referred to, expressly states that the report of the referee "is to be considered as correct as to all debts and credits that have passed through the hands of said Gilmer, *except as modified* by this agreement as to charges for services rendered by said Gilmer." The ob-

jection, therefore, was open to the appellees by the express provision of the agreement.

[3] Again, it was objected that the trustee had been credited only with the sum of \$5,500 as the amount properly paid by him to the heirs of Wm. Welch; whereas, the facts showed that the trustee paid these heirs the sum of \$6,174.17. The answer is that the amount due these heirs had been fixed by a decree of the court made in the cause at the sum of \$5,500, and there is no authority appearing for a payment of any amount in excess of that sum.

We find nothing in the record that would justify the court in disturbing the conclusion reached by his honor, and the judgment entered by him is, therefore, affirmed.

Affirmed.

(158 N. C. 29)

PENN v. STANDARD LIFE & ACCIDENTAL INS. CO.

(Supreme Court of North Carolina. Dec. 23, 1911.)

INSURANCE (§ 466*) — ACCIDENT POLICY — CONSTRUCTION.

Where an accident policy provided a specified insurance for the loss of sight, caused directly and independently of all other causes, through external, accidental, and violent means, insured was not entitled to recover for loss of sight due to an injury to an eye, caused by his accidentally falling from a train, such fall having merely hastened the loss of sight in the eye, which would have been ultimately lost independent of the accident because of a cataract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1178, 1186; Dec. Dig. § 466.*]

Appeal from Superior Court, Rockingham County; W. J. Adams, Judge.

Action by Aaron T. Penn against the Standard Life & Accidental Insurance Company. Judgment for defendant, and plaintiff appeals. **Affirmed.**

Morehead & Morehead and Sapp & Williams, for appellant. G. S. Bradshaw and T. H. Calvert, for appellee.

WALKER, J. The defendant issued to the plaintiff an accident policy which insured him against "the irrecoverable and entire loss of one eye" in the sum of \$2,500, with the proviso that the insurance should only be "against bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means." Plaintiff alleged that he fell from a train, and was so injured that he lost the sight of one eye. There was evidence tending to cast some suspicion on his statement

that he had accidentally fallen; but, in the view we take of the case, it is not necessary to further refer to it or make any comment upon it. There was also evidence tending to show that at the time of the fall he had a cataract on the eye that he alleges was injured which would have resulted eventually in destroying it, and the plaintiff introduced evidence to the contrary.

The case turns upon the construction of the language in the policy which we have quoted, and with reference to it and the evidence as to the cataract the court charged the jury as follows: "The court charges you that if you find that the plaintiff fell from the car and was thereby injured, and that this injury was soon thereafter followed by a loss of sight, and you further find that the condition of the plaintiff's eye at that time was such that, independent of that injury, he would ultimately have lost his sight, and that this injury, falling from the car, merely hastened the loss of his sight, in that event you will not find that the injury was caused directly and independently of all other causes through external, accidental, and violent means; but if you find from the evidence and by the greater weight of it that the plaintiff has suffered the entire loss of sight of his eye, that the loss of his sight is irrecoverable, that the loss was caused directly and independently of all other causes, through external, accidental and violent means, your answer to the second issue will be 'Yes.' If you do not so find, your answer will be 'No.'" The plaintiff excepted to this instruction. There was a verdict for the defendant, and, judgment having been entered thereon, the plaintiff appealed. If the instruction was a correct one, and we think it was, the rule for a new trial was properly discharged. When the terms of a policy are free from uncertainty or ambiguity, they "should be understood in their plain, ordinary and popular sense"; and it is only when "any provision, condition or exception" is "uncertain or ambiguous in its meaning or is capable of two constructions" that it "should receive that construction which is most favorable to the insured." 1 Cyc. pp. 243, 244; May on Insurance, § 172. As long as parties who are capable of so doing shall be permitted to make their own contracts, it is the plain duty of the court to enforce them as they are written, unless fraud or public policy shall intervene. *Binder v. Accident Ass'n*, 127 Iowa, 25, 85, 102 N. W. 190. While the rule is thoroughly settled that policies of this and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured, and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly dis-

closed intent of the parties. Taking the policy, in the case at bar, by its four corners, it will admit of but one construction. *White v. S. L. & Accident Ins. Co.*, 95 Minn. 77, 103 N. W. 735, 884.

In *Carr v. P. M. Life Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180, the court said that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and which could have no more force than the general provision, "Independent of all other causes." See, also, *C. T. Mut. Ass'n v. Fulton*, 79 Fed. 423, 24 C. C. A. 654. If the jury had found that the injury was caused by the sum of two causes—that is, that the accident and the pre-existing cataract and diseased condition of the eye were together responsible for the subsequent blindness—the plaintiff could not have recovered, as the injury must have resulted from the accident, "Independent of all other causes." In *White v. S. L. & Accident Ins. Co.*, 95 Minn. 77, 103 N. W. 734, 884, the policy, in terms, had reference to injuries or death resulting "solely from such injuries as the proximate cause thereof," and provided that the insurance did not cover accident or death "resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disorder, or disease in any form." In that case the court said: "Similar policies have been before both the state and federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury be the proximate cause of death, the company is liable, but, if an injury and an existing bodily disease or infirmity concur and co-operate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease—if the disease results and springs from the injury—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists. The rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature." See, also, *M. C. Company v. Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1062. *Ward v. Aetna Life Ins. Co.*, 85 Neb. 471, 123 N. W. 456, was an action on a policy which permitted recovery only when the injury or death resulted from accidental means "Independently of all other causes"; and the court said: "Plaintiff was not entitled to re-

cover if death was caused by the sum of these two causes."

We may thus summarize another case: "It is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies further back, and is whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be one for recovery under the policy; but if because of the former attacks there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy." *N. A. Casualty Co. v. Shields*, 155 Fed. 54, 85 C. C. A. 122. In still another important case a similar ruling was made: "If Shryock suffered an accident and his death was caused by that alone, the association agreed by its certificate to pay the promised indemnity. But, if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor." *N. M. Acc. Ass'n v. Shryock*, 73 Fed. 774, 20 C. C. A. 8. The policy in that case contained a clause similar to the one we have quoted from the policy upon which this suit was brought.

In *Binder v. Accident Ass'n*, supra, the policy provided that it must appear that the death or disability "was purely accidental, and the direct result of an accident, and that the accident was the sole and only cause of the said member's death or disability." The court said: "If it be true, as the jury might have found under the evi-

dence, that the diseased condition of the arteries aggravated the effect of the accident, if there was one, and contributed to the disability occasioned thereby, then, under the express terms of the contract, there was no liability on the part of the association." *Freeman v. M. Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, was an action on a policy containing a provision similar to the one in the policy upon which this suit was brought. Speaking to the question now under discussion, the court said: "The question as to whether peritonitis, if that caused his death, is to be deemed a disease within the meaning of this policy, so far as to prevent a recovery, depends upon the question whether or not before the time of the fall, and at the time of the fall, he had then the disease—was then suffering with the disease. If he was, then, in the sense of the policy, although (the disease was) aggravated and made fatal by the fall, he cannot recover." See *C. T. Accident Ass'n v. Fulton*, 79 Fed. 423, 24 C. C. A. 654.

There is some conflict in the authorities, but we believe that those best considered hold with the courts whose decisions we have cited. The charge of the court placed the vital issue fairly and squarely before the jury, and they have found the facts against the plaintiff, which means that he had a cataract at the time he fell, if he did fall, and that it united actively and efficiently with the fall in producing the unfortunate result. In some cases where the words "proximate cause" have been used in the policy to describe the causal connection between the accident and the resultant injury, some courts have held that the words thus employed to express the nature of the risk should be construed according to their common and accepted meaning as adopted and approved in law under like conditions and circumstances, and as thus interpreted they refer to the efficient cause from which the injury results, whether such cause produces the injury directly or through the medium of an intervening cause or agency, which it sets in motion, and which are then untied by close causal relation to each other, and this rule was applied to a case in which it appeared that the insured sustained an accidental fall which caused an abrasion of the skin of his leg, with the result that blood poisoning set in and death ensued, and it was very correctly held that the evidence should be submitted to the jury to find whether the death resulted proximately and solely from the fall. And some, at least, of the cases cited by appellant's counsel, may be harmonized with our decision in this case by adverting to the distinction pointed out in those cases. *Cary v. P. A. Ins. Co.*, 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997; 7 Am. & Eng. Ann. Cas. 484. No such words are to be

found in this policy. The case we have just put was somewhat like the one cited by us from the Massachusetts court, and in the latter case it was held that, where the accident itself causes the disease which then unites with it in producing the injury, the insurer is liable, but not where the disease pre-existed and contributed proximately to the injury. If this distinction is kept clearly in view, many of the authorities, which apparently conflict, may be reconciled. In our case there is no question of proximate cause. The parties have solemnly contracted, the plaintiff to be protected and the defendant to insure him against loss, under well-defined conditions, and the contract must be construed, being unambiguous, as it is written, under the maxim of the law, which prohibits us to make a contract for the parties, but allows us only to construe the contract which they have made (*In haec fœdera non veni*).

The other exceptions do not suggest to us any reversible error. A careful consideration of this case discloses nothing that should induce us to reverse the judgment.

No error.

(157 N. C. 499)

LUTHER et al. v. LUTHER et al.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. PARTITION (§ 30*)—PROCEEDINGS.

Tenants in common cannot, as a matter of right, have partial partition of the lands owned by them, and when only a part of the land is described in the petition the defendant may allege that there are other lands owned in common, and have them included in the partition; but he cannot by answer secure partition of lands in which others, who are not parties, are interested.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 80-82; Dec. Dig. § 30.*]

2. PARTITION (§ 113*)—APPEAL FROM CLERK.

In partition upon an appeal from the clerk, the proceeding being before the court, he may hear and determine all the matters in controversy between the parties.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 113.*]

3. PARTITION (§ 30*)—PROCEEDINGS—PETITION.

The petition in partition alleged that the defendants, who were husband and wife, were joint tenants, between themselves, of an undivided half interest in the land. In his answer the defendant husband sought partition of other lands owned in common by him and plaintiffs, but did not allege that his wife had any interest therein. *Held*, that he was entitled to partition of such lands, for the petition showed that the husband and wife were seised of an estate by entirety, with a right of survivorship; and hence no separate part of the land would be allotted to the wife.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 30.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Proceedings by R. L. Luther and another against D. P. Luther and another for partition. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

This is a proceeding by R. L. Luther and S. J. Luther against D. P. Luther and wife, Ida Luther, to have partition of two tracts of land, particularly described in the petition. The petitioners allege that R. L. Luther and S. J. Luther are owners of two undivided one-sixth interests in said lands, each being entitled to one-sixth thereof, and that the defendant D. P. Luther is the owner of an undivided one-sixth interest therein, and that he and his wife, the defendant Ida Luther, are, as between themselves, joint tenants of an undivided one-half interest. The defendants answer, and, among other things, allege that the petitioners and the defendant D. P. Luther are tenants in common of two other tracts of land described in the answer, and that they and three other persons, not parties to the proceeding, are tenants in common in a third tract of land, and ask that these three tracts be embraced in the order for partition.

The petitioners moved before the clerk to strike from the answer the allegations in reference to the three tracts of land, "for that the said portion of the answer is obnoxious, because it makes the above-entitled action multifarious, in that it asks for division of tracts of land separate and distinct from the tract of land, for a division of which the petition asks, and which said tracts of land are not held by the same tenants in common as the tract of land the division of which is prayed for in the petition, and in that it blends in one independent cause of action to which the same persons are not proper parties; that the said portion of the answer asked to be stricken out is irrelevant to the cause of action set forth in the petition of the petitioners." The clerk sustained the motion, and made an order appointing commissioners to divide the land described in the petition, and the defendants excepted and appealed to the judge.

At the September term, 1911, of court, the appeal came on for hearing, and the defendants, by leave of the court, struck from their answer the allegations as to the third tract of land, and his honor then decreed that the actions above mentioned be severed, and that the proceeding to partition the lands described in the petition herein constitute one proceeding, and the proceeding to partition the lands described in the answer herein constitute a separate proceeding, and that the order of the clerk, directing a partition of the lands set forth in the petition, be confirmed, and the exceptions of the defendant be overruled.

The defendants excepted and appealed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Jas. H. Merrimon, for appellants. Locke Craig and Jones & Williams, for appellees.

ALLEN, J. [1,2] The authorities seem to agree that tenants in common cannot, as a matter of right, have partial partition of the lands owned by them, and that when only a part of the land is described in the petition the defendant may allege that there are other lands owned in common, and have them included in the order of partition. 30 Cyc. 177; Barnes v. Lynch, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 473; Bigelow v. Littlefield, 52 Me. 24, 83 Am. Dec. 484. In the last case cited, the court says: "One tenant in common cannot enforce partition of part only of the common estate. Such a course would lead to fraud and oppression." If a different rule should be adopted, and three or four small tracts of land were owned in common, separate petitions could be filed for each, costs would be increased, and frequently sales for division would be necessary, when, if all were included in one petition, an actual partition would be practicable. It is, however, true, as contended by the petitioner, that the defendant cannot by answer introduce into the proceeding lands in which others, who are not parties, are interested. Simpson v. Wallace, 83 N. C. 477; Brooks v. Austin, 95 N. C. 474.

Applying these principles to the facts appearing in the record, the order of his honor was, in our opinion, erroneous. When the proceeding was before the clerk, the objection of the petitioners was well taken, because at that time, as to one of the tracts of land described in the answer, it was alleged that three persons were interested, who were not parties, but on appeal, by leave of court, this tract was eliminated, and, the proceeding being before the judge, he could hear and determine all matters in controversy. Roseman v. Roseman, 127 N. C. 498, 37 S. E. 518.

[3] But the petitioners further say that the elimination of the third tract did not cure the evil, because it is alleged in the petition that Ida Luther has an interest in the lands described in the petition, and it does not appear that she has any interest in the lands described in the answer. There would be much force in this contention but for the form of the allegation in the petition, which is that "the defendants, D. P. Luther and Ida Luther, are joint tenants, as between themselves, of an undivided one-half interest in said lands," which we understand to mean an estate by entireties, under Bruce v. Nicholson, 109 N. C. 205, 13 S. E. 790, 26 Am. St. Rep. 562, and other cases, with the right of survivorship. If so, no separate part of the land would be allotted to Ida Luther, but one share would be set apart to D. P. Luther and Ida Luther. This is

in accord with the policy of our law, which is to discourage multiplicity of actions, and to administer the rights of the parties in one proceeding, when possible.

Reversed.

(158 N. C. 42)

CAMPBELL v. FARLEY et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. JUDICIAL SALES (§ 4*)—APPOINTMENT OF COMMISSIONER—MOTION.

Where a commissioner, appointed to sell lands, dies before making a deed, the proper remedy for the purchaser who has paid the price is to move the court to appoint a new commissioner to make the deed; for until the deed is executed the land is in custodia legis.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 15; Dec. Dig. § 4.*]

2. JUDICIAL SALES (§ 22*)—PURCHASE MONEY—PAYMENT.

An order for the judicial sale of land, providing that the purchase money should be paid by a certain time, is merely directory, and does not affect the purchaser's title when payment has been accepted by plaintiff.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 47; Dec. Dig. § 22.*]

3. JUDICIAL SALES (§ 31*)—CONFIRMATION NUNC PRO TUNC.

The confirmation of a judicial sale by the court upon the report of the commissioner may be made nunc pro tunc.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-61; Dec. Dig. § 31.*]

Appeal from Superior Court, Graham County; Cline, Judge.

Action by L. C. Campbell against John G. Farley and others, in which there was a judgment for plaintiff, and defendants' lands were ordered to be sold. Motion by the Union Development Company, assignee of the purchaser at the sale, for the appointment of a commissioner to complete the sale. From an order granting the motion, Earl P. Tatham, a subsequent purchaser of the land, appeals. Affirmed.

J. S. Adams and Jas. H. Merrimon, for appellant. Morpew & Phillips, for appellee.

WALKER, J. This is a motion in the original cause by the assignee of the purchaser at a judicial sale for the appointment of a commissioner to complete the sale, left unfinished by a former commissioner, who has died, by executing a deed to the purchaser. Those who claim under the sale have had possession of the land ever since it was made. The court found as facts that the sale was made by the commissioner, and reported to the court and that the purchase price had been paid.

[1] A motion in this cause is the proper remedy. "There is no pretense that any deed has been executed to the purchaser of the land, sold under the order of the court, by an authorized servant of the court, and

under its permission, and until that is done the land continues to be in custodia legis, and any relief which may be had in reference to it or the purchase money must be sought in the original proceeding." *Kemp v. Kemp*, 85 N. C. 496. This doctrine is approved in *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572. See, also, *Lord v. Beard*, 79 N. C. 9; *Mauney v. Pemberton*, 75 N. C. 221; *Long v. Jarratt*, 94 N. C. 445.

[2] It is true that the order of sale provided for the payment of the purchase money, either the whole thereof or by installments, at a certain time, but this was not mandatory; it was merely directory, as time was not of the essence of the transaction; and if the purchase money has since been paid, and the court or the plaintiff has accepted it, it is immaterial that it was not paid ad diem, and this is so as to any other irregularity, not affecting the substance or prejudicial to the rights of the parties, as is the case here. The court finds that the purchaser, R. L. Cooper, assigned his bid to W. P. Rose, and the latter assigned to the Union Development Company, by which this motion is made. It is also found as a fact that Earl P. Tatham, to whom Campbell conveyed his interest by deed, acquired his interest with full notice of the appellee's rights, if the adverse possession of the land by the purchaser and those claiming under him by assignment did not constitute notice in law. *Tankard v. Tankard*, 79 N. C. 54; *Edwards v. Thompson*, 71 N. C. 177.

[3] There does not seem to be much stress laid upon the point as to the necessity for a confirmation of the sale by the court upon the report of the commissioner, but this can be done now by the court nunc pro tunc, if it is not dispensed with by agreement of the parties. *Joyner v. Futrell*, 136 N. C. 801, 48 S. E. 649. A fair construction of the proceedings of the court and the facts in the case, as found or admitted, leads us to the conclusion that there was no error committed by his honor in deciding this case.

No error.

(157 N. C. 462)

MICHAEL v. MOORE et ux.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. FRAUDULENT CONVEYANCES (§ 95*)—GIFT TO WIFE—RIGHTS OF CREDITORS.

Where, pending suit against defendant for malicious prosecution, he mortgaged certain land belonging to him and gave the proceeds to his wife with which to improve her separate property, so that on recovery of a judgment against him there was no property on which to levy an execution, the judgment creditor could follow the proceeds of the mortgage into the improvements under the doctrine of unjust enrichment.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 243-288; Dec. Dig. § 95.*]

2. FRAUDULENT CONVEYANCES (§ 64*)—GIFT TO WIFE—RIGHTS OF CREDITORS—INTENT TO DEFRAUD.

Money given by an insolvent to his wife and used by her to improve her property may be followed by his creditors without showing actual intent to defraud, the transaction being void per se, under Revisal 1905, § 962, providing that no voluntary gift by one indebted shall be void in law as to creditors, but the debt of the donor shall be taken as evidence from which an intent to defraud creditors may be inferred, etc.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 159-165; Dec. Dig. § 64.*]

3. FRAUDULENT CONVEYANCES (§ 51*)—GIFT TO WIFE—RIGHTS OF CREDITORS—EXEMPT PROPERTY.

Where an insolvent gave the proceeds of a mortgage of his property to his wife, who used the same to improve her separate estate, the husband's personal property exemption should be first deducted from the amount expended in making the improvements; the clear balance being the basis of the estimate of the amount chargeable against the property for the benefit of the husband's creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 114-117; Dec. Dig. § 51.*]

Appeal from Superior Court, Catawba County; Long, Judge.

Action by P. W. Michael against J. O. Moore and wife. Judgment for plaintiff, and defendants appeal. New trial.

The plaintiff, at May term, 1908, of Catawba superior court, obtained a judgment against J. O. Moore, one of the defendants, for \$300 and costs in a suit for damages for malicious prosecution. At the time the judgment was taken, the defendant J. O. Moore owned a tract of land in Alexander county. He gave notice of appeal from the said judgment to this court, being allowed time within which to perfect such appeal, which appeal was not, in fact, prosecuted. Before the time for perfecting said appeal had expired, and before the plaintiff caused a transcript of said judgment to be docketed in Alexander county, the defendant J. O. Moore and his wife, Dora Moore, joining him, executed a mortgage on the land in Alexander county to secure the payment of \$2,000 borrowed from the mortgagee. The defendants, with the \$2,000 so borrowed, erected a residence on a lot in the city of Hickory, the title to which was in the defendant Dora Moore. The feme defendant had actual notice of the suit, and of the judgment taken therein, before the execution of the mortgage and the use of the \$2,000 in the erection of the dwelling house on her lot. At the time of the transaction the defendant J. O. Moore was insolvent. After plaintiff had exhausted his legal remedies by execution and supplemental proceedings, he instituted this proceeding for equitable relief. The jury returned the following verdict: "(1) Did defendant J. O. Moore dispose of all of the lands owned by him and expend the bulk

of the proceeds therefrom in the erection of permanent improvements on lands of the defendant Dora Moore, for the purpose of defeating or delaying or defrauding the payment of the plaintiff's judgment against him, referred to in the complaint? Answer: No. (2) If so, did the defendant Dora Moore have knowledge of such purpose on the part of her husband and participate in the alleged fraud of her husband, as set out in the first issue? Answer: No. (3) What is the value of the lot of land owned by Dora Moore, independent of the improvement placed on it by the money of her husband? Answer: Six hundred dollars. (4) What amount of money of J. O. Moore, referred to in the first issue, was expended upon the lot of Dora Moore with her consent? Answer: About \$2,000." Upon the verdict, the court rendered the following judgment: "This cause coming on before the undersigned and a jury, and the jury having found the third and fourth issues in favor of the plaintiff, and the male defendant, as it appears from the record, being indebted to the plaintiff in the sum of \$300 and costs \$48.15, it is, therefore, upon the whole record, considered and adjudged that the plaintiff recover of the defendant J. O. Moore \$348.15 and the costs of this suit. It is further considered and adjudged that the value of the lot owned by the defendant Dora Moore in her own right, independent of the interests of her husband in the house and lot, is \$600. It is further considered and adjudged that the interest of the defendant J. O. Moore in the house and lot described in the complaint is \$2,000, and that said sum was expended by J. O. Moore on the said lot of his wife, with her consent, in making improvements thereon, from his own moneys, and the said wife holds her said lot, subject to the equity in the same of her husband, in the sum of \$2,000, to be pursued by the plaintiff as he may be advised." Defendants appealed.

Councill & Yount, for appellants. W. A. Self and A. A. Whitener, for appellee.

WALKER, J. (after stating the facts as above). [1] We entertain no doubt as to the plaintiff's right to follow the fund invested by his debtor in improvements upon his wife's land. No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Guthrie v. Bacon*, 107 N. C. 338, 12 S. E. 204, and cases cited; *McGill v. Harman*, 55 N. C. 179; *Gentry v. Harper*, 55 N. C. 177. The doctrine is well stated and applied in *Burton v. Farinholt*, 86 N. C. 260, by Justice Ruffin, as follows: "The life policy in question was the property of the

plaintiff's intestate. As soon as delivered, it vested in him, and, like any other chose in action, became an integral part of his estate, subject to every rule of property known to the law. Being indebted to a state of clear insolvency at the time of its voluntary assignment to his daughters, his act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not. It is a principle of the common law, as old as the law itself, and upon which the preservation of all property depends, that, except so far as the same may be exempt by positive law, the whole of every man's property shall be devoted to the payment of his debts. He cannot gratuitously give away any part of it; the law meaning that he shall be just to his creditors before he is generous to his family. From the fact that he was at the time insolvent, and that his transfer to his daughters was without valuable consideration, it results, as a conclusion of law, that the assignment was void as to his creditors. As said in *Gentry v. Harper*, 55 N. C. 177, it is against conscience for debtors to attempt in any way to withdraw property or effects from the payment of debts, and, if the courts of law cannot reach the debtor's interest, a court of equity will." More apposite is the case of *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351, in which the present Chief Justice says: "If she were not a free trader, the action concerns property she claims as her separate property, and she can be sued in regard thereto, no matter when she acquired it; her husband being joined with her as defendant. Code, §§ 178, 424 (4). It cannot be allowed that when an insolvent husband (or his firm, as here charged) makes over his property to his wife in fraud of his creditors, she cannot be sued for the recovery thereof because she is a married woman. If in such case the specific property (money for instance) has been invested in some other shape, the fund may be followed. *Edwards v. Culberson*, 111 N. C. 844, 16 S. E. 238, 18 L. R. A. 204, and cases there cited."

[2] It is not necessary to show an actual intent to defraud. The transaction is void per se. *Revisal 1905*, § 962; *McCanless v. Flinchum*, 89 N. C. 378. Nor does her coverture protect the feme defendant. *Bell v. McJones*, 151 N. C. 85, 65 S. E. 646; 2 Pom. Eq. Jur. (3d Ed.) § 945. The facts of our case are substantially like those in *Trefethen v. Lynam*, 90 Me. 376, 88 Atl. 335, 88 L. R. A. 190, 60 Am. St. Rep. 271, and with reference to the transaction in that case, by which the wife's property was improved, the court said: "The wife cannot rightfully retain, as against her husband's creditors, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions, he cannot acquire any property which shall be free from the claims of prior creditors; nor can she ac-

quire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. Under the principles above stated, however, the husband's right is not the test of his prior creditors' right. As to them, neither husband nor wife can erect buildings on her land with his money and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she should not retain any benefit or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained, would cause her no loss of her own property, but would simply transmit some part of the husband's property to his creditors—a most equitable proceeding." It is there said by the court that the principle so stated is fairly deducible from the cases. Our attention has been called to the case of *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 400, in which it is held that money of an insolvent husband invested in land, as a gift to his wife, and which is conveyed to her, may be followed by creditors and the land subjected to its payment; but money, when thus invested in improvements on her land, cannot be followed by them, and the latter decision seems to rest upon the idea that the right of the husband's creditors to follow the fund arises out of her implied promise or contract to pay for the improvements. We do not concur in this view. The two cases are affected by the same principle, which has nothing to do with the law of contracts. The creditor's right is an equitable one, and the money so invested, whether in land or improvements, is regarded as "a personal fund fraudulently withdrawn from the husband's creditors," as said by Justice Shepherd in his dissenting opinion, which fully and clearly states the true doctrine. The court proceeds to subject the property, which has derived a benefit from the improvement, not upon the theory that the wife has contracted, either expressly or impliedly, to pay for the improvements, but

it follows the fund taken from the husband's estate, and which justly belonged to the creditors, into her hands and holds the property as security for its repayment, even against her consent. Any other ruling would be entirely opposed to the true principle upon which this equity of the creditors is based, as will appear in the numerous decisions of this court, some of which we have cited. If a husband is permitted thus to dispose of his estate, and without any accountability on the part of the wife to them, it would enable him to commit the most gigantic frauds in defiance of his creditors. The law cannot be supposed to have contemplated any such result in its attempts to protect the wife against the consequences of her improvident contracts. The general doctrine is nowhere better stated than in *Perry on Trusts* (5th Ed.) § 170: "Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus at law married women or infants are liable upon their contracts. But in equity, if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women, and converts her by construction into a trustee, and compels her to do justice by executing the trust." We need not agree to all that is said in the passage just quoted for the purpose of disposing of this case, as there is no element of contract in the equity which we are now enforcing. The suit is for the purpose of recovering the husband's assets which should be devoted to the payment of his debts, and not the wife's. It would be against good conscience for her to retain the benefit accruing from his fraudulent act and not pay for it. It is not her property, but justly belongs to his creditors. There is no injustice or wrong in taking from her that which she does not own, as against the creditors, and restoring it to them. It is said in *Wall v. Fairley*, 73 N. C. 464: "It does not follow that the creditors cannot follow the funds of the debtor in the hands of his voluntary, and therefore, in law, fraudulent, donee. It is settled that in the case of a fraudulent

donation, such as this appears to have been, they can do so"—and this must be true, without there being any implied promise to pay for the benefit that may have been derived from the improvement.

[3] But, in order to ascertain what the benefit is, the personal property exempted (\$500) must first be deducted from the amount expended in making the improvement, and the clear balance will be the basis for the estimate. We need not decide whether the creditors can recover the entire sum wrongfully used in improving the property, less the exemption, or only the amount by which the property is enhanced in value, as it may not be necessary to do so. We are satisfied that, to the extent the property has been substantially benefited or increased in value by the improvement, the creditors are entitled to subject it to the satisfaction of their claims. The pleadings are not framed, nor were the issues, so as to allow to the debtor the benefit of his personal property exemption by deducting \$500 from the amount put into the improvements. His creditors could not have reached this, if he had retained the money, and therefore are not entitled to have it considered in ascertaining the increased value of the land by reason of the improvement. The judgment as rendered is incomplete, in any view of the case, as it requires nothing to be done, but merely declares the right of the husband, and erroneously too, as he has acquired no equity in the property because of its improvement with his money. The transaction is valid as between him and his wife, and, thus considered, she is entitled to the benefit of the improvement; there being no resulting trust in such a case. It is the creditors who have the only equity and can follow the fund.

The case is remanded, with directions to reform the pleadings in accordance with the principles declared in this opinion. Issues should be submitted for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and also the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary.

New trial.

(157 N. C. 490)

WORLEY v. LAUREL RIVER LOGGING CO.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, in an action for injuries to a servant, the evidence shows that after an order of the defendant's superintendent another employé of the defendant, equal in authority to such superintendent, gave the plaintiff a different

order, an instruction that, if the jury find that if the plaintiff had obeyed the orders of the superintendent he would not have been injured, they should find the defendant not negligent was not justified by the evidence, and was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

2. MASTER AND SERVANT (§ 234*)—LIABILITY FOR INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé may recover for an injury from a defective appliance, though he used such appliance, knowing it to be defective, and with some appreciation of the danger, unless he was guilty of an affirmative negligent act, or the danger was so obvious that the chances of injury were greater than those of safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686; Dec. Dig. § 234.*]

3. MASTER AND SERVANT (§ 296*)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Though a requested instruction that, if the jury "find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, they should find the plaintiff guilty of contributory negligence" may be technically correct, it was properly refused for its tendency to confuse and mislead the jury; the proper practice being for the judge to explain the conduct which would amount to contributory negligence, and to state that if there is such negligence, which is the real cause of the injury, the plaintiff cannot recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

In an action for injuries to a servant, requested instructions on contributory negligence were properly refused, where the only conduct of the plaintiff alleged in the answer to have been negligent was in the operation of a train, and there was no evidence introduced of negligence in this particular.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

Where, in an action for personal injuries, there was no evidence that the plaintiff was at any time unconscious, or that he suffered even momentarily an impairment of his mental powers, an instruction that the loss of mental powers by the plaintiff might be considered as an element of damages is improper, and ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

On Motion to Dismiss.

6. APPEAL AND ERROR (§ 539*)—REVIEW—NECESSITY OF EXCEPTIONS BELOW—STIPULATION.

While exceptions to evidence must be entered during the trial, and it is not sufficient to object, where the case was not settled by the judge, but by agreement of counsel, and the assignments of error began with the words "the defendant excepted for that," and are followed by the signatures of counsel for plaintiff and defendant, agreeing to the settlement, the signatures amount to an agreement that the exceptions set out in the assignments were duly entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2357, 2358; Dec. Dig. § 539.*]

7. APPEAL AND ERROR (§ 272*)—EXCEPTIONS—CHARGE OF COURT.

Exceptions to the charge of the court may be taken for the first time when the case on appeal is settled, so that, where a case was settled by agreement of counsel, and exceptions and assignments of error followed the charge, the exceptions were duly entered, and are sufficient to support the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272; * Trial, Cent. Dig. § 680.]

Appeal from Superior Court, Madison County; Lane, Judge.

Action by O. C. Worley against the Laurel River Logging Company. From a judgment for plaintiff, defendant appeals. Affirmed in part and reversed in part, and new trial as to part of issues granted.

This is an action to recover damages for personal injuries. The plaintiff, at the time of his injury, was employed as an engineer by the defendant, a corporation, engaged in the manufacture of lumber, and operating in connection therewith a logging road.

The plaintiff alleges that he was operating the train of the defendant on the 14th day of September, 1910, and was injured by reason of a derailment; that the defendant was negligent, in that it allowed and permitted the track and roadbed of its road to be and remain in a poor and dangerous condition, without ballast on its tracks, and with many heavy grades and sharp and dangerous curves; and it allowed and permitted the brakes on the cars which the plaintiff hauled over said road in the performance of his duties to become defective and out of repair, to such an extent that it was impossible to control and operate a train therewith, and permitted said brakes to remain in said defective and dangerous condition, though often notified of that fact and requested to repair the same; and it failed and neglected to keep and maintain its track and roadbed in a safe condition, and carelessly and negligently failed and neglected to keep and maintain its cars and rolling stock in good repair; so that they could be operated in safety, and did carelessly and negligently fail to furnish and equip its said road with the rolling stock, tools, and appliances in ordinary use at that time.

The defendant denies negligence, and alleges that the plaintiff was guilty of contributory negligence, in that he allowed the train of cars mentioned to get beyond his control by reason of careless handling of the same, or was running the same at a dangerous and reckless rate of speed down a grade, thereby causing the same to get beyond his control; or he otherwise operated said train in a negligent, careless, and reckless manner, by reason of which negligence and carelessness the plaintiff was injured, if any injury he sustained. The plaintiff offered evidence to sustain the allegations of negli-

gence, and there was no evidence to the contrary.

It was in evidence that on the morning of the day the plaintiff was injured that he told Mr. Hill, a superintendent of the defendant, that the brake on the car, attached to his train, was defective, and that he was told by Hill to place the car on a siding, and not to take it out until it was repaired; that the plaintiff placed the car on the siding as directed, and when he returned later he found the car loaded with lumber, and took it out in his train under orders from one Anderson, who was the mill foreman, and who overlooked the taking out of cars, and who told the plaintiff that Lieb, a superintendent, equal in authority with Hill, said for him to do so. This car was a part of the train when the plaintiff was injured.

The defendant requested the court to instruct the jury as follows:

"(1) Before the plaintiff can recover, he must satisfy the jury, by the greater weight of the testimony, not only that defendant was negligent, but that such negligence, if the jury finds there was any, was the proximate cause of plaintiff's injury, and if the jury do not so find they will answer the first issue, 'No.'

"(2) Proximate cause is the real effective cause of the injury, and if from all of the testimony you find that plaintiff's conduct was the real cause of the injury, then you will answer the first issue, 'No.'

"(3) If the jury find from the evidence that, if plaintiff had obeyed the orders of Hill, the superintendent, he would not have been injured they will answer the first issue, 'No.'

"(4) If you believe the evidence in this case, you will answer the second issue, 'Yes.'

"(5) If you find from the evidence that plaintiff knew the car and engine being run by him were defective, and was acquainted with the grades and curves of the roadbed, as testified by him, and knew that such operation by him was dangerous, then you will answer the second issue, 'Yes.'

"(6) Plaintiff having testified that he knew the dangers incident to operating the train under the circumstances, if you believe this evidence, you will answer the second issue, 'Yes.'

"(7) If you find from the greater weight of the evidence that plaintiff took out the car, which was attached to his engine, contrary to the orders of Hill, the superintendent, and that the use of this car was the proximate cause of the injury, you will answer the second issue, 'Yes.'

"(8) If you find from the evidence that the superintendent, Hill, ordered the plaintiff not to use the car which was attached to the engine at the time of the accident, and that plaintiff disobeyed such order, and such dis-

obedience was the proximate cause of the injury, you will answer the second issue, 'Yes.'

"(9) If the jury find from the evidence that Worley reported to Superintendent Hill, on the day before the accident, that the car was out of order, and that Hill directed him to set the car out on the siding for repairs, and not to use it again until it was repaired, and that the plaintiff, Worley, in disobedience of this order, took the car out for use, knowing it had not been repaired; and that such use of the car was the proximate cause of the plaintiff's injury, you will answer the second issue, 'Yes.'

"(10) There is no evidence that Anderson, the mill foreman, had authority to give orders to the plaintiff, and if plaintiff obeyed an order of Anderson in taking out the car testified about, instead of obeying the orders of Hill, the superintendent, and was injured in consequence, you will answer the second issue, 'Yes.'

"(11) If you find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer the second issue, 'Yes.'"

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted. Verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Martin & Wright, for appellant. Gudger & McElroy, for appellee.

ALLEN, J. We have examined the entire record, and have considered the numerous exceptions entered by the defendant, and find nothing of which it can justly complain on the first and second issues.

The evidence does not disclose a real controversy between the plaintiff and the defendant as to negligence, and the court would have been justified in directing the jury to answer the first issue, "Yes," if the evidence was believed.

In addition to the presumption of negligence arising from a derailment (*Marcom v. Railroad*, 126 N. C. 200, 35 S. E. 423; *Wright v. Railroad*, 127 N. C. 229, 37 S. E. 221; *Hemphill v. L. Co.*, 141 N. C. 487, 54 S. E. 420), there was ample evidence that the roadbed was unsafe, that the grades and curves were unusual and dangerous, and that the equipment was defective; and there was no evidence to the contrary.

Mr. Hill, superintendent of the defendant, who was introduced by the plaintiff, gives an account of the condition of the road and its equipment which shows utter indifference on the part of the defendant to the safety of its employes. He says: "I do not know the condition of the track where the engine ran off; from the mill down, there were some very bad places. The place where the wreck occurred had little to do with it; it was the place where the engine started—from where it left the mill to where it went off. The

track has about a 4 per cent. grade in some places, and in others about 10 per cent.; it would perhaps run about the length of this hill at 4 per cent., and then dip suddenly to a 10 per cent. grade. There are some reverse curves and some very sharp curves. Just before you get to the point where the engine left the track, you come around a sharp curve, and take a right smart dip, and it is almost straight for 20 or 30 yards, and you make a curve, a good stiff curve, and that is where the accident occurred; it was a long and very continuous curve. I know that the car was loaded with lumber when he started out. I can't say that Mr. Worley was given orders to bring the car out, but I told Worley not to bring that car out until it was fixed. The mill foreman overlooked the bringing out of cars from the mill. He was Van Anderson, and Robert Lieb was over him. I can't recall who ordered the car loaded; don't know. All that was hearsay, so far as I am concerned. The brake was not put on properly; the rod that comes over and under the brakes—the brake rod, I suppose you call it—passed under the rocking bolster, which the plank laid on, and this rod, for some reason, would work back next to the king pin, that comes through the rocking bolster, that holds it, and when you went to make a curve that bolster would shut down on it, and you could not put the brakes on; and if there were several curves you would get a pretty good start, and it would be hard to control the train. The cars had wooden brake shoes. I don't think there was ever another car made like it, before or since. The wheels turned on the axles. They insisted on loading the cars so heavy at the mill that I gave orders not to load over 3,500 feet on this particular car, and on other cars, and they often had on 5,000 feet. It made them so heavy that a car of that size and the tonnage of the lumber would weigh 20 tons, and without proper brakes, behind a 10-ton engine. When you loaded with more than 3,500 feet, with the weight of the car, the weight was more than the engine had the capacity of controlling. The wheels on the cars were not regular car wheels in common use at that time; they were old car wheels. They looked like they were 20 or 30 years old. They turned on the axle, and we often had to take the axle out. Sometimes there would be an inch play, and the car wheel would wobble as it went down the track, and when loaded so heavy it sorter cut and dug into the rails and climbed off. This car had been practically in the condition I have stated ever since it was built; there was only a piece of iron that was supposed to hold the brake rod back, and it would break, and they would put another little piece of iron in there, and it would break, and the next week something would happen again. I don't know whether the brakes on that car were like those in ordinary use on railroads of that date or not.

I never saw a car like it before, and the brakes were in keeping with the car."

[1] His honor, however, instead of directing the jury to answer the first issue, "Yes," if they believed the evidence, submitted the question of negligence to them, and gave substantially the first and second prayers for instructions. He could not have given the third, because there was evidence that, after the order of Hill, an employé of the defendant, equal in authority to Hill, gave him a different order.

The principal contentions of the defendant on the issue of contributory negligence are that the plaintiff continued to operate the train with knowledge of the defects and the danger, and that he was acting contrary to the orders of his superintendent, Hill.

[2] We do not approve the doctrine that an employé is barred of a recovery, because he realizes that he is using a defective appliance, and has some appreciation of the danger of doing so, and think the better rule is that, under such circumstances, there is no contributory negligence, unless the employé is guilty of a negligent act in doing his work, or the danger is so obvious that the chances of injury are greater than those of safety. *Thomas v. R. R.*, 129 N. C. 394, 40 S. E. 201; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 332, 50 S. E. 703. The contention of the defendant, if sustained, would encourage employers to use antiquated and defective machinery, and to notify employés of the danger, as they would thereby escape liability for injury.

The prayers for instruction, based on the idea that the plaintiff could not recover if he acted contrary to the orders of Hill, were properly refused, because there was evidence that the plaintiff, at the time of his injury, was acting under the orders of another superintendent, who had the authority to control him.

[3] The principle embodied in the eleventh request for instruction is supported by authority, and may be technically correct; but we think, if applied in instructing juries, it would tend to confuse and mislead, and that it is wiser to adhere to the practice which requires the judge to explain the conduct of the plaintiff which will amount to negligence, and that if there is negligence which is the real cause of the injury he cannot recover. If we depart from this rule, and say that the slightest negligence on the part of the plaintiff contributing to his injury is fatal to his cause of action, we must apply the same standard to the conduct of the defendant, when considering the first issue, and in practical operation the search for the real, efficient cause of the injury may easily be lost sight of.

[4] Again, his honor could have denied all the prayers for instructions on the second is-

sue, because the only conduct of the plaintiff alleged in the answer to have been negligent, was in the operation of the train, and there was no evidence of negligence in this particular.

[5] On the issue of damages, his honor told the jury that the loss of mental powers by the plaintiff might be considered as an element of damages, when, upon an examination of the evidence, there is no suggestion that the plaintiff was at any time unconscious, or that he suffered even momentarily an impairment of mental powers. We doubt if this affected the verdict, but we cannot say it did not, and under the authorities in this state this instruction was erroneous. *Smith v. Railroad*, 126 N. C. 712, 36 S. E. 170; *Wilkie v. Railroad*, 128 N. C. 113, 38 S. E. 289; *Bryan v. Railroad*, 134 N. C. 538, 47 S. E. 15.

In the *Bryan Case*, a new trial was ordered, because a charge was given that the jury might consider the loss of physical and mental powers in estimating damage, when there was no evidence of the loss of mental powers, and this case was approved in *Jones v. Insurance Co.*, 153 N. C. 391, 69 S. E. 266.

We must therefore order a new trial, but it is restricted to the issue of damages.

Partial new trial.

On Motion to Dismiss.

This is a motion to dismiss the appeal or to affirm the judgment, upon the ground that there are no exceptions in the record upon which the assignments of error are based.

[8, 7] Exceptions to evidence must be entered during the progress of the trial, and it is not sufficient to object. The exception must be noted. Exceptions to the charge may be taken for the first time when the case on appeal is settled, and should point out the parts of the charge to which exceptions are taken. The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and if there is an assignment of error, not supported by an exception, it will be disregarded.

Applying these principles to the record in this case, the motion of the appellee must be denied. The case was not settled by the judge, but by agreement of counsel. The exceptions and assignments of error follow the charge, and immediately thereafter we find the signatures of counsel for plaintiff and defendant, and each assignment begins, "The defendant excepted for that," etc. This is, in our opinion, an agreement by counsel that the exceptions set out in the assignments were duly entered.

Motion denied.

(157 N. C. 634)

STATE v. DOSTER.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. CRIMINAL LAW (§ 88*)—CRIMINAL JURISDICTION—RECORDERS' COURTS.

Const. art. 4, § 27, provides that justices of the peace shall have jurisdiction of all criminal matters arising within their counties where the punishment cannot exceed a fine of \$50 or imprisonment for 30 days. Section 14 authorizes the General Assembly to establish special courts for the trial of misdemeanors in cities and towns, and provides that such courts may be given exclusive jurisdiction of offenses committed within the corporate limits of the city or town where they are established. By Pub. Laws 1907, c. 860, the recorder's court of the city of Monroe was established, section 4, subsec. 3, of which conferred thereon exclusive jurisdiction of all criminal offenses within Monroe township in the county of Union, which then or thereafter might be within the jurisdiction of the justices of the peace. *Held* that, while such act was valid in so far as it vested the recorder's court with exclusive jurisdiction of offenses previously cognizable by a justice of the peace within the limits of the city of Monroe, it was invalid in so far as it attempted to extend such jurisdiction to offenses committed beyond the city limits and within the county, which, notwithstanding the statute, were still cognizable by a justice of the peace.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 127; Dec. Dig. § 88.*]

2. CONSTITUTIONAL LAW (§ 48*)—STATUTES—CONSTRUCTION.

A statute will never be declared unconstitutional, unless it plainly and clearly appears that the General Assembly has exceeded its powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

Appeal from Superior Court, Union County; Cooke, Judge.

J. E. Doster was convicted of a misdemeanor, and from an order denying his motion in arrest of judgment he appeals. Affirmed.

On the trial it appeared that defendant on October 29, 1911, the said date being Sunday, was found off his premises, and having a shotgun, etc., within Monroe township and outside of the city of Munroe, contrary to Revisal 1905, § 3842; that on warrant issued by M. L. Flow, a justice of the peace of Munroe township, resident within the city of Munroe, defendant was convicted for said offense, and on appeal to this court was again convicted and sentenced. Defendant, having raised question by motion to quash the indictment, etc., moved on arrest of judgment that under the statute establishing the recorder's court for the city of Munroe a justice of the peace had no jurisdiction to try the offense. Motion denied, and defendant excepted and appealed.

J. J. Parker, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. [1] The act establishing the recorder's court for the city of Munroe (Pub. Laws 1907, c. 860), in section 4, subsec. 3, confers upon said court exclusive original jurisdiction of all criminal offenses within Munroe township, in said county of Union, "which are now or may hereafter be within the jurisdiction of a justice of the peace." Section 3842 creates an offense which is within the ordinary jurisdiction of the justice of the peace, and, if the act in question is valid, the position of defendant must be sustained. Const. art. 4, § 27, among other things, provides that "the several justices of the peace shall have jurisdiction of all criminal matters arising within their counties where the punishment cannot exceed a fine of \$50.00 or imprisonment for 30 days." In *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742, the court held that this provision as to jurisdiction, otherwise peremptory, was so far modified by section 14 of the same article, that authorizing the General Assembly to establish special courts for the trial of misdemeanors in cities and towns, that such courts could be given exclusive jurisdiction of all proper offenses committed within the incorporate limits of the city or town where the same were properly established.

[2] In *Baskerville's Case* the offense was committed within the incorporate limits and the exclusive jurisdiction given by statute to the recorder's court was to that extent upheld. The principles of construction approved in *Baskerville's Case* and the conclusion reached are set forth in the opinion as follows: "It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers. *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968; *State v. Lytle*, 138 N. C. 738, 51 S. E. 66, *supra*. It is also an accepted canon of construction that, in case of ambiguity, the whole Constitution is to be examined in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument, and not to raise any conflict between its parts which can be avoided. *Black on Interpretation of Laws*, p. 17, cl. 10, citing *Cooley*, Const. Lim. p. 53, and *Manly v. State*, 7 Md. 135. And the same idea is expressed by our court in *State v. Pender*, 66 N. C. 318, *supra*, where the judge says: "It is the duty of the courts of this state, and one which the court has endeavored faithfully and impartially to perform, to give to the Constitution such an interpretation as will harmonize all of the parts, and without violating any leading idea in it as a whole." From the principles here stated and the decisions of our courts from the language of the Constitution itself, and considering the two sections together and giving to each its

proper effect, we think it a correct deduction, and hold it to be the law, that: (a) Section 27, art. 4, conferring jurisdiction on justices of the peace, is so modified by section 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns, and give them exclusive jurisdiction of misdemeanors committed within the corporate limits of the same. Applying the principles approved in Baskerville's Case to the facts presented here, we think it follows as a necessary conclusion that when, as in this case, the offense is committed outside of the corporate limits of the city, the general provision of the Constitution conferring criminal jurisdiction on justices of the peace must prevail. And the act establishing the recorder's court in so far as it attempts to confer exclusive jurisdiction on such offenses occurring outside the city limits must be declared invalid.

There is no error, and the judgment of his honor must be affirmed.

Affirmed.

(187 N. C. 637)

STATE et al. v. STAPLES.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES—PUBLIC WELFARE—REVIEW.

Courts will not interfere with the exercise of the discretionary powers conferred on a municipal corporation for the public welfare, unless the exercise thereof is so clearly unreasonable as to amount to a manifest abuse of discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

2. MUNICIPAL CORPORATIONS (§ 602*)—POLICE POWER — PUBLIC WELFARE — BILLBOARD ORDINANCE—REASONABLENESS.

Where the charter of a city authorized it to pass an ordinance regulating billboards generally, an ordinance prohibiting the erection or maintenance of any billboard within the city nearer the ground than 24 inches, except when erected against a solid wall, was a reasonable exercise of the city's police power for the public welfare.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 602.*]

3. MUNICIPAL CORPORATIONS (§ 602*)—BILLBOARD REGULATION—NUISANCE.

Where a billboard maintained on private property is secure and is not per se an infringement on public safety, it is not a nuisance, and cannot be made so by legislative fiat and then prohibited, nor can its maintenance be regulated by mere aesthetic conditions under an alleged exercise of the city's police power.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 602.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by the State and City of Asheville against W. J. Staples. Judgment for defendant, and the State appeals. Reversed.

It appeared that defendant was arrested, tried, and convicted on a warrant issued by the police judge of said city, and the testimony showed a violation by defendant of an ordinance of the city in terms as follows: "Sec. 773. That no person, firm or corporation shall erect or maintain within the city of Asheville any billboard or other similar structure used solely for the purpose of displaying posters or other public advertisements, the boards of which shall be nearer the ground than twenty-four inches, except where said billboards are erected and maintained against the wall of a building or other solid wall, and any person violating any of the provisions of this section, shall upon conviction, be subject to a penalty of twenty-five dollars for each and every such offense." In the superior court on motion there was judgment questioning the warrant which was based on and recited the ordinance, and the state excepted and appealed.

T. W. Bickett, Atty. Gen., G. L. Jones, Asst. Atty. Gen., and J. F. Glenn, for the State. Craig, Martin & Thomason, for appellee.

HOKE, J. (after stating the facts as above). [1] It is well recognized in this state that "courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Rosenthal v. Goldsboro*, 149 N. C. 123, 62 S. E. 905, 20 L. R. A. (N. S.) 809; *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671. There was some limitation placed on the principle in the case of *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473, 43 L. R. A. 446, but that case was expressly overruled in *Small v. City of Edenton*, 146 N. C. 527, 60 S. E. 413, 20 L. R. A. (N. S.) 145, and the opinion of the present Chief Justice in *Small's Case* is in full approval of the position as it had formerly prevailed. The charter of the city of Asheville confers ample power to pass an ordinance of the general character in question. *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670.

[2] And in the learned and well-considered brief of the counsel for the city it is suggested in support of the ordinance in question here that the same is reasonable and "necessary to protect the public generally from the unsafe condition caused by the accumulation of leaves, papers, and other waste material which accumulate against billboards when constructed against the ground. It is a necessary restriction to protect adjoining and other buildings contiguous thereto from the danger of fire, which

could so easily be conducted from such condition. It is also necessary for the purpose of keeping vacant property in a sanitary condition." On authority here and elsewhere these considerations should in our opinion be allowed to prevail and the ordinance upheld as a valid exercise of the powers conferred. *Rosenthal v. Goldsboro*, supra; *State v. Whitlock*, supra; *Small v. Edenton*, supra; *City of Chicago v. Gunning System*, 214 Ill. 628, 78 N. E. 1085, 70 L. R. A. 230; *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659; *City of Passaic v. Bill Posting Co.*, 71 N. J. Law, 75, 58 Atl. 348; *In re Wilshire (C. C.)* 103 Fed. 620.

In our present decision we do not intend to qualify or question in any way the disposition made of *Whitlock's Appeal*, supra. In that case it appeared that the ordinance prohibited the erection of billboards on private property, regardless of whether the same were secure or insecure. It seemed to have been based on aesthetic consideration alone, having no reference whatever to the protection and security of the public, and, on that account, it was held to be an unwarranted and unreasonable interference with the rights of the individual owner. In his forcible and learned opinion in *Whitlock's Case*, Associate Justice Brown states the doctrine applicable and the reasons upon which it rests as follows: "Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the state may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right, and make them conform to the safety and welfare of established society, that the police power of the state is invoked."

[3] "While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others. *Tiedeman, Lim.* 439. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a secure structure upon private property, and one which is not per se an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited"—citing *Syates v. Milwaukee*,

10 Wall. 497, 19 L. Ed. 984; 1 Dillon on Municipal Corporations, 374. There is error, and this will be certified that the cause be further proceeded with.

Reversed.

(157 N. C. 557)

COXE et al. v. CARPENTER et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. TRESPASS (§ 46*)—PROOF OF TITLE—EVIDENCE.

Where, in trespass *quare clausum fregit*, defendants introduced a state grant for the land, but did not connect themselves therewith, its only effect was to show that the state claimed no interest in the land, and relieved plaintiff from showing such fact.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 46.*]

2. ADVERSE POSSESSION (§ 115*)—UTILIZATION OF LAND—EVIDENCE—QUESTION FOR JURY.

Where land in controversy was steep, declivitous, very barren, and fit only for the timber upon it, evidence that plaintiff's ancestor for at least 30 years had occupied it, and, with his tenants, had cut timber for lumber, firewood, and housebote, was sufficient to require submission of the issue of his adverse possession to the jury.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 691-701; Dec. Dig. § 115.*]

Appeal from Superior Court, Polk County; Council, Judge.

Action by Francis S. Coxe and others, as trustees and executors of Col. Frank Coxe, deceased, against K. J. Carpenter and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This was an action of trespass *quare clausum fregit*. The plaintiffs relied upon color of title and adverse possession. The defendants introduced a grant from the state, which covers the locus in quo but did not connect themselves with it, so that it had the effect only of showing that the title was out of the state. There was evidence tending to show that the plaintiffs, and those under whom they claim, had been in the actual possession of the land for more than 30 years, claiming it as their own. The witness John Pack testified that he had lived on the Coxe plantation a little over 20 years, and has known the land in dispute for more than 20 years. Col. Frank Coxe had possession of it when he first knew it, and used it for "timber, wood, pine, and such," and would cut wood there nearly every day—firewood and stove wood. There was a great deal of chestnut timber on the land, and Coxe got boards and rails from the land every once in a while. The witness cultivated a portion of the other part of the Elwood land, and lived on it 13 years as a tenant of Col. Coxe; cultivated it part of the time, and while he lived there he got all the

wood he needed from the land in dispute every year, as did the other tenants of Col. Coxe. The witness also stated that the land in dispute was not cleared, it being ordinary timber land, and "mighty little" of it could be cultivated. It was rough land, and "some of it you could not stand upon without holding to the bushes." The land was poor, and Coxe had been cutting timber on it all these years. He opened and laid out roads on it, in order to haul the wood off; one of the roads was there when he first took possession. There was much other evidence of the same kind. There also was evidence that the land was not fit for cultivation, but was only useful and valuable for its timber—it could not be cultivated profitably; and also that Coxe was using it, as indicated, for its timber, and reserving it for the purpose of subsequently getting a water supply; it being in evidence that he had run a level on the branch to see if there was fall enough to the place he lived, so that he could utilize the water, which he found to be the case. The case was submitted to the jury under an instruction as to what would constitute, in law, adverse possession, and the only question, as was admitted on the argument, is whether the facts we have stated, if found by the jury, were sufficient to constitute such possession. The jury rendered a verdict for the plaintiffs, and from the judgment thereon the defendants appealed.

Smith & Shipman, for appellants. S. Gallert, for appellees.

WALKER, J. [1] The material issue in this case is easily apparent from the state of the proof and the admissions in the record. Plaintiffs did not have a paper title for the locus in quo, but relied solely upon their color of title and adverse possession. Defendants introduced a state grant for the land, but did not connect themselves with it. The only effect of this evidence was to show that the state claimed no interest in the land, and to relieve the plaintiffs from the necessity of showing that fact. But it is conceded that our decision must turn upon the character of plaintiffs' possession as being, or not, adverse, and sufficient in law to ripen their color into a good and perfect title to the land.

The evidence tends to show that the land was very barren and only fit for use as timber land. A large part of it was so steep and declivitous that it was necessary to hold to the bushes in order to stand and "keep your equilibrium." There was other evidence to the effect that the land was in the possession of plaintiffs, and those under whom they claimed, for many years, at least 30, and that Col. Coxe, who claimed the land (it does not appear under what title, except the color), occupied the land with those right-

fully claiming under him, and asserted dominion over it for more than the period required by law to ripen the title; that he did not clear or cultivate any part of the land, because it was not fit for cultivation or clearing. It was mostly wild and unarable land, and only useful and valuable for the timber. It was further in evidence that Col. Coxe, his tenants, and those claiming under Coxe for many years cut timber, for the purpose of making it into lumber, and also for firewood and housebote. The witness described this user as being for "timber, wood, boards, pine, and such," and this was an everyday occurrence; and roads already there were used and new ones laid out, for the purpose of utilizing the land in its then state and condition. His tenants got firewood and stove wood from the land in the same way. There is no doubt but that the possession, if adverse, was open, visible, notorious, and continuous, and no owner of the land could have failed to take notice of it, as an assertion against his title, from the very beginning. There was also evidence that the plaintiffs and those under whom they claimed "had possession of the land" for more than seven years.

[2] We think this case is governed by *Berry v. McPherson*, 153 N. C. 4, 68 S. E. 892. There are two propositions decided in that case, which we take from the headnotes: (1) "The testimony of the plaintiff, unexplained and uncontradicted upon cross-examination, that he and his father had been in possession of the locus in quo for 30 years, in order to show possession under color of title as against the state under deeds he had introduced in evidence, is sufficient to go to the jury." (2) "While the evidence of title by adverse possession must tend to prove the continuity of possession for the statutory period in plain terms or by 'necessary implication,' it is sufficient to go to the jury, if it was as decided and notorious as the nature of the land would permit." We may well show the application of the principles, settled in that case, to those which have been established in the case at bar, in referring generally to what was said by the court, through Justice Brown: The evidence of plaintiff in the case was that "there is an island about midway of his possession, and a road leading across the swamp to the island; that he and his father kept up this road; that there was a road leading across the woods to the island for a third of the way, from which he and his father regularly got firewood; that his father sold timber off the land in controversy, and that six years ago defendant cut timber on this land, and promised to pay plaintiff for it; that on one occasion defendant, in presence of plaintiff and his brother, recognized plaintiff's possession by admitting the cedar corner claimed

(157 N. C. 575)

by plaintiff to be the true division corner. Plaintiff further testified that tenants on his farm cut wood on this land whenever they needed it, and that he had cut and sold shingles off it frequently, and his father had cut and sold railroad ties. Plaintiff further stated that he sold pine timber off the land, and allowed the neighbors to get wood off it whenever they desired. The land in controversy appears to be swamp land, uninclosed, and with no habitation upon it. The evidence indicates that plaintiff and his father, for more than 30 years, exercised acts of dominion over the land, and made from it the only profits and use of which it is susceptible. From the evidence of the witness, the jury may well infer that these acts were those of ownership, and not those of an occasional trespasser; and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners, and were not pillaging as trespassers. *Williams v. Buchanan*, 23 N. C. 535 [35 Am. Dec. 760]; *Tredwell v. Reddick*, 23 N. C. 56; *Hamilton v. Icard*, 114 N. C. 538 [19 S. E. 607]; *Simpson v. Blount*, 14 N. C. 34; *Baum v. Shooting Club*, 96 N. C. 310 [2 S. E. 673]. It is true that in proving continuous adverse possession under color of title, nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by 'necessary implication.' *Ruffin v. Overby*, 105 N. C. 83 [11 S. E. 251]. This possession need not be unceasing; but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected some portion of the disputed land to the only use of which it was susceptible. *Ruffin v. Overby*, supra; *McLean v. Smith*, 106 N. C. 172 [11 S. E. 184]; *Hamilton v. Icard*, supra. While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof."

This is practically a motion by the defendants to nonsuit the plaintiffs. We are of the opinion that there was sufficient proof of facts showing adverse possession, and the case was properly submitted to the jury for their consideration. There was consequently no error in the rulings of the court.

No error.

KELLER v. CHAMPION FIBRE CO.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. MASTER AND SERVANT (§§ 286, 289*)—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by the derailment of a log train which he was operating down a mountain by gravity, whether defendant was negligent, and whether plaintiff was also negligent, held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289.*]

2. NEGLIGENCE (§ 136*) — QUESTION FOR COURT OR JURY—NONSUIT—CONTRIBUTORY NEGLIGENCE.

A motion for nonsuit on the issue of contributory negligence can only be sustained when the facts necessary to show contributory negligence are established by plaintiff's evidence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Appeal from Superior Court, Jackson County; Cline, Judge.

Action by B. B. Keller against the Champion Fibre Company. Judgment for plaintiff, and defendant appeals. Affirmed.

These issues were submitted to the jury:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: Yes.

"(2) Did the plaintiff, by his own negligence, contribute to his own injury? Answer: No.

"(3) What damage is plaintiff entitled to recover? Answer: Six thousand dollars (\$6,000)."

From the judgment rendered, the defendant appealed.

P. H. C. Cabell, Martin & Wright, Bourne, Parker & Morrison, and Bryson & Black, for appellant. Walter E. Moore and Moore & Rollins, for appellee.

PER CURIAM. The plaintiff moved the court to dismiss the defendant's appeal, for the reason that the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal, as required by rules 19 and 21 of the court (140 N. C. 660, 66 S. E. vii). The court is of opinion, upon an examination of the record, that the assignments of error are properly placed at end of case on appeal, and that assignments Nos. 1 and 2, relating to the refusal to sustain the motions to nonsuit the plaintiff, are properly assigned and worded, and that defendant is entitled to have them passed upon by the court. But the majority of the court is of opinion that the remaining assignments, all of which relate to the charge of the judge and the refusal to give special instructions asked by defendant, are not fully or properly assigned, and come within the rulings of this court in *Thompson v. Railroad*, 147 N.

C. 413, 61 S. E. 286; *Lee v. Baird*, 146 N. C. 361, 59 S. E. 876; *Smith v. Mfg. Co.*, 151 N. C. 260, 65 S. E. 1009. Taking into consideration the motions to nonsuit, the court is of opinion that they were properly denied.

[1] There is much conflicting evidence upon the material issues of fact, but the evidence of the plaintiff tends to establish that he was brakeman on defendant's logging railroad; that in March, 1910, the defendant's superintendent directed plaintiff to let a string of eight cars, heavily loaded, run down the mountain incline grade without an engine attached; that in obedience to orders plaintiff did so; that the cars ran into a cow, and pushed it some distance on the track, and were then derailed, in consequence of which plaintiff was seriously injured; that, had the engine been attached, it could have controlled the cars, and the derailment would not have occurred; that the brakes were defective, out of order, and failed to stop the cars when applied; that plaintiff was furnished with only one person to assist in controlling the cars, and that was insufficient, in the absence of the engine.

[2] Upon the issue of contributory negligence, the court is of opinion that a motion to nonsuit can only be sustained when the facts necessary to constitute contributory negligence are established by the evidence of the plaintiff. In this case the evidence offered by plaintiff does not of itself make out contributory negligence upon his part; upon the contrary, it tends strongly to rebut such defense.

The judgment of the superior court is affirmed.

HOKE, J. (concurring in result). I think that the assignment of errors is sufficient under the rule, but concur in the result, being of opinion that no reversible error appears in the record.

(158 N. C. 24)

REA v. STANDARD MIRROR CO. et al.
(Supreme Court of North Carolina. Dec. 23, 1911.)

1. REMOVAL OF CAUSES (§ 49*)—SEVERABLE CONTROVERSIES.

Where a servant was injured through the joint negligence of the master and its vice principal, the cause is a joint one, and no severable controversy exists.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

2. REMOVAL OF CAUSES (§ 25*)—SEVERABLE CONTROVERSIES—PETITION.

Whether a complaint states a joint wrong, in which there is no severable controversy, is not affected by an allegation in the petition for removal to the federal court that the resident defendant was fraudulently joined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

3. REMOVAL OF CAUSES (§ 95*)—PROCEEDINGS TO PROCURE—PETITION.

Where a verified petition for removal on the ground of diversity of citizenship alleges fraudulent joinder, with a statement of facts, sufficient, if true, to show that there has been a fraudulent joinder of a resident defendant, together with a sufficient bond, is filed in the state court, the case should be removed, and the jurisdiction of the state court is at an end; the plaintiff, if he desires to challenge the truth of any averments, having the right to do so in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.*]

4. REMOVAL OF CAUSES (§ 86*)—PROCEEDINGS TO PROCURE—PETITION—VERIFICATION.

A petition for removal of a cause into the federal court, upon the ground of diversity of citizenship, alleging that a resident party has been fraudulently joined to defeat the right of removal, must be verified.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 177; Dec. Dig. § 86.*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by Z. M. Rea against the Standard Mirror Company and another. From a judgment ordering the case removed to the federal court, plaintiff appeals. Affirmed.

Walser & Walser and Bryant & Brogden, for appellant. Roberson & Barnhart and Craige & Craige, for appellees.

HOKE, J. At April term, 1911, of said court, plaintiff, a citizen and resident of Davidson county, N. C., having entered suit, filed his complaint in the superior court of Davidson county, alleging liability for physical injuries received by reason of the joint negligence on the part of the defendant the Standard Mirror Company, a corporation, citizen and resident of the state of Pennsylvania, doing business at High Point, N. C., and Frank Wineskie, a resident of this state, and secretary and general manager of the company's plant in this state, having direct charge and control of the work and the laborers employed therein, including the plaintiff. The wrong alleged being in part the negligent provision made, and directions given by said Wineskie when engaged in his duties as defendant's general manager, etc.

The defendant, in apt time, and accompanied by proper bond, with good and sufficient sureties, filed his duly verified petition for removal, setting forth the position and duties of defendant Wineskie in reference to his codefendant's plant at the time of the injury, with detailed and special averment that said Wineskie was not charged with the supervision and control of plaintiff or other laborers employed in the work, or of supplying them with safe and suitable machinery or placing, etc.; that his duties were entirely in the office of defendant company, disconnected with any direction or supervision

of laborers, machinery, etc.; and the petition further proceeds as follows: "That he was not present or in the factory when the plaintiff was injured; that the injury received was neither the direct nor proximate cause or result of any negligence of defendant Wineskie, nor of any duty imposed upon him, nor of the failure on his part to use due care, caution, or prudence, and properly discharge his duties, which are, and were at and before the alleged injury of plaintiff, in the office of said company, as above set forth; that the rights of the real parties in interest to this controversy can be finally adjudicated without the presence of the defendant Wineskie; that the defendant Wineskie is an improper party to this proceeding; that he has no connection therewith, and that he is an unnecessary party; that defendant Wineskie has been improperly and fraudulently joined as a defendant in this suit, for the purpose of fraudulently and improperly preventing, or attempting to prevent, this defendant from removing this cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of this suit, that Wineskie was not charged with the duties aforesaid, as alleged in the complaint; and that he was joined as a party defendant for the sole and only purpose of preventing the removal of this cause, and not in good faith." Upon these the controlling facts relevant to the question presented, we are of opinion that the order for removal was properly made.

[1] It is now very generally held that, on the facts stated in the complaint, the cause of action may be considered and dealt with as a joint wrong, and that when such allegations are made in good faith they must be considered and passed upon as the complaint presents them, and that when viewed as a legal proposition no severable controversy is presented which requires or permits a removal to the federal courts. *Railway v. Miller*, 217 U. S. 209, 20 Sup. Ct. 450, 54 L. Ed. 732; *Ala. R. R. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; *Chesapeake & Ohio R. R. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Dougherty v. Railroad* (C. C.) 126 Fed. 239.

[2] And it is held, further, that the position as stated is not altered or in any way affected by allegation of the petition that the resident defendant was joined for the mere purpose of avoiding removal, or with no honest intent of seeking relief against such resident, or the like, nor by general allegations of fraudulent joinder. *Kansas City R. R. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; *Foster v. Gas & Electric Co.* (C. C.) 185 Fed. 979; *Shane v. Electric Ry.* (C. C.) 150 Fed. 801; *Knuth v. Electric Ry.* (C. C.) 148 Fed. 73; *Thomas v. Great Northern R. Co.*, 147 Fed. 83, 77 C. C. A. 255; *Hough v. Railroad*, 144 N. C. 701, 57 S. E. 469; *Tobacco Co. v. Tobacco Co.*, 144 N. C.

352, 57 S. E. 5; *Ill. R. R. v. Houchins*, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205; *So. R. R. v. Grizzle*, 124 Ga. 735, 58 S. E. 244, 110 Am. St. Rep. 191. To cite from one or two of the cases, in *Railroad v. Miller*, supra, it was held: "For the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it, in good faith, in his pleadings; and if a plaintiff, in a suit for personal injuries, joined with the foreign corporation one or more of its employes, residents of plaintiff's state, as defendants, and the state court holds that the joinder is not improper, the cause is not separable, and cannot be removed into the federal court. *Ala. Great So. R. R. v. Thompson*, 200 U. S. 206 [26 Sup. Ct. 161, 50 L. Ed. 441]; *Railway Co. v. Bonon*, 200 U. S. 221 [26 Sup. Ct. 168, 50 L. Ed. 448]." And in *Kansas Ry. v. Herman*, the court held: "While an action commenced in a state court against two defendants, one of whom is a resident and the other a nonresident, may be removed to the circuit court of the United States by the nonresident defendant, if it can be shown that the cause of action is separable, and the resident defendant is joined fraudulently, for the purpose of preventing the removal of the cause to the federal court, such removal cannot be had, if it does not appear that the resident defendant is fraudulently joined for such purpose. This rule will be adhered to, even if on the trial of the action the lower court holds that no evidence was given by the plaintiff tending to show liability of the resident defendant, and a second application for a removal from the state to the federal court has been made and denied after a trial, and the trial court has sustained a demurrer to the evidence as to the resident defendant, and where it appears that the ruling was on the merits and in invitum. *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, distinguished, and *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 803, followed. Where a fraudulent joinder of defendants is averred by the party petitioning for removal, and is specifically denied, the petitioner has the affirmative of the issue."

[3] These and other authorities are also to the effect that, where the petition for removal, properly verified, as in this case, and accompanied by proper and sufficient bond, has been filed in the state court, and the same contains allegation of fraudulent joinder, together with full and direct statement of the facts and circumstances of the transactions, sufficient, if true, to demonstrate that there had been such fraudulent joinder of the resident defendant, in such case, the order for removal should be made, and the jurisdiction of the state court is at an end. If the plaintiff desires to challenge the truth of these averments, he must do so on motion

to remand or other proper procedure in the federal court. That court, being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine the facts upon which the jurisdiction rests. *Chesapeake Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; *Wecker v. National Enameling, etc., Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430; *Kansas City Ry. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Boatmen's Bank v. Fritzlen*, 75 Kan. 479, 89 Pac. 915, 22 L. R. A. (N. S.) 1235; *McAllister v. Chesapeake Ry.*, 157 Fed. 740, 85 C. C. A. 316; *Atlantic Coast Line v. Bailey* (C. C.) 151 Fed. 891; *So. Ry. v. Hudgins*, 107 Ga. 334, 33 S. E. 442; *Byson v. McPherson*, 71 Iowa, 437, 32 N. W. 418.

[4] As we have heretofore intimated, we think a petition in cases like the present should be verified. Ordinarily, in causes coming within the direct provisions of the statute, such verification is not absolutely required, though it is usual to have it, and in these petitions, alleging fraudulent joinder, there are one or two cases in the lower federal courts which hold that no verification is necessary. But this is not a case coming directly within the terms of the statute, but rather a corollary, which arises from the necessity of the case, and the procedure therein should be to some extent the subject of judicial regulation and control. As it would be inexpedient, and to some extent an idle thing, to confer jurisdiction of a cause on the Circuit Court of the United States, and allow to some other tribunal the power to determine the facts upon which the jurisdiction rests, so it would be to seriously inconvenience and threaten the proper and timely exercise of jurisdiction on the part of the state courts to require them to stay their procedure on simple allegations which can be made without consideration or any sense of responsibility; and we think it rests on sound reason, and is a fair deduction from the authoritative cases, that the petition for removal by reason of fraudulent joinder should be duly verified. *Louisville & Nashville R. R. v. Wangellin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Welch v. Cin.*, etc., R. R. (C. C.) 177 Fed. 760; *Kelly v. Chicago, etc., R. R.* (C. C.) 122 Fed. 286; *Ross v. Erie R. R.* (C. C.) 120 Fed. 703; *Union Terminal v. Chicago* (C. C.) 119 Fed. 209. In *Wangellin's Case*, supra, the affidavit of the vice president of the road, as to the truth of the facts contained therein, accompanied the petition of removal. In *Ross' Case*, it appears that the petition was duly and properly verified by defendant company. This is certainly the prevalent custom, and should always be required.

There is no error, and the judgment, directing removal of the cause, is affirmed.

Affirmed.

(157 N. C. 577)

REXFORD et al. v. MARTIN et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

ADVERSE POSSESSION (§ 113*)—EVIDENCE.

On a plea of adverse possession, evidence as to who claimed the land at the time defendants acquired possession was admissible to show the beginning of the possession, its notoriety, and continuity.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 669-681; Dec. Dig. § 113.*]

Appeal from Superior Court, Swain County; Cline, Judge.

Action by C. H. Rexford and others against John H. Martin and others. Judgment for defendants, and plaintiff Rexford appeals. Affirmed.

W. L. Taylor, Bryson & Black, and Frye & Frye, for appellant. John W. Hinsdale, for appellees.

PER CURIAM. This case has received a careful examination, and we are of the opinion that no substantial or reversible error, if error at all, was committed during the trial. It is plain that the defendants had good color of title, and the case turned largely upon their possession—that is, whether it was sufficiently adverse, notorious, continuous, etc., to ripen their color into a good and valid title—and we entertain no doubt upon this branch of the case. The evidence as to who claimed the land was competent and relevant to show the beginning of the possession, its notoriety and continuity, and, if any of the questions or answers were incompetent, as contended by plaintiffs, we do not see that any error in this respect was prejudicial.

In view of the facts, it must certainly be considered as harmless. We do not intend even to intimate that there was error. The substantial merits are clearly with the defendants, and the jury, under an exceedingly fair and proper charge, have found the issue of fact against the plaintiffs, and their verdict in our judgment should not be disturbed.

No error.

(158 N. C. 28)

SMITH v. MILLER et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. REMAINDERS (§ 16*)—CONTINGENT REMAINDERS—SALES—ORDERS—REVIEW.

The commissioner appointed by the court to sell property held by contingent remainder for reinvestment may properly except to rulings of the court during the several stages of the proceedings, and appeal from the final judgment.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 11; Dec. Dig. § 16.*]

2. REMAINDERS (§ 16*)—CONTINGENT REMAINDERS—SALES—POWER OF COURT.

The court having power to sell property held by contingent remainder has jurisdiction

to order the commissioner appointed to make the sale to pay taxes on the property, though such taxes were payable by the life tenant.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.*]

3. REMAINDERS (§ 16*)—CONTINGENT REMAINDERS—SALES—POWER OF COURT.

An order of court in a suit for the sale of property held by contingent remainder, which directs the commissioner appointed to make the sale to pay all taxes "as are and have been laid against" the property, includes, not only taxes due and in the hands of the officers for collection at the time of the making of the order, but all such as thereafter accrue, as well as those previously paid by the commissioner for the estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.*]

4. LIFE ESTATES (§ 18*)—TAXES—LIABILITY.

Under Revisal 1905, § 2859, making a tenant for life liable for taxes, and providing that, where the life tenant suffers the property to be sold for taxes, the remainderman may redeem the land, a remainderman or reversioner may pay the taxes before a sale where the life tenant does not do so, and will be entitled to reimbursement therefor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 39; Dec. Dig. § 18.*]

5. REMAINDERS (§ 16*)—CONTINGENT REMAINDERS—SALES—POWER OF COURT.

The court in a suit for the sale of property held by contingent remainder for reinvestment has no jurisdiction to order a sale of property adjudged to be the property of the commissioner appointed to make the sale; such property not having been levied on or seized.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by E. A. Smith against C. H. Miller and others for the sale of a contingent remainder for reinvestment. From a final judgment, C. H. Miller, the commissioner appointed to sell the property, appeals. Modified.

A. S. Barnard, for appellant. Mark W. Brown, for appellee.

WALKER, J. This case has been before us for adjudication of one question or another several times, and is reported in 151 N. C. 620, 66 S. E. 671; 152 N. C. 314, 67 S. E. 746; 155 N. C. 242, 71 S. E. 353; 155 N. C. 247, 71 S. E. 355.

[1] The defendant, C. H. Miller, who was the commissioner appointed by the court to sell certain realty, has brought the case here by appeal from the final judgment, he having excepted to rulings of the court during the several stages of the proceedings in the court below, which was the proper method of procedure, as we held in *Smith v. Miller*, 152 N. C. 314, 67 S. E. 746, and 155 N. C. 242, 71 S. E. 355. He relies upon the following exceptions taken to the rulings of Judge Peebles:

[2] 1. Miller, as commissioner, was allowed certain items in his account, and to this ruling of the judge there was no exception

so that they must stand. But he was denied credit for other items, and to this ruling he has excepted. Among them is a claim he now makes for taxes and local assessments levied upon the property which he sold under orders of the court. It appears that at December term, 1904, Judge Shaw made an order directing or authorizing Miller, as commissioner, "to pay all such taxes and street assessments as are and have been levied against any of the property described in the petition (for a sale of the land) in this cause, same to be paid by him out of funds in his hands." No exception was taken to this order by any of the parties. The commissioner paid taxes and assessments since his qualification to the amount of \$2,018.76, some before the order was made and some afterwards, but not included in the amount presently to be mentioned. He also paid taxes and assessments then in the hands of the sheriff and city tax collector for collection, amounting to \$3,131.78, the total amount of taxes and assessments thus paid being \$5,735.44. The appellees contend that he is not entitled to credit for this payment of taxes and assessments, first, because, as Judge Peebles ruled, Judge Shaw had no power to make such an order; second, because the amount paid over and above the sum of \$3,131.78, which was then due and collectible, was not embraced by the terms of the order; and, third, because the life tenant, Mrs. Elizabeth A. Smith, was liable for the taxes and assessments, and they were not properly and legally chargeable upon the fund in the hands of Miller, as commissioner. We do not see why Judge Shaw could not make such an order. It was within the power and jurisdiction of the court to sell the land for partition, and, in order to give a clear title, it was certainly necessary that the taxes, which constitute liens upon the land, should be paid. What would be the use of dividing the lands if they could be sold for taxes and the estate of the parties therein be forfeited or lost? This proceeding would in such a case be a vain and useless one. The commissioner may not have been under any obligation to pay the taxes and assessment without an order, but it seems to us, at least, that the order was not only a proper and legal one, but absolutely necessary for the protection of the interests of the parties. It was clearly to their advantage, and, having profited by it, they will not now be heard to complain. He who is willing to reap the benefit should be made to take it with the burden which naturally and equitably goes with it. We think the court had the jurisdiction, and the order was a just and lawful exercise of his power.

[3] Our opinion, also, is that the order of Judge Shaw embraces, and was intended to

include, if we are to construe it by the words employed, not only taxes and assessments then due and in the hands of the officers for collection, but all such as thereafter accrued, as well as those theretofore paid by Miller himself while commissioner for the estate. The language is, "All such taxes and assessments as are and have been levied." It would seem that these words are sufficient to take in the past, present, and future taxes and assessments. This meaning is not only apparent on the face of the order, but it would be hard to conclude that the court intended that only a part should be paid. If any of the taxes or assessments had been left unpaid, the property could just as well have been sold for that part as for the whole thereof.

[4] It is true the statute provides for the payment of the taxes by the life tenant. But, suppose she failed to pay them, either purposely or because she had no funds with which to pay them, must the property be sacrificed for this reason, and should we heed such an argument from the remaindermen, who are now enjoying the benefit which they derived solely from the payment? If the life tenant failed to pay, they may perhaps have an action against her, either at common law or under the statute (Revisal, § 2859) which reads as follows: "Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner." By this provision of the law the remainderman or reversioner may redeem from a tax sale, but must he wait until there is a sale and the accumulation of costs and expenses before he exercises the right? If it is inevitable that the land will be sold for the tax, why should he wait? The law evidently means that, if the life tenant does not pay and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax, and for the same reason that he can redeem from a tax sale already made. It may be that he could do so without the aid of the statute. Revisal, § 2857, provides for the payment of all taxes assessed upon real property ordered to be

sold in judicial proceedings and remaining unpaid, and also for the payment of such as may be required to redeem the same, if it has been sold for taxes, and it then provides that payment of the taxes shall be made out of the proceeds of the sale. Sections 2857 and 2858 provide, also, for the payment of taxes assessed upon real estate by trustees, mortgagees, and lienors. The object of the law seems to be, not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. This exception is sustained, and Miller will be allowed the full amount of taxes and assessments paid by him.

2. We also think that Miller, as commissioner, should be allowed commissions at least to the amount that they were ordered to be retained by him, which appears to be \$1,400. There was no exception to this order at the time, and Judge Shaw is presumed to have made it upon full consideration of all the facts and circumstances; and, while we do not decide that the order was not reviewable by Judge Peebles, as it is not necessary to do so, we do not see why it should not stand as it was made. The learned judge in overruling it may have been influenced, at least to some extent, by the erroneous view taken of some of the questions we are now considering. This exception to the ruling disallowing commissions of \$1,400 is sustained.

[5] 3. Miller, as commissioner, disbursed a large sum in the manufacture of concrete blocks for use in the construction of the new hotel building in Asheville. Judge Peebles refused to allow him any credit for this expenditure, and ordered his successor, Mr. Whitson, to sell the blocks, and apply the net proceeds as a credit on the judgment against Miller in this case, after finding as a fact that the blocks were manufactured by Miller "in his business, and are not the property of the Smith estate, but the property of Miller, as he could not sell them to himself as commissioner. He is not credited with them, but they are ordered to be sold." If they did not belong to the "Smith estate," but to Miller, it follows that the court had no right to order a sale of them. They had not been levied upon or seized in execution for any debt due by Miller to the "Smith estate." It is clear to us that the sale of them was not only irregular, but void, and Miller is entitled to have, at least, the proceeds or the amount thereof paid to him. This was said in the argument to be \$600. He is also entitled, at least, to the proceeds of any other property of his which has been sold in like manner.

None of the exceptions we have considered are covered by our first ruling in the case, that the court did not have jurisdiction to authorize the building of the hotel. They relate entirely to other matters clearly with-

in the cognizance of the court. The other exceptions of defendant are overruled.

It may be that some of the amounts are not correctly stated, and, if they are not, the court below may refer the matter for a finding as to the true amounts, unless the parties can agree, as to them.

The judgment of the superior court will be modified in accordance with this opinion. Error.

(158 N. C. 61)

FISHER v. ENGLISH LUMBER CO.

(Supreme Court of North Carolina. Dec. 28, 1911.)

1. SALES (§ 340*)—ACTIONS FOR PRICE—REMEDY.

Where a seller suing for the price showed a contract of sale and delivery of goods in compliance therewith, he was entitled to recover the price, and was not required to allege and prove damages sustained because of the buyer's breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

2. PRINCIPAL AND AGENT (§ 120*)—TRANSACTIONS BY AGENT—EVIDENCE.

Where there was some evidence that an agent was authorized to represent the principal in a transaction, and that the principal recognized the agent's authority to make a contract or ratified the contract, evidence of transactions between the agent and the other party to the contract with respect to the contract was admissible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 402-412; Dec. Dig. § 120.*]

Appeal from Superior Court, Swain County; Oline, Judge.

Action by D. G. Fisher against the English Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover the purchase price of lumber sold by the plaintiff to the defendant, and the question to be decided is whether the sale was executed or executory. The contract, as plaintiff alleged, was for the sale of oak, chestnut, and poplar lumber, except the chestnut culls; the "cull lumber" having been theretofore sold to Mr. Wilbar, as explained to defendant, who was to pay for the lumber \$12 per 1000 feet. The plaintiff also alleged that the lumber "was sold pack run, and defendant was to take it just as it came to it, except the chestnut culls, which were to be thrown out." The stock was to run from three to six feet in length, and was supposed to be one face clear, but with some culls in it. The defendant denied that it made the contract as set out in the complaint, and alleged a different agreement. It also denied that Mac English, an officer of defendant company, was authorized to contract for it. The plaintiff introduced letters which passed between the parties, and other evidence which tended to show that English had such authority, and

stating that the company would send Mr. Hayes "to take the stock up," and, after receiving a letter from the plaintiff explaining the agreement with Mac English, the defendant sent Mac English and Hayes to inspect the lumber or "to take it up," as expressed in the case, which we understand to mean that they were to inspect it, and, if found to be according to the quantity and quality represented by plaintiff, to accept it. Plaintiff asked Mac English if he had seen the lumber, and he said that he had seen it, and "it was all right." The defendant afterwards did accept one car load of the lumber, and it was shipped by it from the place of delivery, and it refused to take the other part of the lot because it was not of the quality represented. The court instructed the jury as to the bearing of the evidence, and the contentions of the parties, and the issues of fact and law. The defendant requested the court to charge the jury as follows: "If the jury should find from the evidence that there was a contract for the sale of lumber, as alleged in the complaint, and that the defendant failed and refused to comply with and perform the same, and refused to accept the lumber, then, before the plaintiff could recover in this action, he must both allege and prove the damages he sustained by reason of such breaches of the contract on the part of the defendant before he would be entitled to recover judgment for any amount because of such breach." The defendant excepted to some of the instructions, which will be noticed hereafter.

The jury returned the following verdict:

"(1) Did the defendant purchase from the plaintiff the lumber described in the complaint? A. Yes.

"(2) Did the defendant fail and refuse to take up and pay for the lumber covered by its contract with the plaintiff? A. Yes.

"(3) What amount, if any, is the plaintiff entitled to recover from the defendant? A. \$504, with interest from December 3, 1909."

Judgment was entered upon the verdict, and defendant appealed.

J. G. Merrimon, for appellant. Bryson & Black, for appellee.

WALKER, J. There is not much in this case but a question of fact. Plaintiff contended that he had sold the lumber to the defendant, through its officer and agent, Mac English, and that it was an executed sale, and not a mere executory contract to sell and deliver, and, further, that it had performed the contract on its part. There can be no doubt of the character of the agreement, if the jury accepted the plaintiff's version of the contract, instead of the defendant's, which they seem to have done. The defense is that after inspecting and measuring the lumber and accepting it, through

Mac English and Hayes, the defendant, with the assistance of the plaintiff, loaded and shipped one car, and then discovered, as it alleges that the balance of the lumber was not of the quality represented by the plaintiff. The jury passed upon this question under the instructions of the court, and found against the defendant, so that there is nothing in the case left but the naked question as to the measure of damages.

The jury have found, under proper instructions and upon sufficient evidence, that plaintiff sold the lumber to the defendant, the identity of the lumber, the place of delivery, and the price being ascertained, and it appears that the only reason for the refusal was that a part of the lumber did not correspond in quality with what it was represented to be. If the jury had found this to be true, it may be that the defendant, under certain circumstances, would be entitled to a reduction of the price, or to reject the lumber. *Caldwell v. Smith*, 20 N. C. 193. But there was some evidence to the effect that the defendant had the lumber inspected by English and Hayes, and loaded and shipped a car load of it. This was at least evidence of the fact that it had elected to accept the lumber, and the court having submitted the question of sale to the jury, and they having found, upon all of the evidence, that there was a sale and that the quality of the lumber was not misrepresented, we do not perceive that there was any legal impediment to the plaintiff's recovery.

[1] The prayer for instruction was properly refused, as the plaintiff is suing for the price, and not for unliquidated damages. If there was a sale, he is entitled to recover the price fixed by the contract; no fraud or any other vitiating fact having been shown.

[2] The objection to what occurred between the plaintiff and Mac English is not tenable. There was some evidence to show that he was authorized to represent the company, and, besides, the correspondence tended to show that he was recognized as defendant's agent, with authority to make the contract for it, or, at least, that the company ratified what he did in its behalf.

We find nothing in the record to indicate that plaintiff was not ready, willing, and able to comply with its contract.

No error.

(157 N. C. 640)

STATE v. ARLINGTON.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. INSURANCE (§ 30*)—REGULATION—AGENTS—LICENSES.

Evidence held to sustain a conviction for acting as an insurance agent without a license tax, in violation of Revisal 1905, § 3484, making such act a misdemeanor.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 35; Dec. Dig. § 30.*]

2. INSURANCE (§ 30*)—REGULATION—AGENTS—LICENSES—INDICTMENT.

Revisal 1905, § 3484, provides that if any person assumes to act as an insurance agent without having obtained a license prescribed by law, or shall act in any manner in any negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in the state, or, as principal or agent, shall violate any provision of the law in regard to the negotiation or effecting of contracts of insurance, he shall be guilty of a misdemeanor. Held, that an indictment charging that defendant did unlawfully and willfully assume to act as an insurance agent "for the Order of Owls," representing the same to be a fraternal insurance order having a sick, accident, and death benefit, the said order not being an insurance company lawfully licensed and authorized to do business in North Carolina, etc., was not objectionable for failure to directly aver that the order was a company subject to the insurance regulations of the state.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 35; Dec. Dig. § 30.*]

3. INSURANCE (§ 687*)—MUTUAL BENEFIT SOCIETY—REGULATION—"FRATERNAL ORDER."

Where a benefit order having a central organization and local bodies throughout the United States and foreign countries had insurance features, and paid death and sick benefits from dues collected from members, etc., it was a fraternal order within Revisal 1905, § 4795, providing that every incorporated association, lodge, or society doing business in the state on the lodge system with ritualistic form of work and representative form of government, organized to pay benefits to members and their beneficiaries in case of disability resulting from disease, accident, or old age, is a fraternal benefit order, and subject to regulation by the state's authorities.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1824; Dec. Dig. § 687.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2942.]

Appeal from Superior Court, Mecklenburg County; Biggs, Judge.

J. J. Arlington was convicted of soliciting insurance without a license, and he appeals. Affirmed.

The bill of indictment was as follows: "The jurors for the state upon their oaths present that J. J. Arlington, late of Mecklenburg county, on the 29th day of March, 1911, with force and arms at and in the said county, unlawfully and willfully did assume to act as an insurance agent for the 'Order of Owls'; the said J. J. Arlington representing the said 'Order of Owls' to be a fraternal insurance order or company, having a sick and accident benefit of \$8 per week and a death benefit of \$100; and the said J. J. Arlington assuming to so act as an insurance agent by soliciting B. S. Davis, B. C. Goldberg, and others to the jurors unknown to become members of the said 'Order of Owls' by keeping open an office and place of business in Charlotte, N. C., by advertising in the Charlotte Daily Observer and other papers to the jurors unknown, by using printed cards and other methods of advertisement, by receiving from B. S. Davis and other persons to

the jurors unknown the sum of \$5 each as initiation fee in the said 'Order of Owls,' the said 'Order of Owls' not being an insurance company lawfully licensed and authorized to do business in North Carolina, and the said J. J. Arlington having no license to act as an insurance agent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors for the state upon their oaths do further present that at and in said county, on the day and year aforesaid, the said J. J. Arlington did engage in the negotiation of unlawful insurance for and with the 'Order of Owls,' a foreign fraternal insurance order or insurance company, not admitted nor licensed to do business in the state of North Carolina, by soliciting B. S. Davis, B. C. Goldberg, and other persons to the jurors unknown to become members of the said 'Order of Owls'; by soliciting from the said B. C. Goldberg, B. S. Davis, and others to the jurors unknown the payment of initiation fees, and by the receipt of the said initiation fee from B. S. Davis and other persons to the jurors unknown, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state." There was verdict of "guilty." Judgment, and defendant excepted and appealed.

Tillett & Guthrie, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. [1] The statute law of North Carolina, more especially chapter 100, 2 Revisal, makes elaborate and minute provision for the protection of its people from imposition under the guise of insurance, real or pretended, and a department is created, charged with the especial duty of seeing that their rules are complied with. Under section 4691 and others bearing on the question all insurance companies must be "licensed and supervised" by the Insurance Commissioner, and, under section 4706, every agent must be licensed. By section 4715(3) every general agent is required to pay a license tax of \$5 per annum, district agent or organizer a like tax of \$3, and a local or canvassing agent a tax of \$1. These and other special regulations apply to foreign companies doing business in the state, and such companies are also required to make deposit for the protection of their policy holders, etc. Under sections 4794-4798, inclusive, fraternal orders are defined and regulated orders, which make provision for sick and death benefits by assessment, and by section 4798 these orders are subject to the same rules, regulations, and supervisions as foreign insurance companies, except that they are not required to make the deposit or have the paid-up capital as in other companies. Having established these extended regulations, a violation of

the same on the part of the companies is made a misdemeanor, under the following comprehensive statute (2 Revisal, c. 81, § 3484): "If any person shall assume to act as an insurance agent or insurance broker without license therefor, as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this state, or as principal or agent shall violate any provision of the law in regard to the negotiation or effecting of contracts of insurance, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred, nor more than five hundred dollars for each offense." Indicted under this section in form as above stated, it was made to appear on the trial that the Order of Owls is an association which seems to have had its origin in South Bend, Ind., consisting of the Home Nest, with power of self-perpetuation and operating under a plan by which branch nests may be and have been organized in large numbers in various sections of the country, under a form of by-laws, suggested by the Home Nest. These by-laws contain provision for sick and death benefits, but the rules or constitution established for the Home Nest do not profess to control the branch nest in this feature of benefits, except in section XXX, which is to the effect that each subordinate nest may pay death benefits to the executor, mother, wife, or child of a member who dies in good standing to an amount not exceeding \$100. As showing the general nature of this organization, and the control and supervision vested in the Home Nest towards the subordinate nests, the following provisions appear in the constitution:

"I. This organization shall be named 'Order of Owls.' Its object the advancement of its members, socially, morally, intellectually and otherwise.

"II. This society shall consist of an organizer's branch and subordinate branches. The organizer's branch shall be known as 'Home Nest,' and the subordinate branches shall be respectively known as 'Nest No. _____'.

"III. The Home Nest shall consist of the organizers thereof or their successors elected by unanimous vote of the survivors to fill any vacancy caused by the death or resignation or removal of any member. No member of the Home Nest shall be expelled except on the unanimous vote of all other members thereof.

"IV. Branch nests shall consist of not less than 10 persons, and no male shall be a member of a branch having female members or vice versa.

* * * * *

"VIII. Each nest shall pay the 'Home Nest', for the support of the general organization, the sum of 10 cents per member quarterly at the end of each quarter for

each member of the branch who was in good standing at any time during such quarter.

"XIV. The Supreme President may at any time revoke the charter of any nest or suspend for any length of time the existence of such nest, and in case of his doing so all the property and funds of the nest shall become the property of the Home Nest and be paid to it.

"XVII. The sum of \$2.00 shall be remitted the Home Nest for each candidate initiated and \$1.00 additional for each charter member.

"XVIII. The sole executive power of this organization shall be vested in the Home Nest and in the Supreme President when the Home Nest is not in session, including the right to grant dispensations of any and all kinds.

"XXVIII. The Supreme President shall designate the first place of holding all conventions. The Home Nest shall be at South Bend, Indiana, unless its members see fit to change it. Except as herein otherwise provided, the executive, legislative and all other powers of the Home Nest shall be vested in a trinity, consisting of the Supreme President, Secretary and Treas."

There was further testimony to the effect that the defendant, not having any license from the insurance commissioner, advertised and represented:

"(a) That the Order of Owls was there. (b) That he was their representative. (c) That the Order of Owls paid accident and death benefits. (d) He solicited people to come at once and join. (e) He gave a membership receipt to those who applied, and paid the required \$5."

In view of this evidence, we concur in the ruling of the trial judge that, if the relevant facts were accepted by the jury, the defendant was guilty as charged in the bill of indictment. "He unlawfully assumed to act as insurance agent for the 'Order of Owls' represented by him to be a fraternal insurance order. He unlawfully engaged in negotiating for insurance in the 'Order of Owls,' a foreign fraternal insurance order, not admitted or licensed to do business in this state."

[2] It is urged that the first count of the bill is fatally defective, and no conviction can be had thereon, for that it contains no direct averment that the "Order of Owls" is a company subject to the insurance regulations, but in our opinion no such averment is required for a proper indictment and no such fact is essential to constitute the crime. The entire, certainly the chief, purpose of this legislation is to protect people from harmful imposition in contracts and dealings of this character, and the evil which the

statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. The language of the act relevant to the charges contained in the first count: "If any person shall assume to act as an insurance agent without a license therefor as required by law." The facts in evidence show that the defendant in his published advertisement and his cards circulated in the vicinity, in taking money and issuing receipts, assumed to be the agent of a company, paying sick and death benefits. His conduct comes within the permissible and proper meaning of the words used in the statute and clearly within the mischief contemplated, and the first count in the bill of indictment must be held sufficient. *State v. Leeper*, 146 N. C. 655, 61 S. E. 535; *State v. Harrison*, 145 N. C. 417, 59 S. E. 867. It was further contended that no conviction should be allowed in either count because it did not appear that any local nest was organized in the locality as stated, and, if otherwise, that the insurance feature was optional with the local nest. But on the facts in evidence neither position can be maintained. It appears that under the constitution these local nests, having the insurance features of death and sick benefits, have been organized in all portions of the country, doing business under by-laws furnished by the Home Nest, and in its scheme of government the authority of the Home Nest is so absolute and all-pervading that it must be judged and have its complexion and status fixed by what it sanctions and approves, and this condition may not be properly altered or affected because some particular nest does or does not adopt this insurance feature. According to defendant's cards by which persons were induced to apply for membership and pay their money, these are the relevant facts:

"Reasons why you should join the Order of Owls:

"1st. Order of Owls has sick and accident benefit of \$8.00 per week.

"2nd. Order of Owls has \$100.00 death benefit.

"3rd. Order of Owls furnished free physician for you and your family.

"4th. Order of Owls will help you to get a position when you are out of employment.

"5th. Order of Owls will help you in your business. They trade with each other.

"6th. Order of Owls furnish you social advantages.

"7th. The dues are 50 cents per month; no extra assessment.

"8th. After closing the charter the initiation fee in this city will be \$25.00.

"9th. You will get in on the election of officers, if you join now, and are one of the leaders.

"10th. You do not have to take the initiation if you join now, and the total cost is only \$5.00.

"Be a Leader!

"Hoo!

Join Now!

Hoo!

"The Order of Owls Is Here!

"The Order of Owls is more than six years old and have about 1,400 nests with a membership of nearly 200,000 in the United States, Canada, Alaska, Cuba, Mexico, Porto Rico, Philippines, Sandwich Islands, New Zealand, Australia and South Africa. The Order of Owls is made up of the

"Jolliest and Best Fellows on Earth."

[3] The company, therefore, which defendant assumed to represent, was a fraternal order, coming within sections 4795-4798 of Revisal, and in soliciting contracts and receiving money for it, when neither he nor his company had been properly licensed, defendant was guilty under the second count in the bill. The authorities relied upon by defendants, as far as examined, do not affect our conclusion. In some of them the bill was questioned because no overt act was charged, as in *Fikes v. State*, 87 Miss. 251, 39 South. 783. In others, as in *State v. Campbell*, 17 Ind. App. 442, 46 N. E. 944, the statute by correct interpretation was held to apply only to incorporated companies. In the case at bar the overt acts are fully set forth, and the law is not so restricted. Throughout the statute, in sections relevant to the inquiry, the words used are insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. This business of insurance and insurance companies has become of such great interest and importance that our statutes, as stated, have made extended regulations for its supervision and control. The department established for the especial purpose under the direction of its active and capable commissioner has done much valuable work in the protection of the people of the state, and in cases permitting constructions that interpretation should be adopted which is best promotive of the public policy and beneficent purpose of the law.

There is no error, and the judgment of the superior court is affirmed.

No error.

(157 N. C. 481)

GARDNER & CLARK et al. v. MCCONNAUGHEY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. EXEMPTIONS (§ 128*)—ALLOTMENT.

Report of appraisers appointed to appraise personal property prior to levy was void where none of the articles disclosed were specifically allotted to the defendant, as required by Revisal 1905, § 695.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 157; Dec. Dig. § 128.*]

2. EXEMPTIONS (§ 128*)—LEVY—ALLOTMENT—TIME.

Under Revisal 1905, § 695, relating to execution, and providing that the officer shall

make his levy on the entire personal estate subject to seizure, but, before he sells, he shall have so much of it set apart for the debtor within the limit of value as he may select, etc., the debtor is entitled to have his exemption ascertained up to and just before the process is executed by sale, the levy being subject to amendment before that time, and hence, in ascertaining the exemption, the debtor is not to be charged with articles which have been consumed or otherwise disposed of since the assessment, or with an increased deterioration in value since that date.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 157; Dec. Dig. § 128.*]

3. EXEMPTIONS (§ 128*)—PERSONAL PROPERTY—LEVY—ALLOTMENT.

Where personal property of a debtor is sought to be subjected to a judgment, it must be first levied on, and then the debtor's personal property exemption allotted as prescribed by Revisal 1905, § 695; the debtor being entitled also to have such exemption reassigned whenever defendant's executions are levied.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 157; Dec. Dig. § 128.*]

Appeal from Superior Court, Burke County; Lane, Judge.

Action by Gardner & Clark and others against N. L. McConnaughey. Execution having been levied on certain of defendant's property and the court having refused to set aside an appraisement, defendant appeals. Reversed.

Spainhour & Mull, for appellant. J. T. Perkins and S. J. Ervin, for appellees.

CLARK, C. J. Execution having been issued upon a judgment taken before a justice of the peace, the sheriff, without levying upon the personal property of the defendant, summoned a jury of appraisers, who filed an itemized valuation of such property, amounting to \$740.62, and reported that, after deducting the \$500 personal property exemption, the defendant possessed \$240.62 of property which was subject to sale of execution, but without specifying and setting apart the articles which should be exempt from sale under the execution, as required by Revisal, § 697. The defendant filed exceptions to the report of the appraisers as provided by Revisal, § 699. At the term of the superior court next ensuing, the defendant moved to set aside the report of the appraisers as void, because it did not appear from the face thereof that there was any allotment of the articles set apart to the defendant as required by Revisal, § 697. The court refused to set aside the report, and directed the matter to be re-referred to the appraisers to specify the articles to be allotted to the defendant, and refused to direct that the allotment should be made out of articles possessed by the defendant at the time of said allotment. The ruling of the judge was, in effect, that the defendant should take as a part of the allotment the articles of personal property which should have been consumed since the first assessment.

[1, 2] The report was void because there were no articles specifically allotted to the defendant as his exemption, as required by Revisal, § 695. The judge further erred in directing that the defendant should be charged with the articles which had been consumed or otherwise disposed of since the assessment, and also ignored the fact that other articles may have increased or depreciated in value since that date. In *Pate v. Harper*, 94 N. C. 23, it was said: "We think the debtor is entitled to have his exemption ascertained up to and just before the process is executed by a sale. While the process is in the officer's hands in full activity, the preliminary action of the appraisers is not conclusive, but remains, in fieri, capable, at their instance, under the call of the officer, at least of correction and amendment. If property has been omitted which ought to have been put on the list, but was not known at the time to belong to the debtor, this could be done. The appraisers ought also to have the power, and we think do have it, to enlarge the exemption, so that none which should be exempt shall be sold from him. The mandate of the statute is that the officer shall make his levy upon the entire personal estate subject to seizure under execution, but, before he sells, to have so much of it set apart for the debtor within the limit of value, as he may select, and when insufficient, all being below the value, such selection is unnecessary." In *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170, the court quotes the above, and adds that the judgment debtor is entitled up to the last moment to have his exemption set apart before the sale, and that the same right belongs to the judgment creditor. There having been no levy, and the allotment not having been made at all, and it not appearing that the defendant was given the opportunity to select the articles, the report was fatally defective, and should have been set aside.

[3] It should be noted that there is a material difference between the allotment of the homestead under Revisal, § 687, which must be done "before levying upon the real estate," and as to which the levy must be only upon the excess, Revisal, § 692, and the allotment of the personal property exemption, for the personal property must be levied upon—that is, taken in possession by the officer—and the personal property exemption is then allotted in the manner provided by Revisal, § 695. The homestead exemption is permanent, unless there is a reallocation by reason of an increase in value in the manner provided by Revisal, § 691. But the personal property exemption is to be reassigned, whenever at subsequent dates executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in

quantity between the levy of executions, especially so as to articles of food which are usually included in such exemptions. The report of the appraisers should have been set aside and the sheriff should proceed to levy his execution, and the personal property exemption must be allotted out of the personal property in the hands of the defendant at the time of such allotment; the articles being selected by the defendant as provided by the Code. In *Campbell v. White*, 95 N. C. 344, it was held: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit"—*Smith, C. J.*, saying that the Constitution (article 10, § 1) is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss, or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that, when any final process against the debtor's estate is to be enforced that much of his estate must be allowed to remain with him as not liable to sale.

Reversed.

(157 N. C. 507)

Ex parte ALDERMAN.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILDREN—GROUNDS.

The court, on habeas corpus to determine the custody of a child of divorced parents, is governed solely by what is for the best interests of the child, and, where the best interests of the child require that it shall remain in the custody of the mother, a judgment awarding her the custody is proper.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.*]

2. DIVORCE (§ 326*)—FOREIGN JUDGMENT—FULL FAITH AND CREDIT.

The court must give full faith and credit to a judgment of the court of a sister state granting within its jurisdiction a divorce in a suit between citizens of the state and within the jurisdiction of the court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 827-840; Dec. Dig. § 326.*]

3. DIVORCE (§ 332*)—FOREIGN JUDGMENT—FULL FAITH AND CREDIT—CUSTODY OF CHILD.

A judgment of a court of a sister state, which awards the custody of a child to the wife obtaining a divorce from her husband subject to the right of the husband to visit the child, and the child to visit the husband at reasonable times, has no extraterritorial effect, and the child, on becoming a citizen of North Carolina, is not under the control of the courts of the sister state, and such judgment is not entitled to full faith and credit, and in a contest for the custody of the child the courts of North Carolina are gov-

erned only by what is for the best interests of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 843; Dec. Dig. § 332.*]

Appeal from Superior Court, Buncombe County; Webb, Judge.

Habeas corpus proceedings by William F. Alderman against Sarah E. Alderman to determine the custody of Hugh Alderman, an infant son of the parties. From a judgment awarding the custody to defendant, petitioner appeals. Affirmed.

This is a proceeding in habeas corpus, instituted by the petitioner, Wm. F. Alderman, to determine the custody of Hugh Alderman, the infant son (four years of age) of petitioner and his former wife, the respondent, Sarah E. Alderman, who now resides with her child at Brevard, N. C. The cause was heard in the superior court of Buncombe county by his honor, Judge Webb, who made findings of fact and rendered judgment as follows:

"This cause coming on to be heard before the undersigned judge, Jas. L. Webb, and being heard upon the affidavits filed by both plaintiff and defendant, I find the following facts:

"(1) I find as a fact that W. F. Alderman and Sarah E. Alderman were married in the state of Florida about 7th day of June, 1899, and lived together as man and wife until about the ——— day of ———, 1909.

"(2) I find as a fact that during the years 1909 and 1910 W. F. Alderman abandoned Sarah E. Alderman, and thereupon, Sarah E. Alderman, who was then with her child, Hugh Alderman, visiting her parents in the state of North Carolina, instituted divorce proceedings in the courts of the state of Florida, alleging willful, continued, and obstinate desertion on the part of W. F. Alderman, and the said Sarah E. Alderman was on February 28, 1911, granted a divorce from the bonds of matrimony upon the ground of willful, continued, and obstinate desertion.

"(3) I find as a fact that during the relationship of man and wife, between the plaintiff and the defendant, there was born Hugh Alderman, the child in question, who is now a little more than four years of age.

"(4) I find as a fact that in the decree that was signed in the divorce proceedings in the state of Florida, rendered February 28, 1911, the following clause and paragraph appears: 'It is further ordered, adjudged, and decreed that the complainant, Sarah E. Alderman, have and she is granted the custody of the child, Hugh Alderman, provided that the defendant, W. F. Alderman shall be allowed to visit said child at such times as may to the said Sarah E. Alderman seem reasonable, and the child, Hugh Alderman, may visit the defendant William F. Alderman at such times and under such circumstances and conditions as are reasonable and

expedient, and the child may at least be permitted to visit said William F. Alderman for two weeks at a time every three months if the said William F. Alderman so desires or elects.'

"(5) I find as a fact that the child, Hugh Alderman, is a frail and delicate child, and that said child was at the time of the institution of the divorce proceedings in the state of Florida, and prior thereto, and has been at all times since, residing with its mother, Sarah E. Alderman, and grandparents, Rev. Paul F. Brown and wife, at Brevard, Transylvania county, N. C.

"(6) I find as a fact that the child's health is such that it would jeopardize it to carry it from the mountains of Western North Carolina to the state of Florida, especially during the warm season of the year.

"(7) I find as a fact that the mother of the child, Sarah E. Alderman, is an intelligent, refined, Christian woman, living with her parents, Rev. Paul F. Brown and wife at Brevard, N. C., and that Rev. Paul F. Brown is the pastor of the Presbyterian Church in Brevard, N. C.

"(8) I find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, and her parents, Rev. Paul F. Brown and wife, the grandparents of Hugh Alderman, are people of sufficient means to properly care for and make comfortable and educate the child, and I further find that the moral welfare of the child, Hugh Alderman, is being well guarded.

"(9) I further find as a fact that prior to the institution of the divorce proceedings in the state of Florida by Sarah E. Alderman v. W. F. Alderman, and since said proceedings were instituted, and prior to and since the decree of separation and divorce was rendered therein, the said William F. Alderman had in his employ a stenographer, one Georgia V. Farmer, and that he became infatuated with said woman, conducting himself in a way not becoming a man of a family, with a living wife, that he showed the said Georgia Farmer many attentions in various ways, riding upon street cars with her, carrying her to restaurants, theaters, purchasing small articles of various kinds for her, taking trips with her on trains, visiting her boarding house, removing the photo of Sarah E. Alderman, his wife, from the locket on his watch chain, which locket contained the miniature photo of Sarah E. Alderman and one of their children, now dead, and placing in said locket the miniature of Georgia Farmer.

"I further find as a fact that William F. Alderman prior to the date of the decree in said divorce proceedings, and while the decree for alimony was being considered, had one Roena Floyd, a single woman, to deed to Georgia Farmer, his stenographer, for a nominal sum of \$10, a house and lot in the city of Jacksonville, Fla., and the said deed

was not registered until after said decree for divorce was signed, to wit, on March 23, 1911.

"I further find that after the institution of this suit in the superior court of Buncombe county to obtain the child Hugh Alderman the said William F. Alderman attempted to kidnap or get possession of the said Hugh Alderman by having a colored boy to secretly get him out of the possession of his mother, Sarah E. Alderman, carry him to Hendersonville, through the country, a distance of 20 miles, there to be turned over to William F. Alderman to be carried to the state of Florida.

"(10) I further find as a fact that William F. Alderman has no permanent place of abode, no settled home, in which to properly care for the child Hugh Alderman, and I further find as a fact that the said William F. Alderman is not a suitable person to have the care and custody of the child, Hugh Alderman, at this time.

"(11) I further find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, is a fit and proper person to have the care and custody of Hugh Alderman, the child in question, in looking after the health, training, and moral development of the child.

"(12) I further find as a fact that Sarah E. Alderman does not object to W. F. Alderman visiting and being allowed to see the child, Hugh Alderman, under proper and reasonable conditions.

"The foregoing facts are found from the large number of affidavits, perhaps 50 or more, filed by both plaintiff and defendant, and from the facts appearing and found by me, I conclude as a matter of law:

"(1) That the court is of the opinion that this is not a proper case where the writ of habeas corpus will lie.

"(2) That if it is a case where such writ will lie, from the foregoing findings of fact, the court is of opinion that it is for the best interest of the child, Hugh Alderman, to be left in the possession of and under the care and custody of its mother, Sarah E. Alderman, and it is so ordered.

"(3) It is further ordered that W. F. Alderman be allowed to visit said child, Hugh Alderman, at the home of its mother at such times and under such conditions as the mother of said child may deem advisable.

"(4) It is further ordered that the prayer of the petitioner be and the same is hereby refused, and it is further ordered that the petitioner, W. F. Alderman, pay all the costs of this action to be taxed by the clerk of the superior court of Buncombe county."

D. L. English and Mark W. Brown, for appellant. Welch Galloway, for appellee.

BROWN, J. It appears from the findings of his honor that the petitioner and respondent were divorced by the courts of the state of Florida, where they resided in 1909 and 1910, at the instance of the respondent, upon

the ground of willful, continued, and obstinate desertion by petitioner of his wife and only child, and the general custody of the child was awarded to the mother, who afterwards removed with her child to Brevard, N. C., where she now resides with her father.

[1] The custody of children in cases of the divorce and separation of their parents is a subject as delicate as any with which courts have to deal. The good of the child should be, and always is, the chief thing to be regarded and the governing principle which guides the judge. All other considerations sink into insignificance. Many cases and text-writers can be cited where the principle is announced that the physical, moral and spiritual welfare of the child is the only safe guide in cases of this kind; and the courts will be guided by those surroundings. In *re Lewis*, 88 N. C. 34; *Jones v. Cotten*, 108 N. C. 458, 18 S. E. 161; In *re Turner*, 151 N. C. 474, 66 S. E. 431; *Hurd on Habeas Corpus*, 528; *Schouler on Dom. Rel.* 248; 2 *Bishop, M. & D.* § 529; *Umlauf v. Umlauf*, 27 Ill. App. 378. One who reads the findings and the judgment of the just and learned judge who heard this matter in the court below must conclude that no other consideration than the child's welfare influenced his decision to remand the child to the care of its best friend, the mother. The love of the mother for her child, regardless of conditions and environments, has been proven by the history of the ages, and, while her devotion can be counted upon almost unfailingly, it is sad to say that sometimes the tie between father and child is a different matter, and requires the strong arm of the law to regulate it with some degree of humanity and tenderness for the child's good.

But the petitioner contends that under the Florida decree he has a vested right in the partial custody of the child, which this court is bound to respect and enforce under the full faith and credit clause of the federal Constitution. That part of the decree of the Florida court which petitioner invokes reads as follows: "W. F. Alderman shall be allowed to visit said child at such times as may to said Sarah E. Alderman seem reasonable, and the child, Hugh, may visit the defendant, W. F. Alderman at such times and under such circumstances and conditions as are reasonable and expedient, and said child may at least be permitted to visit W. F. Alderman for two weeks at a time, etc., if W. F. Alderman so desires." The language used would seem to indicate that the mother is expected to exercise careful supervision and control over the child, and that her consent or permission is necessary before the child can visit its father even for two weeks at a time. But nevertheless, if the language used was compulsory in its terms, that clause of the decree is not such a judgment of another state which the courts of this state are bound to enforce.

[2] All states and governments possess inherent power over the marriage relation, its formation and dissolution, as regards its own citizens, and, as both the husband and wife were citizens of Florida and properly before its courts as parties to the suit, we must give full faith and credit to the annulment of their marriage. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; *Haddock v. Haddock*, 201 U. S. 563, 26 Sup. Ct. 525, 50 L. Ed. 867.

[3] But the infant child of their union is not property, and the father can have no vested right in the child or its services under a decree divorcing the parents. Such decree as to the child has no extraterritorial effect beyond the boundaries of the state where it was rendered. The child is now a citizen of North Carolina, and, as such peculiarly under its guardianship and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interests of the child. "Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state." 1 *Tiedeman*, State and Fed. Con. p. 325; *Starnes v. Mfg. Co.*, 147 N. C. 559, 61 S. E. 528, 17 L. R. A. (N. S.) 602. In this case it is said: "The supreme right of the state to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights." Therefore it follows that, when this child became a citizen and resident of this state and duly domiciled here, it is no longer under the control of the Florida courts. In the case of *Frank Bort*, 25 Kan. 308, 37 Am. Rep. 255, the full faith and credit clause of the federal Constitution was invoked by the petitioner in support of his supposed right under a decree in another state. Mr. Justice Brewer (afterwards of the Supreme Court of the United States) denied the correctness of such position, saying: "This claim seems to rest on the assumption that the parents have some property rights in the possession of their children, and is very justly repudiated by the courts of Massachusetts." 2 *Bishop on Mar. & Div.* (5th Ed.) 204. The same question was before the Kansas court again in 1885, and it held that the decree of the foreign court in no manner concluded other courts of the state where the child is then residing as to the best interests of the child. *Avery v. Avery*, 33 Kan. 1, 5 Pac. 419, 52 Am. Rep. 523, citing and approving *In re Bort*. To the same effect is the decision of the Court of Appeals of New York in *People v. Allen*, 105 N. Y. 628, 11 N. E. 143. In *Wilson v. Elliott*, 96 Tex. 474, 73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 928, the same question was considered by the Supreme Court of Texas, and it was held

that the decree of the court of another state awarding the custody of a child was not binding upon the courts of Texas under the full faith and credit clause of the federal Constitution after the child had become domiciled in Texas. The court says: "Were the subject-matter of the decree property or a matter in which the parents were solely concerned, the decree would, by reason of said article, be entitled to the effect which the trial court has given it. But neither of these propositions is true. The child is not in any sense property of the parents. It is also equally well established that the government has an interest in the welfare and consequently in the question of the custody and environments of the child, and to this the rights of the parents are entirely subordinate." See, also, *Legate v. Legate*, 87 Tex. 252, 28 S. W. 281; *State v. Michel*, 105 La. 741, 30 South. 122, 54 L. R. A. 927.

The judgment is affirmed.

(158 N. C. 50)

ROBERTS v. PRATT.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. JUDGMENT (§ 822*)—FOREIGN JUDGMENT—FRAUD—RES JUDICATA.

Where, after a judgment in South Dakota, a motion was made to set it aside for fraud and denied, such denial was *res judicata*, and precluded the defense of fraud to an action on the judgment in North Carolina.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1496-1500; Dec. Dig. § 822.*]

2. JUDGMENT (§ 930*)—FOREIGN JUDGMENT—ACTION—COUNTERCLAIM.

In an action on a foreign judgment, defendant was entitled to plead as a counterclaim payments made since the rendition of the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1760; Dec. Dig. § 930.*]

Appeal from Superior Court, McDowell County; Long, Judge.

Action between Grace Roberts and W. M. Pratt. Judgment for plaintiff for less than the relief demanded, and both parties appeal. Affirmed

Civil action to recover on a judgment rendered in favor of plaintiff against defendant in the courts of South Dakota, tried before his honor, B. F. Long, and a jury at July term, 1911, superior court, McDowell county. Plaintiff declared on a judgment in her favor, rendered in the courts of South Dakota; said judgment having at the time jurisdiction of the cause and of the parties by personal service within that jurisdiction. Defendant answered, alleging fraud in the procurement of the judgment, and pleading a counterclaim by reason of payments and receipts bearing date since the rendition of the judgment.

The following issues were submitted and answered by the jury:

"(1) Is section No. 151, on page 594-5 of the Revised Code of South Dakota, the only statutory law of that state relating to remedies for setting aside judgments after the term?" (Answer dictated to stenographer. See page 55 of record.)

"(2) Was the judgment described in the complaint obtained by the fraud of the plaintiff, as alleged in the answer? Answer: Yes.

"(3) What amount, if any, has the defendant paid to plaintiff upon the judgment since the rendition thereof? Answer: \$320.73.

"(4) What amount, if anything, has the defendant paid on note declared on in the South Dakota suit, and not included in the inquiry and pleadings in that suit, and now set up as a counterclaim in this action? Answer: \$642.25."

The court, being of opinion that the matters involved on the issues of fraud had been determined by the judgment on a former appeal in the cause, set the verdict aside as to that issue, and entered judgment according to the facts as established by the verdict on the remaining issues. Defendant and plaintiff having duly excepted, appealed to this court.

W. T. Morgan, for plaintiff. Pless & Winborne, for defendant.

Defendant's Appeal.

HOKE, J. (after stating the facts as above). [1] The questions presented in this record have all been practically decided on a former appeal in the cause and reported. 152 N. C. 731, 68 S. E. 240. On that appeal it was held that, the issue of fraud having been decided against defendant on a motion made in the South Dakota court to set the judgment aside on that ground, defendant was precluded from raising a like question here. On this subject the former opinion is as follows: "This being the doctrine applicable on the facts as they now appear, the judgment of the Dakota court, as heretofore stated, denying the defendant's application to set aside the original judgment on the ground of fraud, will preclude all further inquiry on that question, and render said judgment an estoppel of record as to all matters embraced in the pleadings which may be considered as material to its rendition"—citing *Turnage v. Joyner*, 145 N. C. 81, 58 S. E. 757; *Manufacturing Co. v. Moore*, 144 N. C. 527, 57 S. E. 213, 10 L. R. A. (N. S.) 734, 119 Am. St. Rep. 983; *Tuttle v. Harrell*, 85 N. C. 456.

There are no new facts in any way bearing on this position, except the fact established that the statutes of South Dakota make provision substantially similar to our own in reference to setting aside a judgment for "mistake, surprise, or excusable neglect." As we endeavored to show on a former ap-

peal, a motion to set aside a judgment by reason of facts alleged in this application would have been entertained at common law, and the statute puts no restrictions, certainly, on this power as formerly exercised in the common-law courts, except to require that the motion should be made within 12 months from the rendition of the judgment. In other respects the statutory provision contemplates and includes a motion on facts of the character presented in this hearing. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Bennett v. Jackson*, 34 W. Va. 62, 11 S. E. 734; *Craig v. Wroth*, 47 Md. 281.

There is no error, and the judgment must be affirmed.

No error.

Plaintiff's Appeal.

[2] The plaintiff appeals, alleging errors in allowing the amounts allowed defendant in his counterclaim. These amounts consisted of alleged payments by defendant, made since the rendition of the judgment, as indicated in the verdict in the third issue, and amounts received by defendant or his agent from rents of property in South Dakota, for which plaintiff was accountable, as ascertained and determined in the fourth issue. These amounts were largely dependent on disputed matters of fact. They were not allowed or considered in the proceedings in South Dakota, by which the original judgment was obtained. On the facts as now presented, they come clearly within the principle sustained in the case of *Tyler v. Capehardt*, 125 N. C. 64, 34 S. E. 108, stated as follows: "(1) A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings. (2) Although the present cause of action might have been set up as a second cause of action in a former suit, but was not, and was not actually litigated, and was not 'such matter as was necessarily implied therein,' the plea of *res judicata* will not avail."

We find no error that would justify us in disturbing the judgment, and the same is in all respects affirmed.

No error.

(157 N. C. 648)

STATE v. DAVIS.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. CONSTITUTIONAL LAW (§ 242*)—DISCRIMINATION—CLASSIFICATION OF SUBJECTS.

Revised 1908, § 3712a, provides that any person who shall loan money on any article of furniture and reserve a greater rate of interest than 6 per cent. either before or aft-

er such interest shall accrue shall be guilty of a misdemeanor. *Held*, that the Legislature had power to classify lenders so as to place those loaning money on household and kitchen furniture in a separate class, and the statute was not in violation of the fourteenth amendment of the federal Constitution as discriminatory, and depriving such lenders of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 691; Dec. Dig. § 242.*]

2. USURY (§ 149*)—OFFENSES—ELEMENTS.

Under Revisal 1908, § 3712a, making it a misdemeanor for any person to charge more than 6 per cent. for loans on household and kitchen furniture, where defendant, for a loan of \$10, took a note for \$16.75 secured by a mortgage on household and kitchen furniture worth at least \$25, reserving at the time the money was supplied \$1.75 to pay interest in advance for 30 days, he was guilty of violating the act, notwithstanding the actual amount of the loan had not been repaid on a sale of the furniture.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 441, 442; Dec. Dig. § 149.*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

J. J. Davis was convicted of taking unlawful interest, and he appeals. Affirmed.

There was evidence on the part of the state tending to show that on or about October 24, 1910, John Wolff, desiring to borrow \$10, applied to one A. R. Bridgers, who was lending money for defendant; that the said Bridgers, with the knowledge, assent, and direction of defendant, advanced to said Wolff \$8.25, taking his note to himself as attorney for defendant in the sum of \$16.75 payable in 30 days, and to secure same took a chattel mortgage on the household and kitchen furniture of said Wolff; that the property included in the mortgage had originally cost about \$75, and was worth at the time the mortgage was executed about \$25; that Wolff paid on the debt \$3.50, and, default having been made, the property was seized under claim and delivery and sold at public auction for \$10.45. "The auctioneer cost \$1, costs claim and delivery \$3 or \$4, credit on mortgage about \$4, and, after applying proceeds as indicated, there was balance claimed by defendant of about \$2.50." There was evidence on part of defendant tending to show that there were claims included in the mortgage other than the money loaned, and that the usurious features of the transaction were without the knowledge or approval of the defendant. On a charge correctly stating the law as declared in the statute there was verdict "Guilty." Judgment, and defendant excepted and appealed.

L. M. Swink, for appellant. The Attorney General and Geo. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. (after stating the facts as above).
[1] The statute law of the state more di-

rectly relevant to the question presented (Revisal 1908, § 3712a), among other things, makes provision as follows: "If any person, firm or corporation who shall or may loan money in any manner whatsoever by note, chattel mortgage, conditional sale or otherwise, upon any articles of household or kitchen furniture, shall take, receive, reserve or charge a greater rate of interest than six per cent. either before or after such interest shall accrue * * * shall be guilty of a misdemeanor," etc. Under a charge which correctly states the provisions of the statute, the jury have found that usurious interest has been charged by defendant; that the obligation was secured by a mortgage on the household and kitchen furniture of the debtor. There is ample evidence to justify the verdict, and the conviction must be upheld if the statute itself is a valid law. It is insisted for the defendant that the statute is in contravention of the fourteenth amendment to the federal Constitution, in that it "unlawfully divides money lenders into two classes, those lending on household and kitchen furniture and on other kinds of property, and unlawfully discriminates against borrowers, putting borrowers, having only one class of property, to wit: household and kitchen furniture, into a class different from the borrower having other kinds of property to offer," but the position cannot in our opinion be maintained. The power of the Legislature to make the taking of usury under certain conditions a criminal offense is well recognized (*Ex parte Edward Berger*, 193 Mo. 16, 90 S. W. 759, 3 L. R. A. [N. S.] 530, 112 Am. St. Rep. 472; *State v. Wickenhoefer*, 6 Pennewill [Del.] 120, 64 Atl. 273); and the right of classification, in the enforcement of reasonable and proper police regulations on this and other subjects, is referred, very largely, to legislative discretion.

In *Insurance Co. v. Daggs*, 172 U. S. 562, 19 Sup. Ct. 282, 43 L. Ed. 552, the Supreme Court of the United States, the court having, with us, the final word on this subject, referred to this right of classification as follows: "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. We said in that case that 'the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless pal-

pably arbitrary"—the limitation being that "the classification has been made on some reasonable ground, something that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 666, *Morris-Scarboro Co. v. Express Co.*, 146 N. C. 170, 59 S. E. 667, 15 L. R. A. (N. S.) 983, and numerous and repeated decisions of that court are in affirmance and illustration of this principle. *Avenue Coach Co. v. New York City*, 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 815; *Lindsley v. Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369; *Engel v. O'Malley*, 219 U. S. 123, 31 Sup. Ct. 190, 55 L. Ed. 128; *Bank v. Kansas*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123; *McLean v. Arkansas*, 211 U. S. 540, 29 Sup. Ct. 206, 53 L. Ed. 315; *Heath & Milligan Manufacturing Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; *N. Y. v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; *Soon Hing v. Crowley*, 113 U. S. 704, 5 Sup. Ct. 730, 28 L. Ed. 1145. In *Coach Co. v. N. Y.*, supra, it was held: "Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so held that an ordinance of the city of New York prohibiting advertising vehicles in a certain street is not unconstitutional as denying equal protection to a transportation company operating stages on such street either because signs of the owners may be displayed on business wagons, or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification." In *Lindsley v. Gas Co.* the court again said: "The equal protection clause of the fourteenth amendment admits of a wide exercise of discretion, and only avoids classification which is purely arbitrary, being without reasonable basis. Nor does a classification having some reasonable basis offend because not made with mathematical accuracy or resulting in some inequality." And in *Engle v. O'Malley*, supra, it is said, approving the same statement in *Heath & Milligan Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236: "That legislation which regulates business may well make distinctions depend upon the degree of evil, and although, when size is not an index, a law may not discriminate between the great and the small, proper regulations based thereon, when size is an index of the evil to be prevented, do not offend the equal protection clause of the fourteenth amendment." In *McLean v. Arkansas*, 211 U. S. 540, 29 Sup. Ct. 206, 53 L. Ed. 315, supra, a regulation establishing a different method of mining coal, by which the wages of laborers were to be ascertained between miners when less than 10 miners were employed and those having a larger number, was implied. And on this very subject of usury and in *Berger's*

Case, supra, differing penal provisions were upheld in case of ordinary usury and when the charge was greater than 2 per cent. per month. And in *Wickenhoefer's Case*, supra, between loans not exceeding \$100 and loans of that sum or greater. If these various classifications have been sustained by our highest court, assuredly a law designed and intended to protect and maintain the home of the citizen should be upheld. If the schools of thought which tend to corrupt and undermine, if the forces which make for disorder and anarchy should ever be able to combine and so far increase as to threaten our social fabric, it is the home, the influences that hallow and emanate from it, which will arise and be potent to save. Referring to this subject as a proper basis for classification, our Attorney General in his argument before us has well said: "Prior to the adoption of the present Constitution, household and kitchen furniture to the value of \$200 was exempt from execution. The lawmaking power of this state has always realized that the loss of those articles necessary for comfortable and decent living entails great suffering upon women and children, frequently resulting in the breaking up of a home, and in the creation of conditions which are a menace to the public health and to the public prosperity. The statute under consideration is a logical and lawful extension of the protection which it has always been the policy of the law to afford this peculiar class of property. The General Assembly knew that the man who mortgages his household goods does so because he has nothing else to mortgage. He is the poor man, the illiterate man, and his poverty and his ignorance make him the easy prey of the usurer. The General Assembly also knew that in some of the cities of the state there were springing up a class of men who were selling money, like furniture, on the installment plan. It was to save the things necessary to the existence of a home from the grasp of such men that the act of 1907 was passed. We submit that the statute tends to preserve the domestic peace, to promote the family health and prosperity, and is a valid exercise of the police power of the state. It is not class legislation. It operates alike on all who take mortgages on household and kitchen furniture. It regulates a business, and does not create a class."

[2] It was further contended that, inasmuch as the property on its sale had not repaid the actual amount of the loan, no usury had been received, and therefore no violation of the statute had been established—citing *Rushing v. Bivins*, 132 N. C. 273, 43 S. E. 798. That was an action by the debtor to recover a penalty allowed by the statute of "twice the amount of usury paid," and the court held, in effect, that, to justify a recovery, it must be made to appear that usurious interest had been paid in money or

money's worth, and a note of the debtor, given therefor, did not amount to such payment. The case does not apply here, when the statute makes it a misdemeanor to take, receive, reserve or charge a greater rate than 6 per cent. The evidence of the state tends to establish that "for a loan of \$10 a note of \$16.75 was taken, secured by a mortgage on household and kitchen furniture, worth at least \$25," which would constitute an usurious transaction within the meaning of the statute (5 A. & E. p. 886), citing Bank v. Wareham Co., 49 N. Y. 635, and, in any event, it appears, further, that on a loan of \$10 for 80 days \$1.75 was reserved at the time the money was supplied. There is no error, and the judgment must be affirmed.

No error.

(187 N. C. 470)

BATEMAN v. HOPKINS.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. FRAUDS, STATUTE OF (§ 110*)—CONTRACTS FOR SALE OF REAL ESTATE—DESCRIPTION OF PROPERTY.

A memorandum, which recites the receipt of money to confirm the bargain on the purchase of the farm on which the signer lives, sufficiently describes the land to be conveyed within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

2. FRAUDS, STATUTE OF (§ 108*)—CONTRACTS FOR SALE OF REAL ESTATE—CONSIDERATION.

A memorandum of a contract to convey land is good under the statute of frauds, though it does not express the consideration, which may be shown by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 214-221; Dec. Dig. § 108.*]

3. SPECIFIC PERFORMANCE (§ 101*)—CONDITIONS PRECEDENT—TENDER OF PAYMENT—WAIVER.

Where a vendor repudiates the contract, and thereby indicates that a tender of the price will be refused, tender of payment by the purchaser before suing for specific performance is unnecessary, but it is enough that he is ready and willing and offers in his pleading to perform.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295; Dec. Dig. § 101.*]

4. VENDOR AND PURCHASER (§§ 147, 148, 169, 170*)—CONTRACTS—PERFORMANCE.

Where stipulations in a contract for the sale and purchase of real estate are mutual and dependent, an actual tender and demand by one party is necessary to put the other party in default and to cut off his right to treat the contract as still subsisting, and, where time is of the essence, the tender and demand must be made on the day named.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 285-295, 343-348; Dec. Dig. §§ 147, 148, 169, 170.*]

5. SPECIFIC PERFORMANCE (§ 101*)—CONTRACTS ENFORCEABLE—CONDITIONS PRECEDENT.

Where a vendor waives tender of performance by his repudiation of the contract, the

purchaser, ready, able, and willing to comply with the contract, may compel specific performance, and the vendor may not then put the purchaser in default by tendering a deed and demanding the price which the purchaser is unable to produce at the time of demand.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295; Dec. Dig. § 101.*]

6. SPECIFIC PERFORMANCE (§ 130*)—CONTRACTS FOR SALE OF REAL ESTATE—JUDGMENT.

The court, decreeing specific performance of a contract to convey real estate after the vendor has repudiated the contract and waived tender of performance, should require the purchaser to pay the price due into court within a reasonable time to be fixed, and, on his failure to do so, his right to specific performance will be denied; but, where he performs on or before the last day named, the vendor must execute a valid deed of the premises.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

Appeal from Superior Court, Tyrrell County; O. H. Allen, Judge.

Action by W. E. Bateman against E. B. Hopkins. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

This action was brought to compel the specific performance of a contract to convey land, by the vendee against the vendor. The memorandum is as follows: "Received of W. E. Bateman five dollars to confirm the bargain on the purchase of the farm on which I now live. This January 8, 1910. [Signed] E. B. Hopkins."

The defendant alleged that the memorandum was as follows: "Received of W. E. Bateman \$5.00 to confirm the bargain on the purchase of the farm on which I now live, and if I fail to make the said W. E. Bateman a deed, then I will pay his \$5.00 back and \$5.00 more, making in all \$10.00."

The jury returned the following verdict: "(1) Did the defendant execute the contract set out in the complaint? Answer: Yes. (2) Did the plaintiff, Bateman, tender the defendant, Hopkins, the \$1,000 part purchase money of the lands described in the complaint? Answer: No. (3) If not, was it waived by defendant, Hopkins? Answer: Yes. (4) Was the plaintiff, Bateman, ready, willing, and able to pay off the indebtedness of said Hopkins to J. C. Meekins, Sr., and to pay the defendant, Hopkins, in addition, the \$1,000 balance of the purchase money? Answer: Yes. (5) What is the yearly rental value of the same? Answer: \$150." The court, after refusing a new trial, rendered judgment upon the verdict for the plaintiff, and defendant appealed.

M. Majette and E. F. Aydlott, for appellant. W. M. Bond, I. M. Meekins, and M. H. Tillitt, for appellee.

WALKER, J. It will be seen that, upon the issue as to the contents of the memorandum, the jury decided in favor of the

plaintiff, and we must therefore consider the case with reference to the contract as it is alleged in the complaint.

[1] We do not entertain any doubt as to the sufficiency of the memorandum under the statute of frauds, as it has been construed in our decisions. "Every deed of conveyance (or contract) must set forth a subject-matter, either certain in itself, or capable of being reduced to a certainty, by a recurrence to something extrinsic to which it refers." *Gaston, J., in Massey v. Belisle*, 24 N. C. 170. In *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 287, the deed described the land as, "My house and lot in the town of Jefferson, Ashe county, N. C."; and the court, with reference to this description, said: "A house and lot, or *one* house and lot in a particular town, would not do, because too indefinite on the face of the instrument itself. See *Plummer v. Owens*, 45 N. C. 254; *Murdock v. Anderson*, 57 N. C. 77. But 'my house and lot' imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and upon the face of the instrument is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good." See *Blow v. Vaughan*, 105 N. C. 199, 10 S. E. 891; *Farmer v. Batts*, 83 N. C. 387. To the same effect is the language of the court in *Manufacturing Co. v. Hendricks*, 106 N. C. 485, 11 S. E. 568: "No decree, however, for specific performance can be granted the defendant unless 'his land where he now lives' (the descriptive words of the receipt) is fully identified by competent testimony. These words are clearly susceptible of being applied to a particular well-defined tract of land—*id certum est, quod certum reddi potest*—and, if the defendant can supply the requisite proof, he will be entitled to relief."

[2] It is further objected that the consideration is not expressed in the memorandum; but it is well settled that this is not required, and it may be shown by oral evidence. *Miller v. Irvine*, 18 N. C. 103; *Thornburg v. Masten*, 88 N. C. 293; *Manufacturing Co. v. Hendricks*, supra; *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474. In *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486, a simple receipt of a sum of money, in part payment of a certain tract of land described in the paper, was held to be sufficient. There was evidence in the case identifying the land and fixing the amount of the consideration. This action is by the vendee against the vendor. It was not necessary, therefore, for the memorandum to set forth the obligation of the vendee to pay the price. There is a difference, as we have often said, between the consideration necessary to support a contract, which was required at common law before the statute of frauds was adopted and is still required, and the promise of

the vendee to pay the purchase money, which must be stated in the writing in order to bind him, if he is sued and is, therefore, the party to be charged. *Hall v. Misenheimer*, supra; *Brown v. Hobbs*, 154 N. C. 544, 70 S. E. 906. "Under the statute of frauds, a contract, in writing, to sell land, signed by the vendor, is good against him, although the correlative obligation of the buyer to pay the price is not in writing and cannot be enforced against him." *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744. See, also, *Improvement Co. v. Guthrie*, 116 N. C. 382, 21 S. E. 952. As the vendee is suing in this case, he agrees to perform the contract, and therefore waives the benefit of the statute, or rather is not seeking to rely upon it.

[3] The overshadowing question in this case is whether the plaintiff has made a proper tender or been relieved therefrom by the conduct of the defendant, and, if so relieved, whether he has been ready, willing, and able to perform his part of the contract. As to the first question, the jury have found, upon sufficient evidence, as we think, that the defendant waived a tender of the purchase price by the plaintiff, not only by his conduct, but by denying the contract and refusing to comply with its terms. The denial and refusal continued to the very time of the trial. The court did not order a sale of the land, but required the defendant to execute a deed for the same and deposit it with the clerk of the court, and the latter to deliver it to the plaintiff upon his paying into court the money due under the contract, and otherwise complying fully with its terms and conditions on his part. Where the vendor has repudiated the agreement, thus making it appear that, if the tender were made, its acceptance would be refused, tender or offer of payment by the vendee before suit is unnecessary. Equity does not require a useless formality. 36 Cyc. 705. In general the rules of equity concerning the necessity of an actual tender are not so stringent as those of the law.

[4] The following are special rules upon the subject, which seem to be settled: "(1) An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property, it would be wholly nugatory. Thus, if defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing and offers to perform in his pleading. *Hunter v. Daniel*, 4 Hare, 420, 433; *Mattocks v. Young*, 66 Me. 459, 467; *Crary v. Smith*, 2 N. Y. 60, 65; *Kerr v. Purdy*, 50 Barb. [N. Y.] 24; *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *White v. Dobson*, 58 Va. 262; *Brock v. Hidy*, 13 Ohio St. 306, 310; *Brown v. Eaton*, 21 Minn. 409, 411; *Gill v. Newell*, 13 Minn. 462, 472 [Gil. 430]; *Deichmann v. Deichmann*, 49 Mo. 107; *Gray v. Dougherty*, 25 Cal. 266, 280, 281. (2) Where the stipulations are

mutual and dependent—that is, where the deed is to be delivered upon the payment of the price—an actual tender and demand by one party is necessary to put the other in default, and to cut off his right to treat the contract as still subsisting. *Hubbell v. Von Schoening*, 49 N. Y. 326, 331; *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. [N. Y.] 205; *Irvin v. Bleakley*, 67 Pa. 24, 28; *Crabtree v. Levings*, 53 Ill. 526." Where time is essential or of the essence of the contract, the tender and demand must be made on the day named, and a fortiori where it is stipulated that if tender and demand are not made by one of the parties at the time specified, the other party may treat the contract as at an end. When time is not essential, another rule has been adopted in a group of decisions, which is said to be more in accordance with principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs. The foregoing principles are considered in 4 *Pomeroy's Eq. Jur.* (3d Ed.) § 1407, and note, at page 2776, where a full citation of the authorities will be found. See, also, *Pomeroy on Contracts*, §§ 360-364. The general rule is thus stated by *Pomeroy*, in section 1407: "The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

[5] But in this case the tender of the money was waived by the defendant, and the jury have found that the plaintiff was ready, able, and willing to comply with his part of the contract. If he was not, in the sense that he did not have the money under his control and within his reach, so that he could put his hands on it and pay it over to the defendant at any moment, the defendant has not put him in default by tendering a deed for the land, thus "cutting off plaintiff's right to treat the contract as still existing," as said above. How can the defendant be hurt, in that respect, by the judgment of the court? The payment of the money is assured, for the plaintiff must pay it into court before he is entitled to receive the deed. This subject was fully discussed in *Harris v. Greenleaf*, 117 Ky. 817, 79 S. W.

267, 25 Ky. Law Rep. 1940, and also reported, with an elaborate and useful note, in 4 *Am. & Eng. Ann. Cas.* at page 849. The court there held that it was not necessary to allege a tender or to bring the money into court upon filing the bill, and said: "*In Hunter v. Daniel*, 4 Hare, 420, a case very much like this one in lacking a tender by the plaintiff before suit brought for specific performance, the argument was submitted that payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The court responded: 'The general rule in equity certainly is not of that strict character. A party filing a suit submits to do everything that is required of him, and the practice of the court is not to require the party to make a formal tender, where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money.' " The same ruling was made in *Webster v. French*, 11 Ill. 254, where the court said: "The result of my examination of this subject clearly shows that the court of chancery is not bound down by any fixed rule on this subject, by which it will allow the substantial ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but the merest technicality could require. The money may, at any time, be ordered to be brought into court, whenever the rights of the opposite party may require it; but while he is insisting that the money is not his, and that he is not bound to accept it, it would seem to be a matter of no great consequence to him whether it is in the custody of the court or not. The court possesses a liberal and enlarged discretion on this subject, by the proper exercise of which the rights of all parties may be protected. * * * It is time enough for the party to bring the purchase money into court, when he is called upon to do so." Lord Chancellor Hardwick said, in *Vernon v. Stephens*, 2 P. Wms. 66: "If the defendant has his money and interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff to lose all the money he has paid. Lapse of time in payment may be recompensed with interest and costs. And as to these agreements they were all intended only as a security for payment of the money, which end is answered by the payment of principal, interest and costs."

The weight of authority is that it is unnecessary for the purchaser to pay the money into court at the time he commences his suit. It is sufficient for him to plead a tender of the purchase money and to offer by his bill to bring in his money, whenever the

same is liquidated and he has a decree for performance. *Johnson v. Sukeley*, 2 McLean, 562, Fed. Cas. No. 7,414; *Mason v. Atkins*, 73 Ark. 491, 84 S. W. 630; *Kerr v. Hammond*, 97 Ga. 567, 25 S. E. 337; *Webster v. French*, 11 Ill. 254; *Hunter v. Bales*, 24 Ind. 299. See, also, *Lamprey v. St. Paul, etc.*, R. Co., 86 Minn. 509, 91 N. W. 29; *Birdsall v. Waldron*, 2 Edw. Ch. (N. Y.) 315. The purchaser, if he offers in his bill to perform, may maintain a suit for specific performance, though he made no tender of the purchase money before the suit, where he shows that the vendor would have refused the tender if it had been made. *Stewart v. Cross*, 66 Ala. 22; *Jenkins v. Harrison*, 66 Ala. 345; *Root v. Johnson*, 99 Ala. 90, 10 South. 293; *Dargin v. Cranson*, 12 Colo. App. 368, 55 Pac. 619; *Ebert v. Arends*, 190 Ill. 221, 60 N. E. 211; *Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 258, 14 Ky. Law Rep. 321; *Deichmann v. Deichmann*, 49 Mo. 107; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Connely v. Haggarty*, 65 N. J. Eq. 596, 56 Atl. 371; *Selleck v. Tallman*, 87 N. Y. 106. In *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, it was held that the discretion which the court has to decree specific performance may be controlled by the conduct of the party who refuses to perform the contract because of the failure of the other party to strictly comply with its conditions. If the vendor notifies the purchaser that he regards the contract as forfeited, and that he will not receive any money from him, the latter is not required, as a condition of his right to specific performance, to make tender of the purchase price. It is sufficient if he offer in his bill to bring the money into court. In a case involving the question of tender of performance by the party seeking relief in equity, and analogous to this, the court said: "This, being a proceeding in equity, will be governed by rules and principles prevalent in those courts where relief of that character is prayed. Among those rules, having application here, is one to be presently mentioned. The true meaning of the rule whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity, must do equity,' is simply this: That, where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. These terms will be imposed 'as the price of the decree it gives him.' The rule 'decides nothing in itself,' for you must first inquire what are the equities which the plaintiff must do in order to entitle him to the relief he seeks. * * * The above are only a few out a large number of examples which might be cited in illustration of the rule referred to, which finds its application, not in questions of pleading, nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory

and final, whereby equitable terms are imposed as a condition precedent to equitable relief granted." *Wheeler v. Reilly*, 61 Mo. 565. See, also, *Campbell v. Lombardo*, 153 Ala. 489, 44 South. 862.

[6] The general and clear result of the best-considered authorities is that the vendor, especially when he has been and is in default himself, or when he has denied or repudiated the contract, cannot insist upon the failure to tender the money or to bring it into court for the purpose of performance, but will be left to such protection as the court can afford in the decree, which will be shaped so as to carry out the purposes of the contract fairly and equitably, without any great regard for technicalities; the object being to do justice to both parties without unnecessarily sacrificing the rights of either. This is the wisest and safest doctrine. In this case, the defendant will be fully protected in the enjoyment of every right he should have by requiring the payment of the money into court for his benefit, before he is called upon to part with his deed. This is all he has a right to expect under the circumstances. The decree in this case conforms to established precedents, except, perhaps, in one respect, and that objection to it can be cured by amendment. It should have set a time, say 60 days after the adjournment of the court, for the payment of the money into court by the plaintiff, and then directed, if it was not paid by the expiration of that time, the suit should be dismissed with costs, which, of course, would deny to the plaintiff any right to an enforcement of the contract, by reason of his own default after notice and reasonable time to pay or perform his part of the agreement. The plaintiff must not have any order for the sale of the land, but, in such a case as this, should be made to perform strictly according to the terms of the contract. If he asks equity, he must do equity. The court, in *Webster v. French*, supra, referring to this matter, said: "In *Bourke v. Bocquet*, 1 Desaus. [S. C.] 142, which was a bill for a specific performance, it does not appear that either a tender or a deposit in court of the purchase money was made, and yet it was decreed 'that it be referred to the master, to state and report what is the balance due on the contract in the bill mentioned, and that on the payment thereof, with interest, and of the costs of the suit, within one month from this day, the defendant execute title to the complainant in the bill. From the brevity with which this case is reported, we cannot learn its particular circumstances; but the decision itself shows that the suit might be maintained without a deposit of the purchase money. The suit of *Louthler v. Anderson*, 1 Bro. Ch. R. 347, was of the same character, and, upon a rehearing before the chancellor, 'his lordship varied the decree, in the manner prayed, by

ordering it to be referred to the master to appoint a short day for the payment of the money, and to compute subsequent interest till that time, and if, upon a tender of a sufficient conveyance, the principal money and interest should not then be paid, the plaintiff's bill to be dismissed (as against defendant), with costs.' Here is the same case, of time given to the complainant, even beyond the hearing, for the payment of the purchase money." And in *Whelan v. Bally*, supra, the court thus refers to the subject: "The objection was made, in *Quin v. Brittain*, 1 Hoff. Ch. [N. Y.] 353, that in the bill (which was substantially a bill to redeem) there was no offer to pay the amount due. But it was held that this was not essential, and the reasons given were that on such a bill no decree would go for the payment of the amount personally; that, if the amount found due were not paid, there would be a decree for dismissal of the bill, which would operate as a foreclosure. *Bishop of Winchester v. Paine*, 11 Vesey, 194."

The other exceptions of the defendant have received our careful scrutiny and found to be without merit, in view of our decision upon the principal matters. We must not be construed as implying that there was error in any of the rulings to which exceptions were taken; but, if there was, it does not call for a reversal of the judgment.

The court below will modify its decree substantially as follows: Require the plaintiff to pay the money due into court and otherwise to comply with his part of the contract, within a reasonable time, to be fixed by the court, and, upon his failure to do so, his right to specific performance to be denied and the action dismissed; but if he does perform, on or before the last day named, that the defendant execute a good and sufficient deed for the premises, properly acknowledged or proven, and deposit it with the clerk of the court, at a time to be named, to be delivered to the plaintiff, and, when this is done, the money so deposited in court shall be paid to the defendant. As the defendant is in default, the court properly taxed him with the costs.

No error.

(157 N. C. 443)

BUCKNER v. SOUTH & W. R. CO. et al.
(Supreme Court of North Carolina. Dec. 20, 1911.)

1. APPEAL AND ERROR (§ 515*) — RECORD — STENOGRAPHER'S NOTES.

In preparing the record on appeal, the stenographer's notes of the evidence should be stated in condensed narrative form where possible, as required by Supreme Court Rule No. 22 (66 S. E. vii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.*]

2. MASTER AND SERVANT (§ 332*) — LIABILITIES FOR INJURIES TO THIRD PERSONS — ACTS OF SERVANT—QUESTION FOR JURY.

Whether wrongful acts of servants to a third person were done within the scope of their employment so as to hold the master liable therefor held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. § 332.*]

3. MASTER AND SERVANT (§ 302*) — LIABILITIES FOR INJURIES TO THIRD PERSONS — ACTS OF SERVANT—QUESTION FOR JURY.

A master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing his work, but wholly for the servant's own purposes and in pursuit of his private and personal ends.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1217; Dec. Dig. § 302.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by Charles Buckner against the South & Western Railroad Company and others. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial granted.

Tucker & Lee and W. T. Morgan, for appellant. Locke Craig, A. Hall Johnston, and J. Norment Powell, for appellees.

BROWN, J. [1] This appeal is in forma pauperis and comprises 134 typewritten pages, of which 110 pages comprise the evidence in chief, cross-examinations, and re-examinations as taken down by the stenographer in the form of question and answer. The defendant offered no evidence, and the witnesses for plaintiff were few in number. At the end of the stenographer's notes is this entry: "It is agreed that the record proper and stenographer's notes shall constitute case on appeal." There is no other attempt to make out a case on appeal as required by law. This is in direct violation of the rule of this court, No. 22 (66 S. E. vii), and of its express decision in *Cressler v. City of Asheville*, 138 N. C. 483, 51 S. E. 53. That such of the evidence as is necessary to present the assignments of error could easily have been stated in condensed narrative form is manifested by the fact that the counsel for plaintiff and defendants have set out in their respective briefs very clear and brief statements of the evidence, which substantially agree. Under the circumstances of this case, we will make an exception and not dismiss the appeal; but we will be compelled to do so in the future unless our rule is observed.

[2] We have been saved the great labor of a close perusal of this bulky transcript by adopting practically the facts as stated in defendant's brief, as follows: "In February, 1906, the defendants, Carolina Company and South & Western Railway Company (no question being made in this case as to their relation to each other or to the work), were engaged in grading and constructing a line of railway through McDowell county, em-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

playing several thousand men at different camps. During that month plaintiff, then at Spartanburg, S. C., was employed by one Redricks to work on said road. In company with others, he went from Spartanburg via Asheville, to Marion, walked nine or ten miles from Marion to Camp 9, where he was told Capt. Harris (who the evidence shows was superintendent at Camps 8 and 9) that he was not needed at Camp 9 and directed to go to Camp 8. Plaintiff thereupon walked to Camp 8, three miles distant, reached there late in the day, had his name given to the walking boss there, was employed at Camp 8, made arrangements to go to work there, and the next morning went to work and worked half a day and then, in company with Wheeler and Wyatt, two of the men who had come with him, started home carrying his baggage. When about half way on the road to Camp 9, they were met by two men, one of whom they identify as Capt. Harris. Harris drew a pistol on Wheeler, and the other man drew a pistol on plaintiff and Wyatt, and all were commanded to throw up their hands, which they did. Harris then asked where they were going and, upon being informed that they were going home, told them to go back to Camp 8, which they refused to do. Thereupon Harris asked their reason, and they answered that it had been misrepresented to them. Harris then said that Redricks was at Camp 9 and they would go down and see whether he misrepresented things or not. Harris and the other man rode behind them, Harris cursing them all the way, with his pistol drawn, and upon their arrival at Camp 9 Harris called to a man, "Sheriff, here are some more hoboes," and directed the man whom he called Sheriff to put them in one of the overseer's houses that had a sufficient lock on it. The evidence shows that the man addressed as "Sheriff" was Geo. Carson, and that he was a walking boss or camp superintendent of one of the defendants at Camp 9, with authority to employ and discharge men at that camp. This man thereupon told plaintiff and his two companions to consider themselves under arrest, searched them, took their money, valuables, and baggage, and drove them before him with drawn pistol to a room where he locked them up. Some time that night, plaintiff was called to the door by this man, who drew a sack over his head and with others not identified, led, dragged, and kicked him some distance from the house, flogged him severely, ordered him to leave, fired off pistols, and ran him away from the camp. As a result of this cruel treatment, plaintiff was severely and permanently injured."

The defense is that the defendants are not liable for the acts of their superintendent and other agents, as such acts were beyond the scope of their authority. The facts as stated by the defendants' counsel show a

degree of severity, abuse, and violation of law which should bring upon the servants of defendants who committed them the punishment of the criminal law. As stated by plaintiff's brief, they disclose a degree of brutality almost unbelievable.

In addition to the statement copied from defendant's brief, the evidence tends to prove that the defendants were engaged in building the railroad, and no question as to an independent contractor is raised. One Fred. Redricks was defendants' labor agent employed to secure laborers for defendants, and in such capacity he employed plaintiff and furnished his transportation to defendants' camps, and there some little provisions, etc., were advanced him. Harris was the superintendent of the work of construction and in control of the labor camps and laborers. Carson and Foster were the walking bosses at camps and had absolute control in superintendent's absence. The arrest was made by the superintendent of defendants while about his master's business, and in the furtherance of the interests of the master; the evident purpose of the arrest being to force the plaintiff to return to work and pay his transportation. When the pistols were leveled at plaintiff, the purpose of the arrest was then and there made known by the superintendent: "He told us that we would have to go back to Camp 8; that we were not going to leave there." "Go back up there and go quick." "Go on back up there and pay your transportation." "We don't owe any transportation." "O yes you do, damn you, and you will go back and pay it," etc. Harris had charge of both Camps 8 and 9, and while on duty and looking after his master's interests, and not for any purposes of his own, he took plaintiff under arrest and held him helplessly imprisoned until he was taken out and beaten that night.

It is contended, and it may be inferred from the evidence, that the very room in which plaintiff was confined was constructed by defendants for prison purposes in order to enforce obedience to the commands of its superintendent and foreman and to prevent escapes.

[3] We recognize the well-established rule that the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing his work, but wholly for the servant's own purposes and in pursuit of his private and personal ends. But that is not the only inference that can be drawn from the evidence in this case. There is nothing to show that Harris and Carson had any private ends of their own to pursue, or that they had quit sight of the company's work and were following the suggestions of their own malice. On the contrary, the evidence shows that they assaulted and imprisoned plaintiff to force him to pay the alleged debt to the company and to compel

him to work against his will on the company's road. This question has been very elaborately discussed in several recent opinions of this court, and it is useless to "thresh over old straw."

The principles laid down in *Jackson v. Telegraph Co.*, 139 N. C. 353, 51 S. E. 1015, 70 L. R. A. 738, *May v. Telegraph Co.*, 72 S. E. 1059, at this term, and *Berry v. Railway*, 155 N. C. 287, 71 S. E. 322, are clearly applicable to the facts of this case as now appearing.

The subject is also fully discussed, and distinctions drawn, in *Daniel v. Railroad Co.*, 136 N. C. 527, 43 S. E. 816, 67 L. R. A. 455; *Sawyer v. Railroad Co.*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716; *Stewart v. Lumber Co.*, 146 N. C. 49, 59 S. E. 545; *Marlowe v. Bland*, 154 N. C. 140, 69 S. E. 752, and *Dover v. Manufacturing Co.*, 72 S. E. 1067, at this term; *Roberts v. Railway Co.*, 143 N. C. 180, 55 S. E. 509, 8 L. R. A. (N. S.) 798.

His honor should have submitted the issues to the jury under appropriate instructions.

The judgment of nonsuit is set aside. New trial.

(157 N. C. 519)

HICKS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. MASTER AND SERVANT (§ 137*)—DEATH OF SERVANT—DANGEROUS INSTRUMENTALITIES.

Where a telegraph company was stringing wires in close proximity to other wires carrying high voltage for light and power purposes, it was the telegraph company's duty to assume that such light and power wires were dangerous, and to conduct its operations accordingly.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 137.*]

2. MASTER AND SERVANT (§ 149*)—DEATH OF SERVANT—DANGEROUS INSTRUMENTALITIES—ELECTRIC WIRES.

Where defendant telegraph company in stringing wires over the highly charged wires of a light and power company did not use a rope according to custom while working in close proximity to other highly charged wires, and decedent, a lineman, in taking hold of one of the wires by order of his foreman, received a shock from which he died, the telegraph company was guilty of actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 291-295; Dec. Dig. § 149.*]

3. APPEAL AND ERROR (§ 1068*)—REVIEW—INSTRUCTIONS—PREJUDICE.

Where, in an action for death of a servant, the jury found that the alleged fellow servant was not negligent, defendant was not prejudiced by the modification of a requested charge as to the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

4. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—RES IPSA LOQUITUR.

Where defendant telegraph company was stringing wires over those of a light and power company, and decedent, a ground man, on being ordered by his foreman to take up one of the wires which was being fastened on the pole, received an electric shock from which he died, the happening of the accident raises a presumption, in the absence of explanation, of want of ordinary care on defendant's part, under the rule that where a thing causing injury is shown to be under defendant's management, and the accident is such that in the ordinary course of things does not happen, if proper care is used, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 881; Dec. Dig. § 265.*]

Appeal from Superior Court, McDowell County; Long, Judge.

Action by Thomas M. Hicks, as administrator, etc., against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover damages for the death of plaintiff's intestate, which is alleged to have been caused by the negligence of the defendant. The intestate was employed by the defendant telegraph company, as a groundman, or assistant lineman, and on the day he was killed was at work for the defendant in a squad of men, who were engaged in stringing wires in the town of Marion, along the right of way of the Southern Railway Company; the defendant being represented there, at the time, by W. K. McClaren, its general superintendent, and R. R. Robinson, foreman of the construction gang, of which plaintiff's intestate was a member. The said railway passes under a bridge which is a part of the main street of said town. The street runs north and south and the railway east and west. The Marion Light & Power Company, which was engaged in furnishing power and light for the citizens of the town, had strung its wires on poles over the wires of the telegraph company, along the street and across the bridge and at right angles to the wires of the said company. The wires of the power company carried about 2,300 volts of electricity, and they were in plain view of everybody in the vicinity. On the day in question, McClaren and Robinson, with certain employees of the company, were engaged in stringing wires above those of the power company; Robinson being in charge of a portion of the squad. He was stationed on the bridge, where he gave directions to the men under him as to how to place the wires, which were in immediate proximity to the power company wires. McClaren was below, to the east of the bridge, under the cut, and not in sight of Robinson. McClaren had a part of the squad with him and under his direction, among whom was plaintiff's intestate. McClaren ordered the intestate to

take hold of one of the wires with his naked hand, which intestate did in obedience to the order. He had hold of the wire but a very short time, when it was allowed to sag and drop upon the wires of the power company, and thereby the current in those wires was transferred to the wire held by the plaintiff's intestate, and he was killed by the deadly fluid. There was no request made to the power company to cut off this current while the work of changing the wires was going on, nor any guard wires put up for the purpose of preventing an accident, or any other protection taken to prevent the wire which was being changed from falling on the heavily charged wires of the power company.

The defendant mainly relied upon the fact that the death of the plaintiff's intestate was caused by the negligent act of Ashurst, who was a fellow servant, though it was contended also that there was no evidence of negligence on the part of defendant company.

The court explained the evidence to the jury and stated the contentions of the parties, and, among others, the following instruction was given to the jury: "If you find from the evidence that the telegraph company employed the young man Hicks to work along its telegraph line under the circumstances testified to by the witnesses, it owed him the duty to exercise reasonable and ordinary care, such care as a person of prudence would ordinarily employ with regard to his own business, to prevent any personal injury to the person transacting such work as was agreed upon between the plaintiff and defendant, and the duty devolved on young Hicks to use ordinary prudence to avoid danger in connection with any labor which he agreed to perform." The court then, at the request of the defendant telegraph company, gave the following instructions: "(1) The burden is upon the plaintiff to prove by a preponderance or greater weight of the evidence that the defendant, the Western Union Telegraph Company, was negligent, and that such negligence was the proximate cause of the death of the plaintiff's intestate, and if the plaintiff has failed so to prove, or if upon the whole evidence the minds of the jurors are evenly balanced as to whether or not the telegraph company was negligent, or as to whether or not such negligence was the proximate cause of the death of the plaintiff's intestate, then the jury should answer the first issue, 'No.' (2) That the defendant, the Western Union Telegraph Company, would not be liable for any negligence on the part of one of its employes who was a fellow servant of the plaintiff's intestate, and if the jury shall find from the evidence that the death of the plaintiff's intestate was caused by the negligence of his coemployé, Ashurst, this would not be negligence upon the part of the Western Union

Telegraph Company, and the jury should answer the first issue, 'No.' (3) If the jury shall find the facts to be as testified to by the witnesses introduced by the Western Union Telegraph Company, the telegraph company was not guilty of negligence, and the jury should answer the first issue, 'No.' * * * (7) Upon the whole evidence, if believed, the plaintiff's intestate, Willard Y. Hicks, and the employé, Ashurst, were fellow servants, and if the jury shall find from the evidence that the plaintiff's intestate was killed by reason of Ashurst's negligence in permitting the telegraph company's wire to come in contact with the wire of the Marion Light & Power Company, this would not constitute negligence upon the part of the telegraph company, and the jury should answer the first issue, 'No.' (8) If the jury shall find from the evidence that Ashurst was instructed to throw the rope over the Light & Power Company's wire preparatory to stringing another wire, and in disregard or in disobedience of such instruction he attached the rope to the wire which was being taken down, and pulled the wire so that it came in contact with the wire of the light and power company, and this act on the part of Ashurst was the proximate cause of the death of the plaintiff's intestate, the telegraph company was not negligent, and would not be liable for the negligence of Ashurst, and the jury should answer the first issue, 'No.' Given with this modification: Provided you find the method he was instructed to employ by his superior was reasonably safe under the circumstances. (9) If the jury shall find from the evidence that Hicks was told by the superintendent, McClaren, to take hold of the wire and hold it, this would not constitute negligence, unless McClaren knew or could have reasonably anticipated that the wire might come in contact with the light wire and thus produce an injury to Hicks, and if the jury should find from the evidence that after Hicks took hold of the wire, and while he was holding it, Ashurst or some other fellow servant of Hicks pulled the wire against the light wire, or carelessly permitted the wire to come in contact with the light wire, this would not constitute negligence on the part of the telegraph company, and the jury should answer the first issue, 'No.' (10) If the jury shall find from the evidence that it was safe, at the time McClaren told Hicks to take hold of the wire, for Hicks to obey this instruction, and thereafter in the conduct of the work some coemployé and fellow servant of Hicks either pulled the wire against the light wire or negligently permitted it to come in contact with the light wire so that the current passed to the wire Hicks was holding, this act on the part of the coemployé or fellow servant of Hicks would be regarded as the proximate cause of Hicks' death, and not the orig-

final instruction of McClaren to Hicks to take hold of the wire, and the jury should answer the first issue, "No."

Under these instructions there was a verdict for the plaintiff, upon which a judgment was entered, and the defendant appealed.

Geo. H. Fearons and A. S. Barnard, for appellant. Hudgins & Watson and A. Hall Johnston, for appellee.

WALKER, J. (after stating the facts as above). It seems to us that no case could have been more accurately tried, under the rules of law, than this one was by the able and learned judge who presided at the trial in the court below. The charge was full and complete in every respect, and surely there is nothing in it of which the defendant has any just or valid reason to complain. The jury have acquitted the light and power company of any negligence upon evidence supporting the verdict and under instructions free from any error, and it is not necessary that we should consider that part of the case.

[1, 2] There was evidence coming from defendant's own witnesses that the wires of that company were regarded as live and dangerous, and work in the proximity of such wires was always conducted with reference to that fact, and it was its legal duty to assume that those wires were dangerous. *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786. There was also evidence that it was the general custom of this telegraph company, and of linemen generally, while working in close proximity to the wires of other companies, which are assumed to be live and dangerous, to use a rope in stretching wires when they are likely to come in contact with the wires of other companies, and this is done to prevent the necessity of taking hold of the wires with the naked hand, which would result in injury if the two wires should come in contact with each other. No guard wires were used so as to prevent such contact, nor were any other precautions taken to make the work of the plaintiff's intestate reasonably safe. Under the evidence and the instructions of the court, the jury must necessarily have found that the death of the intestate was not due to any negligence of Ashurst, who is alleged to have been a fellow servant, and who was on the bridge manipulating one of the wires, for the court instructed the jury that, if the negligence of the fellow servant, Ashurst, caused the death of the intestate, they should answer the first issue, "No," that is, that his death was not caused by defendant's negligence, and the jury answered the issue, "Yes," and that instruction was without reference to any orders from a superior officer or vice principal, under which Ashurst may have been acting at the time. [3] If Ashurst was not negligent, and the jury have so found as a

fact, what difference can it make, if the judge did modify the defendant's eighth prayer for instructions, for it is predicated entirely on the negligence of Ashurst, and it is, of course, immaterial whether his negligence, if in fact there was any, consisted in disobeying safe orders or in pulling or dragging the wire negligently and in disregard of them, so that the wire sagged and fell on the live wires of the company, causing a deadly current of electricity to be transmitted to the body of the plaintiff's intestate, which resulted in his death. Let us repeat, and in a more definite manner, that the court, in giving the instruction contained in the defendant's seventh prayer, told the jury that Hicks and Ashurst were fellow servants, and if they found from the evidence that intestate's death was caused by his negligence in handling the wire—that is, any kind of negligence—it could not be imputed to the telegraph company as its negligence, although he was employed by it, and they should answer the first issue, "No." It follows logically from their affirmative answer to that issue that the next prayer, which was modified, was immaterial, as it would be vain and idle for the jury to consider whether the company was negligent by reason of any unsafe orders to Ashurst, or otherwise, after they had found that Ashurst was not negligent at all. Of course, the company could not be made answerable for a negligence that did not exist. Besides, the court expressly told the jury, as we have seen, that, if it was Ashurst's negligence that caused intestate's death, it would not be the negligence of the company, and they should answer the first issue, "No"; so the defendant virtually got the benefit of the instruction it asked for in its eighth prayer, in the instruction given in response to its seventh prayer.

[4] We think, that, perhaps, this is a case which calls for the application of the rule laid down in *Turner v. Power Co.*, 154 N. C. 181, 69 S. E. 767, 32 L. R. A. (N. S.) 848, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such that in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. And this statement will be found to be in accord with well-considered cases in other courts, as in *Griffen v. Manice*, 166 N. Y. 188 [59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630]; *Howser v. Railroad*, 80 Md. 146 [30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332]; *Sheridan v. Foley*, 58 N. J. Law, 230 [33 Atl. 484]; *Armour v. Golkowska*, 95 Ill. App. 492." And again: "These and numerous other authorities on the subject will disclose that it is not the injury alone that can call for the ap

plication of this doctrine or maxim, but the injury and the facts and circumstances immediately attending it and constituting together the occurrence or event which present the conditions when it may properly be allowed to prevail. Thus in *Shearman & Redfield on Negligence*, § 59, the authors say: 'In many cases the maxim *res ipsa loquitur* applies; the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances, which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer.'

But it is not necessary that we should go so far, for his honor put the case to the jury practically upon the rule of the prudent man, both as to the conduct of the defendant and of Hicks, and they found that the defendant had not, under the circumstances, exercised ordinary care. Cases showing the measure of duty of those who employ this dangerous agency in their business have been decided by this court. *Haynes v. Gas Co.*, supra; *Horne v. Power Co.*, 144 N. C. 375, 57 S. E. 19; *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399; *Turner v. Power Co.*, supra. In the *Haynes* Case, Justice Burwell, speaking for the court, said: "The danger is great, and the care and watchfulness must be commensurate with it." It appears in this case that the defendant did absolutely nothing to provide for the safety of its servant, who was killed. Our attention has not been called to any precautionary method adopted by it for that purpose. There is no doubt as to what was the duty of the defendant to its servant occupying a position of great danger in performing his work, and there is very little law in the case. It presents substantially and largely a question of fact, which, under a faultless charge, the jury have found against the defendant. We take this extract from defendant's brief, adding that we think it states a correct principle of law: "It may be taken as settled by the overwhelming weight of authority that a company maintaining electric wires carrying a high voltage of electricity is fixed with the duty of using all necessary care and prudence to make the wires safe at places where others might have the right to go either for work, business, or pleasure. *Mitchell v. Electric Company*, 129 N. C. 166 [39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735]." "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity,

which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound, it exists; and, being odorless, the only means of its discovery lies in the senses of feeling, communicated through the touch (of a person) which, as soon as done, he becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." *Mitchell v. Electric Co.*, 129 N. C. 169, 39 S. E. 802, 55 L. R. A. 398, 85 Am. St. Rep. 735.

We do not think there was any error in the other rulings or in the charge to which exceptions were taken.

No error.

(157 N. C. 535)

FERRELL v. DIXIE COTTON MILLS.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. NEGLIGENCE (§ 23*)—DANGEROUS INSTRUMENTALITIES—ELECTRIC WIRE—CHILDREN TRESPASSERS.

Defendant cotton mill company maintained various dwelling houses for employes around its plant, and, back of a garden patch connected with one of the houses rented to plaintiff, defendant maintained an electric pole which had been partially sustained by a guy wire fastened in the ground. The pole supported uninsulated electric wires carrying a high voltage for power purposes, and the guy wire was fastened to the pole above the cross-arm and came down between two of the electric wires passing within eight inches of one of them. The guy wire had become loose some six or eight months prior to the accident and had been permitted to hang against the pole which, though located entirely on defendant's ground, was in an open space where the children of the neighborhood, including plaintiff's intestate, a child six years old, were wont to play, and who, to defendant's knowledge, had been in the habit of catching hold of the wire and swinging on it out from the pole and back. On the day of the accident the wire had become charged, and plaintiff's intestate took hold of it and was instantly killed: Held that, even though the child was a trespasser, defendant was guilty of actionable negligence in permitting such dangerous condition to exist on its premises, known to be frequented by children, and was therefore liable for decedent's death.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

2. NEGLIGENCE (§ 23*)—DANGEROUS PREMISES—TRAPS—ELECTRIC WIRES.

Where defendant maintained on its premises a guy wire highly charged with electricity at a point where it knew children of the age of plaintiff's intestate were wont to play, defendant was not relieved from liability for decedent's death by being shocked while playing with the wire, by the fact that defendant's watchman had told the children to stay away from the pole.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

3. NEGLIGENCE (§ 23*)—DANGEROUS INSTRUMENTALITIES—CONTROL.

Where plaintiff's child, six years old, was killed by coming in contact with a highly charged guy wire attached to a pole belonging to defendant, and it appeared that no one other than defendant had charge of the pole or authority to remedy any defects in or about it, it was not material to defendant's liability whether the pole was located on or off premises rented by defendant to plaintiff.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

4. DEATH (§ 24*)—DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENTS.

That the parents of a boy six years old permitted him to play in a yard from which he went onto defendant's nearby premises, and was killed by coming in contact with a live wire attached to one of defendant's poles, was insufficient to charge the parents with contributory negligence precluding a recovery for the child's death.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

Appeal from Superior Court, Iredell County; Lyon, Judge.

Action by M. C. Ferrell, as administrator, etc., against the Dixie Cotton Mills. Judgment for plaintiff, and defendant appeals. **Affirmed.**

This action was brought by the plaintiff to recover damages for the death of his son, which is alleged to have been caused by the negligence of the defendant. The intestate of plaintiff, his six year old son, was killed by an electric shock received from a loose guy wire, suspended from a pole on which was strung the wires supplying defendant with power to run its cotton mill. This pole was on defendant's property and belonged to it. The guy wire was attached to the top of the pole, and fastened at the other end to a piece of timber in the ground. This guy wire was for the purpose of holding the pole in place. The wires—three of them—which carried the current were naked; that is, they were uninsulated except where they were fastened to the cross-arm on the poles. This guy wire was fastened to the pole above the cross-arm and came down between two of the electric wires, passing within some eight inches of one of them. Some six or eight months prior to the boy's death, the earth had been removed from the place where the guy wire was fastened in the ground, so that it became loose. It was permitted to hang loose against the pole for several months before

the injury. The plaintiff, with his family, lived in one of the defendant's dwelling houses. Two of his children worked in the mill. The house was only a short distance from this pole, only 50 yards or more. Plaintiff testified that the pole was just beyond the corner of his garden patch. The evidence indicates that there were some 20 or more of the mill dwellings; that there were no fences about them; and that people, children and others, were accustomed and were permitted to go about the settlement pretty much as they pleased. This pole stood some 10 feet or more from the railway track, which at that point ran through a cut. There was a path on the side of the cut and between it and the pole. Any one who desired to do so used this path. There is much evidence in the record that children had been accustomed to play about this pole, on the railway bank, and they were seen on several occasions playing about it, playing with this loose guy wire, swinging on it out from the pole and back. This fact had been reported to the agents of the defendant. It was admitted that the wires on the pole carried a current of 2,200 volts, and the evidence shows that such a current is highly dangerous and deadly. At the close of the testimony, the defendant moved to nonsuit the plaintiff. This motion was overruled, and whether it should have been granted depends upon the state of the evidence. Defendant appealed.

H. P. Grier and Z. V. Turlington, for appellant. L. C. Caldwell, Burwell & Cansler, and Gillett & Guthrie, for appellee.

WALKER, J. [1] The negligence charged against the defendant is the maintaining by it of a highly dangerous and deadly condition and instrumentality on premises which were uninclosed, and which were in an attractive place to children, and on which premises defendant knew, or by the exercise of reasonable care ought to have known, that small children were accustomed to play. There was ample evidence to sustain this allegation. The contention of the appellant is that the child was a trespasser, to whom it owed no duty except to refrain from willfully injuring it. If the injury had been to a person of such mature age that he could appreciate the nature of his acts, and the dangers attached to the situation, we would agree with this contention. But when, as in this case, the injury is suffered by a six year old boy, under such circumstances and surrounding conditions as the evidence showed to exist, a different rule of law governs the conduct and liability of the defendant. What did this six year old boy know about the dangers of electricity? What could he possibly have known about the rules of property and the laws of trespass? Technically he may have been a trespasser on defendant's land; but

all he knew about it was that it was an attractive place to play, and that it was where he and the other little children of the neighborhood were accustomed to play, and had been playing for months past. The defendant knew, or ought to have known, that this pole with the loose guy wire attached to it was an instrument of death, which might become effective to any one who came in contact with it. The defendant also knew, or ought to have known, that the children were in the habit of playing about this pole, and that they were also in the habit of swinging on this loose guy wire. Under these circumstances, the law will not permit the defendant to allege a technical trespass and thereby shield itself from the consequences of its negligence, resulting in the death of the son of the plaintiff.

The doctrine of the "turntable cases" was first before this court in the case of *Kramer v. Railroad*, 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359. There the nine year old son of plaintiff was killed by climbing upon a pile of cross-ties negligently stacked by defendant in an unused portion of one of the streets of the town of Marion. The court held that plaintiff's son was not a trespasser; but it further says: "If he was too young to be bound by any rule as to contributory negligence and had a habit of playing, with other boys, on the cross-ties, with the knowledge of defendant, and without the defendant's attempting to prevent such sport or to take precautions against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the cross-ties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury."

In *Briscoe v. Power Co.*, 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116, plaintiff was not permitted to recover, as the evidence failed to show that the premises of defendant were especially attractive to children, or that children were accustomed to play there; and also that this rule of law had never been held applicable in the case of a boy 13 years of age. But, in the course of the opinion, Mr. Justice Connor states his approval of the rule of law, which we think is applicable to the case in hand. On page 411 of 148 N. C., on page 606 of 62 S. E. (19 L. R. A. [N. S.] 1116), he says, quoting from 21 A. & E. Enc. 473: "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injury from contact with conditions existing thereon." Immediately following this language, the editor says: "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been an-

ticipated, is well applied in the rule of numerous cases that one who maintains dangerous implements or appliances on uninclosed premises of a nature likely to attract children in play, or permits dangerous conditions to exist thereon, is liable to a child who is so injured, though a trespasser at the time when the injuries were received; and with stronger reason, when the presence of a child trespasser is actually known to a party, or when such presence would have been known had reasonable care been exercised."

In the case of *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399, plaintiff was permitted to recover for the death of her son, a 17 year old boy, who was killed by catching hold of a wire which was hanging low over a path used by people in going to a moving picture show. The *Harrington Case*, supra, *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, *Mitchell v. Electric Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735, as well as other cases in our reports, lay down the rule that persons and corporations dealing in electricity are held to the highest degree of care in maintenance and inspection of their wires, poles, etc. This rule is well stated in *Mitchell's Case*, supra: "In behalf of human life, and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." See *Hicks v. Telegraph Co.*, 73 S. E. 139, at this term.

Henderson v. Refining Co., 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668, presents a state of facts almost exactly similar to the facts in this case. There the 11 year old son of plaintiff was killed by getting into a gas engine erected on a vacant uninclosed lot by defendant. The lot lay between two dwelling houses owned by defendant, in one of which the parents of the boy had formerly lived. The lot had been used as a sort of common, and as a playground for the children. There was a path across it. The court says: "A fair inference is that heedlessly, or without appreciating the danger, the child ventured too near and was injured. Under these circumstances he cannot be regarded as a mere trespasser. The lot was really an appurtenance to the two houses and was a part of the curtilage."

As in the above case, we think that from the evidence in this case it is reasonable to infer that this pole was within the curtilage of plaintiff's dwelling. He says that it was right at, or near to, the corner of his uninclosed garden patch, only a short distance from his home.

In sustaining a recovery by the plaintiff in *Mattson v. Railroad*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, it is said: "It (the defendant) failed to

take proper care of dynamite brought into this vicinity, and left it exposed upon premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves."

In *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 203, 45 Am. St. Rep. 114, an eight year old boy was drowned in a gravel pit situated on an uninclosed vacant lot belonging to defendant. The court says: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees. 2 Sher. & Redf. Neg. (4th Ed.) § 705; 4 A. & E. 53, and cases in note. In such case the owner should reasonably anticipate the injury which has happened. 1 Thompson on Neg. 304."

Tacket v. Henderson, 12 Cal. App. 658, 108 Pac. 151, cites at length the cases of *Mitchell v. Electric Co.* and *Haynes v. Gas Co.*, supra, and approves the doctrine there laid down. It is there held: "A person or corporation using wires charged with electricity is bound, while the public is not, not only to know the extent of the dangers arising from them, but to use the very highest degree of care practical to avoid injury."

In *Olson v. Gill*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884, it is said: "Here the appellants, having no apparent use for the dynamite, and knowing of the trespassing proclivities of the boys, needlessly stored it, a most dangerous agency, where in the exercise of ordinary prudence they should have anticipated the trespassing boys would really find, be attracted by, and take it. Under such circumstances, we cannot hold that the trespassing of the boys should as a matter of law excuse the appellants from liability." The boys above mentioned were 13 and 14 years of age, and the dynamite was stored in an unlocked building on a vacant, uninclosed lot.

In *Branson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, it is held: "Defendants piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it. Held, that a recovery was justifiable."

In *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, an eight year old boy was drowned in a conduit situated near a schoolhouse. Entrance to the conduit was barred up; but one of the bars had been broken for a year or more, and children had played in and about it for several years, and its condition had been brought to the notice of the city authorities. The court says: "We are constrained to hold, therefore, that the doctrine of the turntable cases should be ap-

plied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner."

In *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625, an 11 year old boy was drowned in defendant's reservoir. The reservoir was fenced; but there was a kind of stile over the fence, and defendant had knowledge that boys played about the reservoir, fishing and indulging in other sports. The court says: "To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and to enjoy, and in such case the obligation to endeavor to protect from the dangers of the seductive instrument or place follows just as though the invitation had been express. * * * It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with meat so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life. Such is not law."

In *Decker v. Paper Co.*, 111 Minn. 439, 127 N. W. 183, a five year old boy was killed while playing on an elevator in defendant's mill. The evidence showed that defendant permitted children and others to go about the premises, and that it had knowledge that children were accustomed to play in this room and on this elevator, and with reference to these facts the court said: "The elevator, in the condition in which defendant maintained it, was extremely dangerous as a playground for young children, and the precise manner in which the accident happened is not of serious moment as respects defendant's liability, since it is clear that death resulted from playing about the elevator. * * * Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away, and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by the plaintiff upon the same subject, presented a question for the jury."

In *Franks v. Cotton Oil Co.*, 78 S. C. 10, 58 S. E. 960, 12 L. R. A. (N. S.) 463, a 10 year old boy was killed by drowning in a reservoir on defendant's premises. The reservoir was unfenced, and children were accustomed to play about it. The court says, quoting from *Thompson on Neg.* § 1030: "Although the dangerous thing may not be what is termed an attractive nuisance—that is to say, not have especial attraction for chil-

dren by reason of their childish instincts—yet where it is so left exposed that they are likely to come into contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.” Again, quoting from Thompson, Neg. § 1026: “One doctrine under this head is that if a child (technically) trespasses on the premises of defendant, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed, his inability to be a trespasser, in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty toward him which they would not owe, under the same circumstances, toward an adult.” See, also, *Bridger v. Railroad*, 25 S. C. 24; *Railroad v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Townsend v. Wathen*, 9 East. 277; *Thompson, Neg.*, §§ 1024–1030; 2 *Wood, Railway Law*, § 321; *Cooley on Torts*, p. 634; *Bishop, Noncontract Law*, § 854; 7 *A. & E. Enc.* 403; 1 *Street's Foundation of Legal Liability*, p. 160; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Biggs v. Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655; *Dobbins v. Railroad*, 91 Tex. 60, 41 S. W. 62; *Kopplekom v. Cement Co.*, 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

In *Snare, etc., v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, it is said: “We think, in reason, and in consonance with the legal principles by which the duty of individuals to protect others from dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to children of tender years who, to its knowledge, were accustomed to play on the public streets in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith.”

Peirce v. Lyden, 157 Fed. 552, 85 C. C. A. 312, holds: “Defendant maintained a shed in a railroad yard of about two acres near a schoolhouse in a city, in which he kept open barrels of oil. During the daytime the shed was left unlocked, and for several months children living in the vicinity who played in the yard had been in the habit of stealing oil from the barrels and making fires with it in the yard, which fact was known to defendant's watchman. On one such occasion, plaintiff, who was an infant, was burned and injured. Held, that defendant was chargeable with notice of such practice of the children from its long continuance and the knowledge of its watchman, and that the question of its keeping the place in such condition in view of the danger of their injury therefrom was for the jury.”

In *Akin v. Bradley*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586, defendant had thrown some dynamite caps on a vacant lot in rear of its place of business. A path ran through this vacant lot, and school children used the path. Plaintiff was a boy of 11 years of age. The court said: “We think that when the respondent left these dangerous explosives by the wayside, where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown here in did not constitute an intervening cause that should relieve respondent from liability.”

In *Stollery v. Railway Co.*, 243 Ill. 290, 90 N. E. 709, a boy of 10 years was killed, and his body found beside a conveyor operated by defendant on a vacant lot in a city. Held: “Under the decisions of this state unguarded premises supplied with dangerous attractions to children are regarded as holding out an implied invitation to them, which will make the owner of the premises liable for injuries to them, even though the children be technically trespassers.” This case also holds: “The rule of law is, as already stated, that the proof of negligence on the part of the appellee's intestate, as well as all the other elements of the action charged in the declaration, may be established by circumstantial evidence.”

The principles of the law of negligence laid down in the foregoing cases, as well as in others too numerous to cite, is both just and humane, and, under the authority of these cases, the court committed no error in submitting the facts in the case to the jury for their decision.

[2] Appellant's fifth exception is to the court's refusal to charge that the defendant

was not guilty of negligence in that its watchman, the witness W. D. Plyler, had told the children to stay away from this pole. Considering the well-known propensity of children of the age of plaintiff's intestate and his playmates to desire to do what they are forbidden, the watchman's warning was hardly more than an invitation. The snip of a pair of wire cutters was all that was necessary to render this death trap perfectly harmless. The defendant, having negligently failed to perform this insignificant act, and thereby caused the death of this six year old boy, now asks the court to excuse its negligence by charging the jury that it is not liable because its watchman told those boys to stay away from this pole. This, we think, is hardly short of trifling with human life. In the excerpt already quoted from *Decker v. Paper Co.*, supra, the court, in speaking to this very question, says: "Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away, and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by the plaintiff upon the same subject, presented a question for the jury." We think that this disposes of appellant's fifth exception.

[3] Appellant's sixth exception is equally without merit. The defendant's liability in this case is in no wise dependent on the question as to whether the pole was on or off of the premises which it had rented to plaintiff, father of the dead boy. In either event, the pole was not rented to the plaintiff. Nor would it make any difference if it had been, except that it may have rendered the question of the negligence of defendant more positive and clear. *Turner v. Power Co.*, 154 N. C. 181, 69 S. E. 767; *Haynes v. Gas Co.*, supra. There was no evidence tending to show that any one except defendant had charge of this pole, or had any authority to remedy any defects in or about it. The defendant, therefore, was responsible for its dangerous and deadly condition.

[4] Appellant's seventh exception is to the refusal of the court to charge the jury that plaintiff's cause of action was barred by his contributory negligence. Under the facts disclosed by the evidence in this case, the plaintiff and his wife were not guilty of contributory negligence in permitting their six year old boy to go out into the yard to play.

In *Day v. Power Co.*, 136 Mo. App. 274, 117 S. W. 81, plaintiff's six year old boy was killed by contact with a live wire which was strung near the end of a roof. Plaintiff lived on the third story of a building, and this roof was used as a kind of back yard. As to the mother's contributory negligence, the court says: "There is no sufficient ground in the facts before us for declaring the mother of the child guilty in law of negligence. Under the facts disclosed, the characteriza-

tion of her conduct was an issue for the jury to solve. There is no merit in the suggestion that the child, only six years old, was guilty of contributory negligence." In *Henderson v. Refining Co.*, 219 Pa. 384, 68 Atl. 963, 123 Am. St. Rep. 668, the court says: "As to the suggestion that the parents were guilty of contributory negligence, they could not be so held as a matter of law, merely because they allowed a seven year old boy to go around by himself upon the streets in the vicinity of his home, or to visit a neighbor's house. At most the question would be for the jury. *Enright v. Railroad*, 204 Pa. 543, 54 Atl. 317. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the machinery. It was not so clear a duty that the court could declare it as a matter of law." In *Enright v. Railroad*, 204 Pa. 543, 54 Atl. 317, holding a father not guilty of contributory negligence in permitting an 11 year old son to stroll along railway tracks $1\frac{1}{2}$ blocks away from home, the court says: "The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." In *Colorado Springs Electric Co. v. Soper*, 38 Colo. 126, 88 Pac. 161, twins five years of age were permitted to play in the grounds of a nearby public institution for deaf and dumb. A passing teamster allowed them to ride with him some two blocks away. One of the children, after being put down, took hold of a piece of barb wire lying in the grass, the other end of which was attached to an electric light pole and in contact with electric wires. The child was injured. In speaking to the question of the contributory negligence on the part of the child's parents, the court says: "They were away from the traveled portion of the street, safe and secure from all dangerous things rightfully on the street. The barbed wire charged with electricity had no right to be there. If parents are negligent in permitting children to play out of doors, on public grounds in the daytime, unattended by the parents themselves or others, then, in the majority of cases, it will be necessary to go out of the business of raising or attempting to raise children, because parents cannot be with children at all hours of the day; neither is it practical to employ others to be with them to guard them against unseen dangers." In *Comptey v. Starke*, 129 Wis. 622, 109 N. W. 650, 9 L. R. A. (N. S.) 652, the court says: "Upon the issue of contributory negligence of plaintiff's mother, the evidence tends to show that she lives in a house something more than a block and a half from the place of injury, and around two street corners; that she is a woman who earns her own living as a nurse, and had the care of the housekeeping for her family, consisting of her mother, an adult brother, herself, and three children; that she had

never known the plaintiff to go where the pile driver was at work; that on the day in question her brother was sick in bed, and she was engaged in her Saturday housecleaning; that she gave plaintiff his lunch in the kitchen, which had a door leading into the back yard which was not locked; that after giving him his lunch she turned to her work in another room and was out of sight only 10 or 15 minutes when she learned of his injury. * * * We think that the ordinary mother of a family, under these circumstances, would be very much surprised to hear that she had been guilty of negligence in the care of an approximately three year old child. Certainly the fact of such negligence is not clear enough to be declared so as a matter of law." In *Tecker v. Railroad*, 60 Wash. 570, 111 Pac. 791, a boy 6½ years of age went to the post office with his 10 year old sister. She went in and got the mail, and when she came out the boy had gone into the street, and had been run over and killed by one of defendant's cars. The court says: "Nor can it be said as matter of law that the parents of a child are negligent in permitting him to go upon the streets in the care of another child of sufficient age to appreciate and avoid danger, or other competent custodian. In such cases the question of negligence should be submitted to the jury. 29 Cyc. 558. The parent is only required to exercise ordinary care in watching and controlling the child. 29 Cyc. 556; *Cameron v. Duluth Co.*, 94 Minn. 104, 102 N. W. 208." In *Saxton v. Railroad*, 219 Pa. 492, 68 Atl. 1022, a boy 6½ years of age was injured. The court says: "The father of the boy was not precluded from recovering because he permitted his son to go upon the streets in a business part of the city unattended." It appeared in *Gunn v. Railroad*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575, that two boys, five and six years of age, were run over and killed by a train of defendant. They lived 300 to 400 yards from the railroad. In speaking to the question of the contributory negligence of the mother, the court says: "The mother sent them that morning to turn the cows up the road, and come back by the corn lot and garden—a different direction from the trestle, I understand. They could not pen or imprison their children from light and air and exercise and play. They could not always keep unflinching watch upon them."

The evidence in this case shows that the father was away from home from early in the morning until late at night, earning a living for himself and family; that the mother was at home taking care of her household duties, which the presence of several children must have rendered both nu-

merous and exacting. Under such circumstances, surely it cannot be held as matter of law that these parents were negligent in permitting their six year old boy to go out in the yard to play without constantly watching him. If such a rule should be adopted, a large majority of the mothers would be forced to keep their little children in the house, or else be responsible for any injury suffered by them at the hands of others.

As to the eighth exception, upon the question of contributory negligence, there is no evidence that the plaintiff knew of the condition of the pole and loose guy wire till August. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the wire. It was not so clear a duty that the court could declare it as a matter of law.

The ninth exception is to the court's definition of "negligence." This exception is without merit, particularly as the court charged the jury as follows: "But if you find a reasonably prudent man ordinarily would have permitted that wire to remain as it was in the place as it was, detached from the ground, then it would not be negligent in the company in having it in that condition, or, if you should find that it was not the proximate cause of the plaintiff's intestate's death, why you should answer the first issue, 'No.'" *Hicks v. Telegraph Co.*, 73 S. E. 139, at this term.

What has been said in regard to the preceding assignments of error, together with the authorities set out, and the principles stated, dispose of the other exceptions. Those facts of this case which are uncontested present a clear case of negligence; the jury having found against the defendant's contention, under the charge of the court, which gave to it the benefit of every principle of law to which it was fairly entitled. At very small expense, the defendant, with notice of the dangerous situation, could, by the exercise of the slightest care, have prevented this accident, and the wonder is that it did not, at once, take steps to do so. It may be that the courts, in view of so many injuries from this deadly agency, which without proper care is a constant menace to the public, will have to suggest that companies who make use of it in their business must either convey it by wires laid under ground, or so safeguard their wires as to remove this ever-increasing danger to those who, in their ordinary avocations, must come in close proximity to this subtle, dangerous, and oftentimes fatal current. It is no injustice or hardship to the defendant that we hold it liable under the conceded facts of this case.

No error.

(187 N. C. 623)

STATE v. GRAINGER et al.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. HOMICIDE (§ 153*)—EVIDENCE—ADMISSIBILITY—PREMEDITATION.

On a charge of murder in the first degree, evidence as to the accused filling up on whisky and shooting up the town a short time before the murder, and of his threats made to his woman companion to kill the deceased and of her identification to him of the victim, was properly admitted to show premeditation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 153.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

An instruction in an action for a homicide that the defendant is not on trial for selling whisky, nor for making an assault upon a third person, was properly refused where the charge of the court clearly stated for what offense the defendants were tried and restricted the trial to that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS.

Where in a prosecution for homicide the defendant requested an instruction that if when defendant shot the deceased they were struggling together, and the deceased entered into the combat willingly, they could only convict of manslaughter, unless it had been shown by the state that the shooting resulted from a premeditated purpose, which would have been carried out even if the deceased had not entered into the struggle, the instruction was properly refused for leaving out of consideration the presumption of murder in the second degree which arises from the killing with a deadly weapon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

4. HOMICIDE (§ 7*)—MOTIVE.

While in a prosecution for homicide the case of the state may be strengthened by the showing of a motive when the evidence is circumstantial, proof of a motive is not necessary to justify a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*]

5. CRIMINAL LAW (§ 770*)—TRIAL—PROVINCE OF COURTS.

It is the duty of the court to call the attention of the jury to the contentions of the parties which are supported by the evidence, so that a recital of the contentions of the state in summing up the contentions of both parties in a prosecution for homicide was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

Brown and Allen, JJ., dissenting.

Appeal from Superior Court, Columbus County; Whedbee, Judge.

Robert Grainger and Missie Marlow were convicted of murder in the second degree, and appeal. Affirmed.

Lewis, Lyon & Greer and Irvin B. Tucker, for appellants. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. The prisoners, Robert Grainger and Missie Marlow, were convicted

of murder in the second degree. The evidence for the state showed: That they were living together without being married. That on the morning of April 28, 1911, in company with one Tyson, they went to Cerro Gordo, where Grainger got an express package out of the depot containing whisky. Grainger had a gun, and, before he got back into the buggy, Missie Marlow said to him: "You had better get a box of shells. You will have need of them this evening." Grainger bought the shells, and they started to Grist's, four miles away. On the way the parties took some 15 or 20 drinks of the whisky to which they had added some water, and the witness said they were "neither drunk nor sober" when they got to Grist's. On the way Grainger was constantly firing his gun, and Missie Marlow reloading the gun every time he fired it. On the road Grainger and Missie Marlow talked about Bud Nobles, the deceased. Grainger said: "Ain't you got an old sport at Grist's?" She denied it, and Grainger said, with an oath, that she knew she had, that it was Bud Nobles, and that he "would tend to him this evening." He made the same threat to her three or four times that he "would tend to Nobles" that evening. When they got to Grist's, Grainger shot and scared some little children, who ran into a ditch about 200 yards from the post office. Then Grainger said: "Let's drink some whisky." As the parties passed Smith's store, Bud Nobles was standing between the store and the old post office. Missie Marlow said to Grainger, "Yonder is the man you want;" and Grainger said, "How do you know it is?" Missie said, "I know him by the suit of clothes, and I want you to shoot his d—d head off;" and Grainger said, "I will do anything you say do." This was about half an hour before he shot Nobles. Grainger fired the gun twice at the house of Mr. Struthers. They then went on down the road about 300 yards, and Grainger said, "Let's stop and take a drink," and they all did so. They then drove up to a negro house and shot a time or two, and, after some profanity and rowdiness, Grainger jumped out of the buggy with his gun in his hand and his knucks on the other, and took after the darkey, whom he overtook and struck two or three times. Missie Marlow overtook him, and they went up the road together, and saw Bud Nobles standing in the yard of Wiley Hammond. Grainger then opened his gun and said, "Bring me some shells." Missie Marlow said, "Run here, Robert, I have got the shells." They ran towards each other, and Grainger got the shells from her. Nobles went on off up the street, when Grainger ran across and cut him off. Nobles' hands went up, palms out, and Grainger shot Nobles, and the latter fell.

He was unarmed. Grainger was four feet from Nobles when he shot him. Nobles died from the wound. There was other evidence of Grainger "shooting up" the town; Missie Marlow being with him.

The above was, in substance, the evidence for the state somewhat condensed. The evidence offered by the defendant tended to show that there was a fight between the two men, and that the prisoner Grainger was cut with a knife. McCumple, witness for the state, testified that he arrested Robert Grainger and Missie Marlow about 2 o'clock that night; that he saw his undershirt, and it was cut in several places; that there was a scar on his arm and two or three cuts in his back, but the cuts were not bleeding, and Grainger said that he had been cut in the arm the day before at Tyson's in trying to part some men in a row. He did not allude to the cuts on his back.

[1] The first 11 exceptions are to the allowance of the evidence as to the prisoner "tanking up" on whisky, his threats to Missie Marlow in regard to Nobles, and the conversation between them, and as to her identifying Nobles, and telling Grainger to shoot his head off, and his saying that he would do so, and the evidence generally in regard to Grainger "shooting up" the town. All this testimony was competent on the charge of murder in the first degree to show premeditation. The jury were lenient in not taking that view of it, but in letting the parties off with a conviction of murder in the second degree. It is true the prisoner testified that there had been a fight between him and the deceased, and on the trial the prisoner was stripped in the presence of the jury, and showed the cuts in his shirt and in his body. But the jury, in spite of the able defense of his counsel and the impassioned appeals to their sympathies, did not accept this version, but found that the prisoners were guilty of murder in the second degree. There is also further evidence for the state that the wounds on the prisoner's body were not fresh the night after the homicide. The jury rejected entirely the prisoner's allegation of self-defense.

The prisoner also relies upon an exception that the judge refused to give the following prayer for instruction: "The court instructs the jury that the prisoner is not on trial for selling whisky nor for making an assault upon Henry Johnson with a pair of knucks, and as independent facts should not be considered by the jury in arriving at a verdict in this case." The prisoner, Grainger, contends that at the time he fired the shots three persons were assaulting him with knives; that he was not in the wrong; that he attempted to get them to stop; that they cut him in the back, and knocked him down and he fired. The court told the jury that,

if this was so, Grainger was not guilty of any offense, and it would be their duty to return a verdict of not guilty. The jury by their verdict utterly rejected the version of the affair contended for by the prisoners. Having rejected the prisoner's plea of self-defense, then, under the law, the jury would be compelled to return a verdict of murder in the second degree, unless the defendant had offered evidence tending to reduce the crime to manslaughter, and there was nothing in the evidence referred to in the above special instructions which tended to reduce or increase the grade of the crime committed. *State v. Quick*, 150 N. C. 820, 64 S. E. 168.

[2] The charge of the court clearly stated for what offense the prisoners were tried, and restricted the trial to that. This was a substantial compliance with the prayer. The prisoners refrained from arguing in their brief the eighteenth exception for refusal to give another prayer for instruction, though they do not expressly abandon it.

[3] That prayer could not have been given by the court, for it left out of consideration the presumption of murder in the second degree which arises from the killing with a deadly weapon.

[4] Nor was it error to refuse the prayer for instruction that it was incumbent upon the state to show motive on the part of Missie Marlow for desiring that death or bodily injury be inflicted on the deceased Bud Nobles. The law does not require that: "If such motive existed, it is the duty of the state to show the same to the jury." While the case may be strengthened by showing motive when the evidence is circumstantial, yet the state is never required to show such motive. *State v. Adams*, 136 N. C. 620, 48 S. E. 589; *State v. Turner*, 143 N. C. 642, 57 S. E. 158; *State v. Stratford*, 149 N. C. 483, 62 S. E. 882.

[5] Nor can we sustain exception 23, which is that the court recited the contentions of the state in summing up the contentions of both parties to the jury. In *Walker v. Walker*, 151 N. C. 167, 65 S. E. 925, Mr. Justice Manning said: "His honor was in this particular stating the contentions of the defendant, and there was evidence offered on the trial supporting this contention. It has been frequently held by this court that it is the duty of the trial judge to call to the attention of the jury those contentions of the parties which are supported by the evidence."

The prisoners were defended by able, eloquent, and zealous counsel. The case was tried by a very careful and able judge. The prisoners both testified in their own behalf. The jury, after weighing carefully and impartially all the evidence on both sides, have arrived at what may well be deemed a most merciful verdict. They might well have

found upon this evidence the prisoners guilty of murder in the first degree.

In carefully considering the exceptions, we find no error committed which was prejudicial to the prisoners.

No error.

BROWN, J. (dissenting). Since I have been a member of this court I have never voted for a new trial in a criminal case unless I saw that some substantial and harmful error had been committed on the trial. I think that is the case here.

The court permitted the state to introduce evidence tending to prove that some time prior to defendant Grainger meeting with Nobles, the deceased, said defendant shot at Struther's house; that he came back up Hammond street, and met up with some negroes, and hit one of them; that he threatened to shoot one Hinson; that he shot at some colored children; that he made an assault on Henry Johnson with his gun and struck him with knucks; and that he was attempting to sell whisky. All this evidence it appears to me to be utterly incompetent and well calculated to seriously prejudice the defendants before the jury.

The plea of the defendant Grainger is self-defense, and his main reliance was his own testimony, and bringing all these extraneous and incompetent matters into the case undoubtedly greatly injured him. State v. Jones, 93 N. C. 611; State v. Barfield, 29 N. C. 299-308; 21 Cyc. p. 896; Whitaker v. State, 79 Ga. 87, 3 S. E. 403.

The prisoners ask the following instruction, which was refused, and they excepted: "The court instructs the jury that the prisoners are not on trial for selling whisky nor for making an assault upon Henry Johnson with a pair of brass knucks, and, as independent facts, should not be considered by the jury in arriving at a verdict in this case." The Attorney General, with his usual candor, says in his brief that in his opinion the court should have given that prayer, and admits that the evidence referred to in the instruction was not competent.

It is argued, however, that, inasmuch as the jury rejected the defendant's plea of self-defense, the error was harmless, as defendant would be guilty of murder in the second degree, the crime for which they stand convicted. It may be that the admission of all that incompetent evidence so prejudiced their minds that the jury rejected his plea and evidence entirely.

This was a proper and pertinent instruction, and, had it been given, it would have neutralized the effect of the incompetent evidence.

ALLEN, J., concurs in this dissent.

(157 N. C. 448)

LANCE v. RUSSELL.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. TRUSTS (§ 305*)—RIGHT OF ACTION—FIDUCIARY RELATIONS.

The complaint alleging that plaintiff, owing defendant \$800, conveyed land to him on a separate contemporaneous unrecorded agreement executed by them, that defendant should sell the land, subject to plaintiff's approval, and out of the proceeds pay the debt to himself, and the surplus to plaintiff; that defendant violated his agreement, and, without plaintiff's approval, sold and conveyed the land to B. for much less than its value; that B. has instituted action against plaintiff's tenant for possession; and that defendant has refused to account to plaintiff for the value of the land or the proceeds of the sale—states a cause of action, B., under such circumstances, having acquired title to the land, and plaintiff's only remedy being in such an action against defendant for an accounting for the value of the land.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 305.*]

2. REFERENCE (§ 31*)—CONSENT REFERENCE—SETTING ASIDE ORDER.

While neither party to a consent reference can, without the consent of the other, withdraw therefrom, the order of reference, as well as the report, may be set aside by the court for good cause shown, as that plaintiff was misled, and consented to the reference because it was represented that a third person was a party to the agreement and would be bound by it, when, in fact, no one had authority to represent him.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 31.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by F. A. Lance against J. N. Russell. From an order setting aside an order of reference, defendant appeals, and moves to dismiss the action. Motion denied, and order affirmed.

This action was commenced on the 16th day of November, 1903, and the complaint is as follows:

"(1) That on the 1st day of April, 1902, the plaintiff executed to the defendant a certain deed conveying to the said J. N. Russell a certain tract of land containing about 325 acres, situate in Limestone township, Buncombe county, N. C., bounded on one side by the French Broad river, the same being fully described in the deed aforesaid, which is duly registered on page 507 of Book No. 123 in the office of register of deeds of Buncombe county.

"(2) That the said deed was intended by the plaintiff and by the defendant to operate only as a deed in trust, and was accepted by the said defendant as such, and the plaintiff alleges that such was the only effect thereof.

"(3) That the trusts upon which the said defendant accepted said conveyance were set out in an instrument of writing executed by the said J. N. Russell simultaneously with the execution of said deed in trust.

That the original of said paper writing was left with J. McD. Whitson, now deceased, who was plaintiff's attorney in that transaction, and plaintiff has diligently searched for said instrument among the papers of the said J. McD. Whitson in the hands of his administrator and elsewhere, and has been unable to find said paper, and therefore plaintiff is unable to attach a copy thereof to his complaint; but, as plaintiff is informed and believes, the defendant has a copy of the same.

"(4) That at the time of execution of said deed in trust plaintiff was indebted to defendant in the sum of about \$800 or \$900, the exact amount being undetermined at that time, and the plaintiff, being desirous of securing to the defendant the payment of said indebtedness, executed the said deed in trust with the agreement that the said defendant should sell said land at a fair valuation, and from the proceeds of such sale pay off plaintiff's indebtedness to the defendant, and pay any overplus to the plaintiff, it being expressly understood and agreed between plaintiff and defendant that defendant should not sell said land for less than its real value, nor without the consent and approval of the plaintiff as to the price.

"(5) That afterwards, to wit, on the 17th day of June, 1903, the defendant undertook to convey, and did execute what purported to be a deed conveying to one H. T. Brown at the price of \$3,500, the said land.

"(6) That according to plaintiff's best knowledge and belief, and he so avers the fact to be, the said land is worth the sum of \$16,250, and the sum of \$3,500 was a grossly inadequate price for said land, as the defendant then and there well knew.

"(7) That said alleged sale by the said defendant to the said H. T. Brown was made against the protest of the plaintiff.

"(8) That the defendant by said alleged sale of said land grossly abused his trust, and thereby damaged the plaintiff to the extent of \$12,750.

"(9) That the said H. T. Brown has instituted suit in the superior court of Buncombe county against J. W. Ducker, plaintiff's tenant, for the possession of said land, claiming to own the same in fee simple by virtue of said alleged deed executed by the defendant as aforesaid.

"(10) That the defendant, J. N. Russell, has not accounted to the plaintiff for the proceeds of said alleged sale of said land or paid plaintiff anything on the account of such alleged sale.

"Wherefore, plaintiff prays the court that the defendant be required to account to the plaintiff for the full value of said land, and pay to the plaintiff the sum of \$16,250 damage, caused by the abuse of his trust as hereinbefore alleged, for the costs of the action, and for such other and further relief as the nature and circumstances of the case will allow, or to the court may seem meet."

An answer was filed by the defendant, and at September term, 1907, the following entry appears on the minute docket: "By mutual agreement this case is referred to Gallatin Roberts, to take and state an account between the various parties."

The referee filed his report at May term, 1909, to which the plaintiff excepted, and at July term, 1911, the judge presiding made the following order, setting aside the report and the order of reference: "This cause coming on to be heard upon the motion of F. A. Lance, plaintiff, to set aside the order of reference, heretofore made in said cause, and upon the motion of John N. Russell, the defendant therein, to confirm the report of Gallatin Roberts, referee, heretofore appointed in said cause, the court finds the following facts:

"(1) That the said report was made in pursuance of the following agreement: 'The defendant, J. N. Russell, comes into court at this stage of the trial, and agrees that the suit of H. T. Brown against J. H. Ducker, and the suit of F. A. Lance against J. N. Russell, may be consolidated for the purpose of this consent decree, which proposition is as follows: That a decree may be entered in the case so consolidated, directing H. T. Brown to convey in fee simple to the plaintiff, F. A. Lance, the land in controversy in the action between H. T. Brown and J. W. Ducker, according to the metes and bounds described in the deed made from F. A. Lance to J. N. Russell, as set forth in the complaint, and that F. A. Lance shall pay off and discharge all of the indebtedness included in the trust agreement marked 'Exhibit A,' as provided for in that instrument, according to the terms and tenor thereof, together with interest lawfully incident to the said indebtedness, and that a referee be appointed by this court, under a consent decree, to state an account between the plaintiff, F. A. Lance, and the defendant, J. N. Russell, and H. T. Brown, and to ascertain what, if anything, is due and owing to the plaintiff, F. A. Lance, by reason of the rents and profits for which the defendant, J. N. Russell, or H. T. Brown, or either of them, by reason of any possession or occupation had and exercised by either J. N. Russell or H. T. Brown, or their tenants, over the land, or any part of the same, in controversy, and for the purpose of such accounting the defendant, J. N. Russell, and H. T. Brown, or both of them, shall be held accountable for the fair and reasonable rental value of the land in controversy, which the referee may determine the said J. N. Russell and H. T. Brown, or their tenants, to have been in the actual possession of. That it shall be decreed that this conveyance shall be made by H. T. Brown to F. A. Lance of any and all amounts of money payable by him under the terms of this agreement. That each side shall pay their own costs, and the court costs shall be divided

equally between J. N. Russell and F. A. Lance, and that Gallatin Roberts, Esq., be appointed referee to state the account between F. A. Lance and J. N. Russell, and that the said referee shall report within — days from date. That the plaintiff, F. A. Lance, shall have 90 days from the time of the filing of his report by the referee in which to pay off the indebtedness upon the land in controversy.'

"(2) That the said Hugh T. Brown mentioned in said order did not consent to said order, and did not in any way become a party to said reference, and is not bound by any of the findings of said referee. That the plaintiff, F. A. Lance, entered into said agreement to refer with the full understanding that the said Hugh T. Brown was a party to such reference, and would not have entered into such agreement but for such understanding. That the said Lance believed, and had reason to believe, that said Brown was a party to such reference. That the said reference without such Brown being a party thereto was prejudicial to the rights of the plaintiff, F. A. Lance, and that the plaintiff should not be, and is not, bound by such reference or by the findings of the referee.

"(3) The court further finds as a fact, it being admitted by the parties, that after the filing of the report of Gallatin Roberts, the said referee, that the said Hugh T. Brown tendered a fee-simple deed to the said land to F. A. Lance, which offer has been continued.

"It is therefore, upon motion of counsel for the plaintiff, considered, ordered, and adjudged that the said report be not confirmed; that the said order of reference be set aside; and that the said cause stand for trial in its order on the civil issue docket of the superior court of Buncombe county."

The defendant excepted to this order, and appealed. H. T. Brown has not been made a party to this action. The defendant also moves in this court to dismiss the action, for that the complaint does not state facts sufficient to constitute a cause of action.

W. W. Jones and Chas. E. Jones, for appellant. Locke Craig and H. B. Carter, for appellee.

ALLEN, J. [1] The motion to dismiss the action upon the ground that the complaint is insufficient is based upon the allegations contained in the ninth paragraph of the complaint, the defendant contending that it is there, in substance, alleged that the plaintiff is resisting a recovery of possession of the land conveyed by the defendant to H. T. Brown, and, if so, that he is not entitled to an account of the purchase money. The allegations of the complaint do not, however, go as far as the defendant insists. It is not alleged that the plaintiff is a party to the action instituted against Ducker, or

that there has been any refusal to surrender possession, or that any defense has been entered in the action. But, if these allegations were present, we think a fair construction of the complaint is that the plaintiff, being indebted to the defendant in the sum of \$800 or \$900, conveyed to him the land in controversy, and that there was a contemporaneous agreement, which was not registered, that the defendant should sell the land, subject to the approval of the plaintiff, and out of the proceeds of sale pay off the debt to the defendant, and pay any surplus to the plaintiff; that the defendant violated his agreement, and sold the land to H. T. Brown, without the approval of the plaintiff, for much less than its real value; that the said Brown has instituted an action against the tenant of the plaintiff to recover possession of the land, and that the defendant has refused to account to the plaintiff for the value of the land or for the proceeds of the sale to Brown. Under these allegations, Brown acquired title to the land, and the only redress for the plaintiff is against the defendant in this action. The case rests largely on the principles declared in *Sprinkle v. Wellborn*, 140 N. C. 178, 52 S. E. 666, 8 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and in our opinion a cause of action is stated in the complaint.

[2] The remaining question is as to the power of the judge to set aside the order of reference and the report of the referee. If it was within his discretion, we have no right to interfere with its lawful exercise. The authorities seem to be uniform that neither party can withdraw from a consent reference, and that it cannot be set aside except by mutual consent, but that the court retains jurisdiction, and may, for good cause shown, set aside the order of reference as well as the report. *Buskee v. Surles*, 79 N. C. 53; *Patrick v. Railroad*, 101 N. C. 604, 8 S. E. 172; *Smith v. Hicks*, 108 N. C. 251, 12 S. E. 1035; *Cummings v. Swepson*, 124 N. C. 584, 32 S. E. 966; *Brackett v. Gilliam*, 125 N. C. 382, 34 S. E. 444. The judge, in effect, finds as a fact that the plaintiff was misled, and that he consented to the reference because it was represented that H. T. Brown was a party to the agreement, and would be bound by it, when, in fact, no one had authority to represent him, which is, we think, "good cause shown." In *Kerr v. Hicks*, 131 N. C. 90, 42 S. E. 532, a consent order of reference was modified and made compulsory upon a finding by the court that one of the parties excepted at the time the order was made, and, if this can be done, there is no reason for denying the power to set aside the order altogether, if one party is misled by the other, and thereby induced to agree to the reference.

We find no error.

Affirmed.

(158 N. C. 38)

WILLIAMS et al., School Committee, v. BRADFORD.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. CIVIL RIGHTS (§ 9*)—SCHOOL TAX—DISCRIMINATION—WHITE AND COLORED RACES.

Priv. Laws 1911, c. 345, provides that, in order to increase the annual tax for the erecting of a school building for the whites in a certain school district, the patrons might apply to the county commissioners for an additional tax to raise funds to erect such building when the board should order the question submitted to the qualified voters of the district. Const. art. 9, § 2, provides that the General Assembly shall provide for a uniform system of public schools, and that the children of the white and colored races shall be taught in separate public schools; "but there shall be no discrimination of or prejudice of either race." Held, that the statute violated the Constitution, in that it discriminated against the colored race by requiring that the tax be issued to erect a building for the whites without leaving any discrimination in the local board as to the apportionment of the fund.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. § 6; Dec. Dig. § 9.*]

2. CONSTITUTIONAL LAW (§ 48*)—STATUTES—CONSTITUTIONALITY—PRESUMPTIONS.

The courts must assume that the Legislature acted in good faith with the purpose of observing the constitutional limitations in enacting a statute, and every presumption must be indulged in favor of its constitutionality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*] Brown, J., dissenting.

Appeal from Superior Court, Camden County; Cline, Judge.

Proceedings by D. E. Williams and others, School Committee, against D. B. Bradford. From a judgment for defendant, plaintiffs appeal. Affirmed.

This case was heard in the court below upon the following case agreed: Chapter 345, Private Laws of 1911, provides for the submitting to a vote of the people of the district the question of additional school tax, and the borrowing a sufficient amount to erect a building not to exceed \$5,000, "for the whites in the school district, number nineteen." The patrons of school district No. 19, as set out in said chapter, applied to the board of county commissioners of Camden county asking for an additional tax, as provided in said chapter, for the purpose of erecting a school building for the whites in said district. There was an election held, and all requirements provided for in chapter 345 were carried out and complied with in every respect, and the majority of the qualified voters of said district voted for the additional school tax. The school committee contracted to erect a building to cost about \$10,000, \$5,000 of which was given by public subscription, and the committee issued bonds to the amount of \$5,000 and advertised them for sale. The defendant, D. B. Bradford, was

the highest bidder, at \$1.01, and refused to take the bonds at that price and pay the money for them, upon the ground that the committee had no right to issue them, for the reason that the act is unconstitutional and the bonds are not valid. Chapter 345 is made a part of this statement of the case. The above facts are submitted to the court for its opinion and judgment. The court held the bonds to be invalid and that the defendant, therefore, is not required to accept them. Judgment was accordingly entered, and the plaintiffs excepted and appealed.

E. F. Aydlott, for appellants. J. C. B. Ehringhaus, for appellee.

WALKER, J. (after stating the facts as above). [1] This case presents but a single question and one which we think, in view of recent decisions of this court, is not difficult of solution. Our Constitution (article 9, § 2) provides as follows: "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the state between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." There is nothing in the act to indicate that any discretion whatever is left with the local board of administration as to the apportionment of the fund which will be raised by a sale of the bonds among the two races without discrimination, as was the case in *Lowery v. School Trustees*, 140 N. C. 39, 52 S. E. 267, and *Bonitz v. School Trustees*, 154 N. C. 379, 70 S. E. 735. The provision of the act in regard to the application of the fund to be raised by taxation requires that it shall be applied to the erection of a school building for the white people, and is as mandatory in this respect as it could have been expressed.

[2] Every presumption is to be indulged in favor of the validity of a statute, and all doubts should be resolved in support of it. We must always assume, when passing upon the constitutionality of a statute, that the Legislature acted with integrity and with an honest purpose to observe the restrictions and limitations imposed by law, 2 Lewis' *Suth. Stat. Constr.* (2d Ed.) § 82. It is also true that, where a duty is imposed or a power conferred upon a public agency, the necessary implication is that the duty should be performed and the power exercised in the manner prescribed in the Constitution. With every disposition to uphold this act, and inclining most favorably to every reasonable construction of it which would execute the legislative will and at the same time conform

to the mandate of the Constitution, we are unable to sustain it; but must declare it to be void, as being in direct conflict with the plain requirements of the fundamental law. The act provides for only one thing, the levying of a tax for the purpose of erecting a school building "for the whites," and only for that purpose. The other provisions of the act relate to the machinery for levying and collecting the tax; but the proceeds of such tax, when collected, are to be applied entirely to the purpose thus clearly indicated and to no other. There is no room whatever for the exercise of any judgment or discretion by the local authorities themselves in the application or appropriation of the tax fund, according to the mandate of the Constitution; that is, without racial discrimination. In this respect, our case differs essentially from *Lowery v. School Trustees* and *Bonitz v. School Trustees*, already cited. In each of these cases, there were expressions in the statute which this court construed to mean that it was not the purpose to tax the people of the school district for the exclusive benefit of the one race or the other, and that while language was used which, if considered by itself, might lead to the conclusion that only one of the races was intended to receive the full and exclusive benefit of the tax, it was explained and its meaning so enlarged by other parts of the act as to avoid any discrimination between the races, and that, by a fair and reasonable construction of the whole act, reading and interpreting each provision with proper reference to the context, the true intent of the Legislature to apportion the fund between the two races fairly and reasonably and in accordance with the constitutional requirement was made apparent. When we bring this act to the test of our decision in *Bonitz v. School Trustees*, 154 N. C. 375, 70 S. E. 735, we can have no reasonable doubt as to its invalidity. Justice Hoke thus speaks for the entire court in that case: "The Constitution of this state (article 9, § 2), in providing for a 'uniform system of public schools wherein tuition shall be free of charge to all the children of the state between the ages of 6 and 21 years,' contains the requirement 'that the children of the white race and the children of the colored race shall be taught in separate schools,' and, further, 'but there shall be no discrimination in favor of or to the prejudice of either race.' In numerous and well-considered decisions this court has held that these provisions of our Constitution, in regard to the two races, are mandatory, and may be disregarded neither by the Legislature nor by officials charged with the duty of administering a given law. *Smith v. School Trustees*, 141 N. C. 143-159, 53 S. E. 524; *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267; *Puitt v. Com'rs*, 94 N. C. 709, 55 Am. Rep. 638; *Riggsbee v. Durham*, 94 N. C. 800. If, therefore, the act in question here, in designating a certain bound-

dary as a 'school district for the white race,' can only be construed as requiring that the funds to be raised under its provisions should be applied exclusively to the white schools within such boundary and the additional facilities afforded only enjoyed by the white children attending such schools, it would be clearly unconstitutional."

The statute we now have under consideration manifestly falls under the condemnation of the law, as stated in that case, and therefore we are of the opinion that it is void, and so are the bonds which have been issued and sold under the supposed authority therein conferred.

This decision has nothing to do with the requirements of the Constitution that the two races shall be taught in separate schools. We will maintain that provision inviolate and in its full integrity. It is not a question in this case whether there shall be such a separation, but whether the Constitution shall be obeyed when it commands that there shall be no discrimination.

There was no error in the ruling of the court below, and we must affirm its judgment.

Affirmed.

BROWN, J. (dissenting). The question presented by this appeal is the validity of the bonds issued under chapter 345, Private Laws of 1911. This act of the General Assembly provides for the levying of an annual tax for the purpose of building a school building for the whites, and authorizes borrowing the money necessary to construct such building, and directs that the special annual tax be applied to the payment of such debt. It is very important to bear in mind that there is no tax levied or debt authorized to be contracted for the maintenance of any schools, white or colored. Nor does the act provide for the building of a colored schoolhouse, for none is needed. So far as the record shows, the colored race is already provided with a suitable and sufficient school building, but the whites are not.

This point has never before been decided in this state, and I think the court has misapplied the former decisions of this court. If the act provided for the levying of a special tax for the sole maintenance and support of the white schools to the exclusion of the colored, then I should say it discriminated against the colored race and would be in violation of article 9, § 2, of our state Constitution. This section reads as follows: "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the state between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but

there shall be no discrimination in favor of or to the prejudice of either race." We find in this section the peremptory mandate of the Constitution that the children of the white race and the children of the colored race shall be taught in separate public schools. How is this to be accomplished unless separate school buildings can be provided necessary for the accommodation of each race? When the General Assembly is commanded to see to it that the two races are taught in separate public schools, it is certainly invested by necessary implication with the power to give effect to that command by providing for the erection of suitable buildings for each race. It is not obliged to provide for buildings for each race at the same time and in the same enactment. It may provide for a building at one session for the white race and at its next session for the colored race, or the latter may be already provided for. Certainly there is no discrimination apparent in the act, because a white school building is a constitutional necessity in which the colored race can have no share or interest. It surely cannot be contended that every time a white schoolhouse is built a colored schoolhouse must also be erected, regardless of the needs of the two races. We have repeatedly affirmed the doctrine that "courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is clear, complete, and unmistakable." This is the language of *Mr. Black* quoted with approval in *Bonitz v. School Trustees*, 154 N. C. 379, 70 S. E. 735, 736.

As the colored race in South Mills township, Camden county, to which this act applies, is doubtless already provided with a school building suitable to their needs (no complaint is made that they are not), and as the white race evidently is not so provided, I think it was the duty of the General Assembly to provide for the erection of a suitable building. That is all that this legislation undertakes to do, and there is nothing discriminatory on its face. The fact that the Legislature did not provide the means in the same enactment for the erection at the same time of a colored school building should be conclusive that none is needed for that race.

(158 N. C. 44)

BROWN, School Treasurer, et al. v. SPRAY, Town Treasurer, et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—PUBLIC SCHOOLS—SCHOOL TREASURER.

Priv. Laws 1907, c. 237, authorized the town of Canton to issue bonds for various purposes, including a graded school building; the town being constituted a school district. A school board was created and a special tax levied for the maintenance of schools, to be collected by the tax collector and paid to the

town treasurer, to be disbursed by him under order of the school board. A special finance committee was provided for with large powers of supervision and control as to contracts made by the governing agencies of the town, and with control over the proceeds of special tax bonds. Priv. Laws 1909, c. 27, amending the former act, provided that the finance committee should have no control over money issued for the building of schools, or over the schools or the taxes collected therefor to be expended in their behalf, and that the school trustees might elect a treasurer, who should have charge of the school money and the proceeds of the sale of the school bonds. *Held* that, as the original act and amendment should be considered as one act, the town tax collector should pay over school taxes directly to the school treasurer.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 19.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—PUBLIC SCHOOLS—SCHOOL TREASURER.

The validity of the provision of Priv. Laws 1909, c. 27, requiring the town tax collector to pay over school funds in the first instance to the school treasurer, and amending Priv. Laws 1907, c. 237, which authorized the town of Canton to issue bonds for school purposes and other purposes, is not affected because other portions of the act authorized the issuance of bonds, other than those for school purposes, at a higher rate of interest than was specified when the proposition was submitted to the people.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 91.*]

Appeal from Superior Court, Haywood County; Webb, Judge.

Mandamus by A. E. Brown, treasurer of the school board of the town of Canton, and others, against H. W. Spray, treasurer of the town of Canton and tax collector, and others. From a judgment for plaintiffs, defendants appeal. Modified and affirmed.

J. Bat. Smathers and Smathers & Morgan, for appellants. W. T. Crawford, for appellees.

HOKE, J. [1] By statute (Priv. Laws 1907, c. 237) the General Assembly authorized the town of Canton, Haywood county, on approval of voters of the town, to issue bonds in the sum of \$65,000 for water supply, sewerage, electric lights, a graded school building, and street improvements and to lay a special tax to pay accruing interest, etc. By section 11 of the act, the town is constituted the "Canton graded school district for white and colored children," and in subsequent sections a school board is created, having general management and control of the schools therein, a special tax is levied for the maintenance of the school to be collected by the tax collector and paid to the town treasurer, to be kept separate and apart, etc., and paid out under order of the school board, etc. Provision is also made for purchase of sites and erecting suitable buildings, etc., for school purposes. By section 7 of the act in question, a finance committee is established and designated by name, and this committee is given large

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

powers of supervision and control in reference to the contracts entered into by the governing agencies of the town, the disposition of the proceeds of the special tax bonds, etc., the establishment of the graded schools, and purchase of sites and erections of buildings therefor, etc. By a subsequent act (Priv. Laws 1909, c. 27) this former statute was amended, and in reference to the question presented the last statute provides as follows:

"Sec. 4. That section seven of said chapter two hundred and thirty-seven be and the same is hereby amended by striking out all after the word 'act,' in line four, down to and including the word 'school,' in line six, it being the purpose of this section to provide that said finance committee shall have no control or authority over the money to be issued for erecting said graded school buildings, nor shall said finance committee have any control or authority whatever over said graded schools or any taxes levied or collected for said graded schools to be expended in their behalf.

"Sec. 5. That section 19 of said chapter be amended by striking out, in line fourteen, the words 'subject to the approval of the finance committee, as aforesaid.'" This section 19 is the section of the former act referring to the portions of the proceeds from sale of said bonds available for school purposes.

"Sec. 6. That section twenty is hereby amended by striking out, in line two, the words 'subject to the approval of the finance committee.'" Section 20 requires approval of finance committee as to purchase of school sites.

"Sec. 7. That the said board of graded-school trustees shall have the power and they are hereby authorized to select a treasurer of said board who shall have charge of the proceeds to be derived from the sale of said school bonds and who shall also have charge of all school money collected under the provisions of this act. Said treasurer shall be elected by said board of school trustees and shall hold his office for a term of two years, until his successor is elected and qualifies. He shall receive as compensation for his services the same commission as is paid to the treasurer of the town of Canton for his services. He shall give such bond for the faithful performance of his services as said board may determine, and shall only pay out moneys which may come into his hands upon the order of the board of trustees."

It is familiar doctrine "that an original act and an amendment to it shall be considered as one act and so far as regards an action after the amendment is adopted, shall be construed as if it had read from the beginning, as it does with the amendment add-

ed to it or incorporated in it." Black on Interpretation of Laws, pp. 356, 357. And on perusal of the original act and the amendment it is clear that the Legislature intended to place the entire management, guidance, and control of these graded school matters, financial and otherwise, with the board of school trustees and its officers and agent, that the taxes levied for school purposes shall be paid direct from the town tax collector to the treasurer selected by the school board, and that the contracts of this board and the disposition of the school funds arising from the sale of bonds or otherwise are to be no longer subject to the finance committee. The application of \$1,178.57, the portion of the school tax paid by the Champion Fiber Company for 1911 to the general bonded indebtedness of the town, was without warrant of law, and the judgment very properly directs that this same shall be paid to the treasurer of the school board, together with any and all other sums devoted to school purposes. By the terms of the statute, the tax was levied for school purposes, and is to be kept separate and applied to the purpose designated. 8 Abbott, Municipal Corporations, §§ 1069-1071.

[2] Our conclusion is not affected because the amendatory act in the first section authorizes the commissioners to issue a portion of the bonds at a higher rate of interest than was specified, when the proposition was submitted to the people. We do not see that the validity of these bonds is in any way presented, and, if it were otherwise, this provision for the enhancement of interest does not extend to the portion of the bonds applicable to school purposes.

The judgment of the court will be so modified that the town tax collector shall pay the taxes levied and collected for school purposes directly to the treasurer of the school board, and, with this modification, the judgment of his honor is affirmed.

Affirmed.

(158 N. C. 238)

**COMMERCIAL & FARMERS' BANK v.
SCOTLAND NECK BANK et al.**

(Supreme Court of North Carolina. Dec. 20, 1911.)

**1. SUBROGATION (§ 23*) — PERSONS MAKING
ADVANCES FOR PAYMENT OF DEBT—RIGHTS
ACQUIRED.**

One who at the instance of a debtor advances the money necessary to pay a debt, evidenced by a past-due note secured by a mortgage, pursuant to an agreement with the debtor that the note and mortgage shall be transferred to him, is entitled to be subrogated to the rights of the creditor in the security, though the creditor was ignorant of the facts, and transferred the note and mortgage to the debtor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. § 23.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 185*)—TITLE OF ASSIGNEES.

An assignee for the benefit of creditors of a debtor succeeds only to the rights of the debtor, and is affected by all equities against the debtor, and takes the property subject to all such equities.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 558; Dec. Dig. § 185.*]

3. SUBROGATION (§ 36*)—PERSONS MAKING ADVANCES FOR DISCHARGE OF DEBT—PERSONS AS AGAINST WHOM SUBROGATION MAY BE ENFORCED.

Where one who, at the request of a debtor, advances the money necessary to pay a debt, evidenced by a past-due note secured by mortgage, was entitled as against the debtor and creditor to be subrogated to the rights of the creditor in the security, he was entitled to be subrogated as against a subsequent assignee of the debtor for the benefit of creditors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 99-103; Dec. Dig. § 36.*]

4. VENDOR AND PURCHASER (§ 231*)—SUBSEQUENT PURCHASERS—NOTICE.

The record of an unanceled mortgage on real estate charges subsequent purchasers with notice of the incumbrance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.* Mortgages, Cent. Dig. § 393.]

Appeal from Superior Court, Halifax County; Ferguson, Judge.

Action by the Commercial & Farmers' Bank against the Scotland Neck Bank and others. From a judgment for plaintiff, defendant F. P. Shields appeals. Affirmed.

This case was heard below upon facts agreed, as follows:

"(1) Both plaintiff and defendant Scotland Neck Bank are, and were at the time of the acts hereinafter set out, corporations of this state, doing a general business.

"(2) On November 1, 1904, S. W. Morrisett and J. G. Morrisett, partners as Morrisett Bros., gave their note to defendant Scotland Neck Bank for \$15,000 for borrowed money, and, to secure the same, S. W. Morrisett and wife executed to the said Scotland Neck Bank a mortgage on real estate in the town of Scotland Neck, N. C., which was duly recorded.

"(3) Some time after the maturity of the note and demand for payment, Morrisett Bros., through S. W. Morrisett, requested the plaintiff bank to take up said note and mortgage and carry the same for them, which plaintiff agreed to do, upon the distinct understanding and agreement between it and Morrisett Bros. that they should have the Scotland Neck Bank transfer and assign to plaintiff the note and mortgage as security for the amount so furnished by it.

"(4) In pursuance of said agreement, the plaintiff on October 2, 1905, furnished Morrisett Bros. with an amount of money sufficient to take up said note and mortgage (for which funds Morrisett Bros. executed to it their note), and Morrisett Bros., acting by

and through said S. W. Morrisett, on the 4th day of October, 1905, with the funds so furnished by plaintiff, under the understanding and agreement aforesaid, paid the Scotland Neck Bank the amount of the note and mortgage, and at the time of payment the Scotland Neck Bank, at the request of S. W. Morrisett, transferred directly to S. W. Morrisett the note and mortgage, indorsing on each the following: 'Transferred to S. W. Morrisett without recourse. Scotland Neck Bank, W. R. Bond, Asst. Cashier. Oct. 4, 1905.'

"(5) At the time of the payment for and transfer of the note and mortgage aforesaid the Scotland Neck Bank had no notice of the understanding and agreement between plaintiff and Morrisett Bros. or S. W. Morrisett, and did not know from whom or how Morrisett Bros. obtained the funds with which the payment was made.

"(6) In making the payment and having the note and mortgage transferred to S. W. Morrisett, as aforesaid, it was the purpose and intention of Morrisett Bros. and S. W. Morrisett that plaintiff was to be the holder and owner of said note and mortgage, but, not desiring the Scotland Neck Bank to know from whom they obtained the money or of their dealings with the plaintiff bank, and being ignorant of any legal effect such transfer might have, had the transfer made directly to S. W. Morrisett, as aforesaid.

"(7) In furtherance of said intention and purpose, and in order to comply with the understanding between Morrisett Bros. and plaintiff, S. W. Morrisett on the following day, October 5, 1905, transferred and delivered to the plaintiff the note and mortgage as collateral security for the note of Morrisett Bros., which they executed for the funds furnished by plaintiff, said note being given on that date for \$2,500 (\$1,500 of which was for the money furnished by plaintiff to take up the note and mortgage held by the Scotland Neck Bank), the note since then having been renewed from time to time, the last renewal being dated May 1, 1908.

"(8) There is now due on the \$2,500 note the sum of \$1,500, and interest, \$1,000 having been paid on same; and said note, as well as the note and mortgage purchased from the Scotland Neck Bank, is long past due.

"(9) Some time after the execution of said notes and the payment and transfer of the note and mortgage, as hereinbefore set out, to wit, on December 19, 1908, Morrisett Bros. duly executed to defendant F. P. Shields a deed of assignment for the benefit of creditors (without preference), which was duly recorded, and in which was conveyed, with other property, the real estate in Scotland Neck, N. C., which was conveyed in the mortgage by S. W. Morrisett to the Scotland Neck Bank.

"(10) That prior to the date of the deed of assignment, as well as afterwards, plaintiff has demanded of Morrisett Bros. payment of their note, which has been refused.

"(11) Plaintiff has demanded of the Scotland Neck Bank that it foreclose the mortgage executed to it by S. W. Morrisett and wife by selling the real estate therein conveyed under the terms and provisions of the same to satisfy the note of Morrisett Bros. secured by it, but said bank has refused and still refuses to do so. The said mortgage has not been canceled on the record.

"(12) Defendants contend that the transaction in regard to the note and mortgage, and the transfer of the same to S. W. Morrisett by Scotland Neck Bank, as set forth in the foregoing statement of facts, was in law a payment of the note and a cancellation of the mortgage as to F. P. Shields, assignee under said deed of assignment, and as to him and the creditors of Morrisett Bros. the mortgage is not in force, while plaintiff contends that such payment and transfer of the note and mortgage did not have that effect, and that the mortgage is still in force as against Shields, assignee, and all others, at least in equity, and is a subsisting security for the debt of Morrisett Bros. to it.

"(13) It is agreed that, if the court shall be of the opinion that the payment of the said note and mortgage and transfer of the same by the Scotland Neck Bank to said S. W. Morrisett, as set out in the foregoing statement of facts, was not, as to defendant F. P. Shields, assignee or grantee under the deed of assignment, a payment of the note and cancellation of this mortgage, and that said mortgage is in force as against Shields as assignee, judgment shall be entered requiring the defendant Scotland Neck Bank to foreclose the mortgage according to the provisions and terms thereof for the benefit of the plaintiff bank.

"(14) It is further agreed that the costs of the action be divided equally between plaintiff and defendant F. P. Shields, assignee. The note for \$2,500 given by Morrisett Bros. to the plaintiff refers to the other note and mortgage for \$1,500 purchased from the Scotland Neck Bank as collateral security for its payment, and it is described therein as having been indorsed by S. W. Morrisett to the plaintiff for that purpose, and the note for \$1,500 to the Scotland Neck Bank, secured by the mortgage, is indorsed as follows: 'Transferred to Commercial & Farmers' Bank (the plaintiff) as collateral. [Signed] S. W. Morrisett.'"

The court rendered the following judgment: "This cause coming on to be heard, and being heard, and fully considered upon the facts agreed, the court is of the opinion that S. W. Morrisett at the time he paid the money to the Scotland Neck Bank and took the assignment of said note and mortgage was not the holder of the same in his own right or in the right of Morrisett Bros.,

but in the right of the Commercial & Farmers' Bank, as trustee for said bank, and therefore it is ordered and adjudged that said note and mortgage was not discharged, but is in full force and effect, and it is thereupon ordered and adjudged that the Scotland Neck Bank foreclose said mortgage according to the provision and terms thereof. It is further ordered that the plaintiff and the defendant F. P. Shields, assignee, each pay one-half of the cost. G. S. Ferguson, Judge."

Defendant F. P. Shields, assignee, excepted and appealed.

Kitchin & Smith, for appellant. R. C. Dunn and Murray Allen, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff's claim appeals very strongly to the conscience of the court, and we think it is sustained by well-settled principles.

[1] The doctrine of subrogation rests upon principles of natural justice and equity, and there are numerous authorities which support the rule that one who at the request of another advances money to pay off a security or incumbrance, in which the latter is interested or to the discharge of which he is bound, under the agreement that he shall have the benefit of the creditor's security, is entitled to be subrogated to the rights of the creditor in the security, and some cases hold that, in the absence of an express agreement, one will be implied that the security shall subsist for the use and benefit of the lender of the money, and it will be so enforced. *Gans v. Thleme*, 93 N. Y. 225; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204. One who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may as against the debtor and the debtor's estate be subrogated to the benefit of such security and of the debt which he has discharged. And a party who has paid a debt at the request of the debtor, under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by this payment, may also be subrogated to the security as against the debtor. But this subrogation will not be allowed against one interested in the property held as security, who was a stranger to the transaction by which the payment was made, and who was under no obligation for the payment of the debt, unless it appears that the payment was made, not as an extinguishment of the debt, but in reliance upon, and as a purchase of, the security. This is a species of conventional subrogation, being a subrogation by an implied convention or agreement. Accordingly, it will not be al-

lowed if it appears not to have been intended by the parties, though this intention, if not expressed, may ordinarily be determined from the circumstances attending the transaction. *Sheldon on Subrogation*, § 274. The authorities are entirely agreed, though, that where a person advances money to pay off a mortgage debt under an agreement with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee, and to enforce the mortgage. *Sheldon on Subrogation*, § 19; 37 Cyc. 467, 471; *Crippen v. Chappell*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Fievel v. Zuber*, 67 Tex. 275, 8 S. W. 273. In the case last mentioned it is said that no different rule has been found except in Louisiana, where the law of the subject is governed by statute. Numerous authorities are cited in support of the rule, and the following passage from *Domat*, in which the principle is clearly and strongly stated, is quoted with approval: "One may acquire the privilege of a creditor without substitution in the same manner as a mortgage by agreement with the debtor that he who shall pay for him shall have the privilege; and it makes no difference whether the payment be made to the creditor by him who lends the money or by the debtor with whom the money has been intrusted." 2 *Strahan's Domat's Civil Law* (Cushing's Ed.) p. 698, § 1783.

The subject is fully discussed in 1 *Jones on Mortgages* (8th Ed.) § 874 et seq. and all the authorities collected. It is there said that the principle is well settled that when the money is advanced at the request of the debtor or creditor, with the agreement that an assignment should be made or that subrogation should take place, or, what is the same thing in law, that the lender should have the benefit of the security, in either of the cases, it will be kept on foot for the repayment of the amount advanced by the lender, and there seems to be no ruling to the contrary. *Downer v. Miller*, 15 Wis. 612, seems to be exactly like this case in all respects. It decides every point raised in favor of the plaintiff, viz., that there clearly exists the right of conventional subrogation; that the express assent of the creditor, who received the money from the party claiming the right, is not necessary; and that the assignee takes subject to plaintiff's equity. *Lyness* was the creditor, *Steever* the debtor, and *Miller* the one who advanced the money and claimed the right of subrogation. The court said: "Miller's rights, therefore, must depend entirely on the effect of the agreement between him and *Steever*, and that we deem sufficient to justify the judgment of the circuit court. That agreement was that *Miller* was to indorse for *Steever* so as

to enable the latter to raise the money at the bank, but that the money was to be used not to pay and extinguish the *Lyness* judgment, but to procure an assignment of it to *Miller*, to indemnify him as the indorser. To use the money thus obtained to pay the judgment and have it discharged would operate as a fraud upon *Miller*, and it is upon this ground that he was entitled to the relief given by the court below. It may be conceded that such relief could not have been given against any party, who, relying upon the discharge of the *Lyness* judgment, has acquired an interest in the property for a valuable consideration, without notice of *Miller's* equitable rights. But the appellant here does not stand in such a position. His rights were subsequent and subject to the *Lyness* mortgage. * * * Nor is the fact that *Lyness* was not party to the agreement that his decree should be assigned for *Miller's* security any reason why that agreement should not be enforced. It was a matter of indifference to him whether the decree was assigned or discharged; and, where justice between others requires it to be assigned, he should not be allowed to prevent it upon the supposed technical right to control his own decree. The enforcement of this agreement between *Miller* and *Steever* without reference to the question whether *Lyness* assented to it is entirely analogous to the principle of subrogation, where the assent or agreement of the creditor who gets the money is not essential to the right. If a surety pays a debt, he has a right to be subrogated to the securities of the creditor, and the latter would not be allowed to object, for it is a matter of indifference to him. It is equally true here, though *Miller's* right is not (strictly) that of subrogation, but grows out of the agreement between him and *Steever*. That agreement is one which should have been enforced, even though *Lyness* had adhered to his refusal to assign the decree. But here he voluntarily consented in the end to make the assignment." *Shreve v. Hankinson*, 34 N. J. Eq. 76; 1 *Pingrey on Mortgages*, § 1175. "Where the amount due on mortgages is paid by a third person at the request of the mortgagor, and there is no understanding that they shall be considered satisfied, a court of equity will, for purposes of justice, keep the mortgages alive, and much more so if the party takes an assignment of the mortgages." *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Gans v. Thleme*, 93 N. Y. 232; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Bacon v. Goodnow*, 59 N. H. 415.

The case of *Gans v. Thleme* is a very strong authority for the position that, under the facts of this case, the plaintiff, who, at the request of the *Morrisett Bros.*, advanced the money to pay the debt owing to the defendant bank, is entitled to be subrogated to the rights of the latter in the debt and mortgage, as will appear from the following extract: "It is no doubt true, however, as

the learned counsel for the respondents argues, that a volunteer cannot acquire either an equitable lien or the right to subrogation (*Sandford v. McLean*, 3 Paige [N. Y.] 122 [23 Am. Dec. 773]; *Wilkes v. Harper*, 1 N. Y. 586; *Id.*, 2 Barb. Ch. [N. Y.] 338), but one who, at the request of another, advances his money to redeem or even pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and, in the absence of an express agreement, one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied, although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence' (*Cheeseborough v. Millard*, 1 Johns. Ch. [N. Y.] 409 [7 Am. Dec. 494]; 1 Story's Equity Jurisprudence, § 943), and is resorted to for the purpose of doing justice between the parties." Why should this not be the true doctrine, when the money is paid at the request of the debtor, with the agreement that the security should continue for the benefit of him who advanced the money? The creditor is not prejudiced in any way or to any extent. The debtor has made the promise and has derived a clear benefit by the payment to his creditor, and in a court of equity he will not be heard to say that the arrangement has failed by reason of the fact that he violated his instructions or agreement if he did, and took an assignment to himself, instead of the plaintiff. The mortgage has not been canceled, and, even if it had been, a court of equity would not regard the cancellation as in the way of enforcing the undoubted right of the plaintiff to relief, provided there has intervened no new right acquired for value and without notice, which will be prejudiced if the lien is enforced. The law will not allow the debtor to avail himself of the breach of trust and thereby defeat the right created by his agreement, upon the faith of which the money was advanced, but will regard the assignment as made for the benefit of him to whom it justly belonged, as we have already shown. *Dudley v. Bergen*, 23 N. J. Eq. 397; *Russell v. Mixer*, 42 Cal. 475; *Cobb v. Dyer*, 69 Me. 494; *Seiberling v. Tipton*, 118 Mo. 373, 21 S. W. 4; *Bruce v. Bonney*, 12 Gray (Mass.) 107, 71 Am. Dec. 739.

In *Russell v. Mixer*, supra, it is said: "The only question presented is whether or not, upon the facts stated in the amended complaint, the plaintiff is entitled to the relief he obtained. We think that there can be no doubt that he is. The agreement between Miller and himself was for an assignment and transfer of the mortgage. The mistake occurred wholly in the selection of the means by which this agreement was to be effectuated. There is no appreciable distinction between this case and that where a scrivener through ignorance or inattention, fails to

select or prepare such an instrument as effectuates the previous agreement of parties, and relief is always decreed in that case. 1 Story, Eq. Jur. § 115. Had the recorder here, upon being informed by the parties that the agreement between them was that the mortgage in question should be more effectually transferred to Russell, prepared a release, instead of an assignment, whether he did so through mere inattention to what he was doing, or through a misapprehension of its legal effect in the premises, there would be no doubt that equity would relieve against the mistake. The rule must be the same in a case where the parties have made the mistake for themselves, and without the aid of either scrivener or recorder." But in *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509, we find an authority which clearly sustains the plaintiff's right of subrogation. It is there said that subrogation is of equitable origin, not dependent upon contract, and is always invoked to prevent injustice. It is defined to be the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt, * * * or that change by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, by being subrogated to him, enters into his right. It is a legal fiction, by force of which an obligation extinguished by a payment by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same rights, and, indeed, as constituting one and the same person with the creditor whom he succeeds. *Sheldon*, Sub. 2; 27 Am. & Eng. Enc. 206; *Davison v. Gregory*, 132 N. C. 389, 43 S. E. 916; *Carter v. Jones*, 40 N. C. 196, 49 Am. Dec. 425; *Springs v. Harven*, 56 N. C. 96. But the court, quoting from and approving *Robinson v. Leavitt*, 7 N. H. 73, further said: "There are cases in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the incumbrancer and treated as assignee of the mortgage, and is enabled to hold the land as assignee, notwithstanding the mortgage itself has been canceled and the debt discharged. The true principle is that, when money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it as may best serve the purpose of justice and the just intent of the parties. Many cases state the rule in equity to be that the incumbrance shall be kept on foot or considered extinguished or merged, according to the intent or interest of the party paying the money. * * * And it makes no difference whether the party on payment

of the money took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt canceled. The debt itself may still be held to subsist in him who paid the money as assignee, so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him."

There are numerous authorities of like tenor. Our recent decision in *Tripp v. Harris*, 154 N. C. 296, 70 S. E. 470, is directly in point. We there held that, where the note secured by a mortgage is paid by a surety thereon, the note is satisfied, but an implied promise of the principal to reimburse the surety at once arises, and that he is subrogated to the rights of the creditor in all securities held by him, and he may, with or without any formal assignment, avail himself thereof for the purpose of indemnifying himself, and, if the security be a mortgage, he may foreclose the same for his own benefit, a creditor of the principal. Our case presents a much stronger equity in favor of the plaintiff, as there the mortgage was not canceled on the record or otherwise. There was an express agreement for subrogation. *Morrisett* received the note as agent for the plaintiff, and had no authority in law or in fact to take an assignment to himself, and the next day he actually delivered note and mortgage, which he had received from the creditor in execution of the agreement, to the plaintiff. The conduct of *Morrisett* shows conclusively that he did not take the assignment to himself for his own benefit and with the purpose of satisfying the debt and canceling the note, but for the use and benefit of the plaintiff bank, in accordance with the agreement between them, because he almost immediately transferred and delivered the note and mortgage to it. In the case of *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627, this court recognized the doctrine of conventional subrogation, and it is there said that where the money is paid to the creditor by another, at the request of the debtor, to discharge his obligation, the person who advanced the money is in equity subrogated to the rights of the creditor in the securities held by him.

[2, 3] We do not understand that the *Morrisetts* or the defendant bank are contesting the right of the plaintiff, the appeal having been taken by the assignee of the *Morrisetts*, and he stands in no better position than his assignors would have held if the general assignment had not been made by them. "It may be said generally that an assignee succeeds only to the rights of his assignor and is affected by all equities against him, and takes the property subject to all such equities." Justice Shepherd thus states the rule

in *Wallace v. Cohen*, 111 N. C. 106, 15 S. E. 893: "It is true, as laid down in *Southerland v. Fremont*, 107 N. C. 565 [12 S. E. 237], that such a trustee or mortgagee is a purchaser for value within St. 13, 27 Eliz., but it is in that case conclusively determined, after some confusion in our decisions, that such a purchaser takes the property subject to any equity or other right that attached to the same in the hands of the debtor. This view is abundantly sustained, not only by our own previous decisions, but by the great weight of judicial authority. *Bassett v. Norsworthy*, *White & Tudor's L. C. Eq.*, and notes. As applicable to the present case, the doctrine has been recognized and applied in a large number of decisions. 'In order to entitle one to protection as a bona fide purchaser in such a case, he must have advanced some new consideration, or incurred some new liability, on the faith of the fraudulent vendee's apparent ownership.' *Johnson v. Peck*, 1 Woodb. & M. 334; *McLeod v. Bank*, 42 Miss. 99; *Hyde v. Ellery*, 18 Md. 496; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Ratcliffe v. Sangston*, 18 Md. 883; *Pope v. Pope*, 40 Miss. 516. Hence 'an assignee of the fraudulent vendee for the benefit of creditors, incurring no new liability on the faith of his title, is not protected.' *Farley v. Lincoln*, 51 N. H. 577, 12 Am. Rep. 182; *Harris v. Horner*, 21 N. C. 455, 30 Am. Dec. 182; *Stevens v. Brennan*, 79 N. Y. 254; *Montgomery v. Bucyrus*, 92 U. S. 257, 23 L. Ed. 656; *Donaldson v. Farwell*, 98 U. S. 631, 23 L. Ed. 993. These authorities, with very many others we could cite, are directly in point, and sustain the right of the plaintiffs to recover without fixing the assignee with notice." This has always been the settled law in this state and certainly since *Potts v. Blackwell*, 56 N. C. 449, was decided. This doctrine is so well established that it requires no further discussion.

[4] Besides, the record of an uncanceled mortgage upon real estate charges subsequent purchasers with notice of the incumbrance. *Smith v. Stark*, 3 Colo. App. 453, 34 Pac. 258.

The court was right in giving judgment for the plaintiff upon the case agreed.

No error.

(157 N. C. 624)

STATE v. GOFFNEY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. INDICTMENT AND INFORMATION (§ 91*)— DESIGNATION OF OFFENSE.

An indictment for housebreaking, charging that the defendant did break and enter (otherwise than by burglarious breaking) with intent to commit a felony, to wit, with intent "feloniously to steal," defines the offense as accurately as if it alleged that the breaking

and entering was feloniously done, and was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 261-265; Dec. Dig. § 91.* Burglary, Cent. Dig. § 36.]

2. INDICTMENT AND INFORMATION (§ 110*) — SUFFICIENCY OF ACCUSATION.

An indictment charging that a defendant did break and enter (otherwise than by burglarious breaking) a storeroom and house with "intent to commit a felony," charges the offense in the words of the statute (Revisal 1905, § 3333), and is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.* Burglary, Cent. Dig. § 31.]

3. BURGLARY (§ 15*)—DEFENSE—CONSENT OF OWNER.

Though a store was broken into with burglarious intent, where the entry was induced by the servant of the owner at the instance of such owner, though with an intent to apprehend the accused, there is such a consent to the entry as to destroy its criminal effect, and a conviction therefor as for a felonious breaking and entering was improper.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 20-23; Dec. Dig. § 15.*]

Appeal from Superior Court, Wilson County; Cooke, Judge.

Sylvester Goffney was convicted of house-breaking, and appeals. Reversed, and proceeding dismissed.

Daniels & Swindell, for appellant. T. W. Bickett, Atty. Gen., and G. L. Jones, Asst. Atty. Gen., for the State.

BROWN, J. 1. The defendant moved in arrest of judgment because the word "felonious" is not charged in the bill. The charge is that defendant did break and enter (otherwise than by burglarious breaking) the storeroom and house of Geo. Barnes and Joe Barnes, partners, etc., with intent to commit a felony, to wit, with intent the goods, etc., of said Barnes Bros., etc., feloniously to steal, etc.

[1, 2] The defendant attacks the bill of indictment for the reason that it does not allege that the breaking and entering into the storeroom was feloniously done. We think this exception is without merit. The indictment alleges that the defendant did break and enter with intent to commit a felony. We are unable to draw any distinction between the words, "unlawfully breaking and entering with the intent to commit a felony," and the words, "unlawfully and feloniously breaking and entering with the intent to commit a felony." Using the word "felonious" as it is used in the indictment defines the offense as accurately as if it were repeated. In other words, if one breaks into a house with intent to commit a felony, he feloniously breaks into the house. The indictment follows the wording of the statute. An indictment like the one at bar in this respect was held good in the case of *State v. Tytus*, 98 N. C. 705, 4 S. E. 29. See,

also, *State v. Staton*, 133 N. C. 643, 45 S. E. 362.

[3] 2. It is contended by the learned counsel for defendant in a well-prepared brief that, upon the state's evidence, no crime has been committed, and with this position we fully agree.

There were only two witnesses examined. Barnes, the prosecutor and owner of the storehouse, testified: "I know the defendant, have known him for four years. He has been in my employ for several years, during which time I found him honest. He assisted me in my store and business a portion of the time. In consequence of statements made to me by Richard Farmer, a negro boy in my employ, I instructed Richard to induce defendant to break in my store. On the night of July 7th Policeman Wynne, myself, and others watched the store, and about 12 o'clock we saw the defendant, Sylvester Goffney, and Richard Farmer go to the store, and saw defendant, Goffney, remove tacks holding a window pane, and remove the window, and enter the store. Richard Farmer immediately afterwards also entered the store through the same window. Policeman Wynne, myself, and others, who were watching the store, after firing pistols, entered the store, and arrested the defendant, Goffney, and required said Farmer to accompany us." The only other witness corroborated Barnes.

It is held in this state and elsewhere that larceny cannot be committed when the owner through his agent consents to the taking and asportation, though such consent is given for the purpose of apprehending the felon. *State v. Adams*, 115 N. C. 775, 20 S. E. 722. In that case it is said: "Although the intent to steal certain property is formed and carried out, the perpetrator is not guilty of larceny if he has been persuaded by a servant of the owner at the latter's instance to commit the theft." In the opinion Mr. Justice Clark well says: "The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the defendant may be punished." In the case at bar it appears that Barnes, the owner of the building entered, directed his servant, Richard Farmer, to induce the defendant to break in his (Barnes') store, that the servant obeyed his orders, and that he and defendant entered the store together, and that Barnes was present, watching them, and arrested defendant after he entered. If it were possible to hold the defendant guilty of a felony, under such circumstances, then Barnes could be likewise convicted of feloniously breaking and entering his own store, for he was present, aiding and abetting the entry of the defendant, and induced him to enter. That would, of course, be a legal absurdity.

Mr. Desty says: "Where the owner was apprised of the proposed burglary, and his servant, procuring the keys from his master, accompanied the burglar, and entered the premises, there could be no conviction." Desty's Am. Crim. Law, p. 486. See, also, Wharton's Crim. Law (9th Ed.) §§ 915, 766-770; Reg. v. Johnson, Car. & M. 218; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477; People v. Collins, 53 Cal. 185; Mace v. State, 9 Tex. App. 110; Spelden v. State, 3 Tex. App. 156, 30 Am. Rep. 126; Williams v. State, 55 Ga. 391; 2 Russel (9th Ed.) 10; 3 Am. & Eng. Enc. Law, 662; 1 Bishop, Crim. Law (4th Ed.) 570. In Love v. People, reported in 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, the building of one Hoag was entered by Robinson, Love, and others. Robinson was a hired detective, but posed among the others as one of them, and entered the building with the others. Robinson entered the building with the consent of Hoag. The court held that Robinson, having entered with the consent of the owner, committed no burglary, and that no burglary was committed because of the absence of felonious intent. The defendants Love and others could not have been accomplices or privy to a burglary because none was committed. Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; many cases cited. In Reg. v. Johnson, Car. & M. 218, where a servant, after having been approached to aid in robbing his master's house, pretended to consent, and then informed the police, who told him to proceed, and he then went out and found the defendants, and took them to the house of his master, letting them in through the door, it was held that they could not be convicted of burglary. In the case of Spelden v. State, 3 Tex. App. 156, 30 Am. Rep. 126, the defendant was indicted for burglary by breaking into a bank with intent to commit larceny. The court says: "In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They (the detectives) had the legal occupancy and control of the bank. Two of them made arrangements with the defendants to enter it, and defendant, when arrested, had entered the bank at the solicitation of these detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent." It is said in Cyc. p. 181: "There is no burglary where the occupant of a house or his servant or agent by his direction or a public officer or detective with his consent * * * takes active steps to aid the suspect or to induce him to enter, although this may be done for the purpose of apprehending and prosecuting him, and although he may intend to commit a felony in the

house." 6 Cyc. 181. We recognize the principle laid down in State v. Smith, 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946, but there is an obvious distinction between that case and this. In that case it is properly held that the fact that a party was deceived into a violation of the liquor laws of the state by a detective will not be a justification. In the case at bar the owner himself gave permission for the defendant to enter which destroyed the criminal feature and made the entry a lawful one.

Upon the facts in evidence, no crime was committed because the entry was with the consent and at the instance of the owner of the property.

His honor should have directed a verdict of not guilty.

Reversed, and proceeding dismissed.

(158 N. C. 251)

TABLE ROCK LUMBER CO. v. BRANCH.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. APPEAL AND ERROR (§ 1212*)—REVERSAL—NEW TRIAL—SCOPE.

When the Supreme Court grants a new trial generally without further disposition, the new trial is upon all of the issues, though it has power to grant either a general or partial new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

2. APPEAL AND ERROR (§ 1178*)—REVERSAL—NEW TRIAL—SCOPE.

Where the error is confined to one issue which is separable from the others, and it clearly appears that no prejudice will result from such a course, the Supreme Court will usually grant a new trial only upon such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

3. DEEDS (§ 86*)—ORDER OF REGISTRATION—NECESSITY.

Revisal 1905, § 1004, provides that, where a conveyance is acknowledged by both husband and wife or by other grantor before the same officer, the form of acknowledgment shall be substantially as therein provided, and section 999 provides that, whenever the proof or acknowledgment of the execution of any instrument required or permitted to be registered is had before any other official than the clerk of the superior court, such clerk shall, before it is registered, examine the certificate of proof or acknowledgment, and, if it is duly proven or acknowledged and the certificates are in due form, he shall order the instrument registered. Held that, where a deed executed by a husband and wife is proven before the clerk of the superior court, an order of registration is not required; a certificate of proof being sufficient.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. § 86.*]

4. WILLS (§ 353*)—PROBATE—RECORD—EFFECT.

An entry of record in probate proceedings that, after an issue of *devisavit vel non*, "the executor, H., offered for probate the will of" testator, "which was duly proven by the oath of P. and C., the subscribing witnesses thereto, according to law, and the said H. took the sundry oaths as executor, and letters testamentary issued," authorized an inference that the sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

scribing witnesses named actually subscribed as witnesses in testator's presence, especially since, under Revisal 1905, § 3113, it was necessary that they subscribe in his presence in order to be subscribing witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 809; Dec. Dig. § 353.*]

5. WILLS (§ 118*) — SUBSCRIPTION — ESSENTIALS.

Revisal 1905, § 3113, provides that no will shall be sufficient, unless written in testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least except as provided. *Held*, that the subscribing witnesses must have subscribed the will in testator's presence after he had signed it or acknowledged the signature in their presence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 302-304; Dec. Dig. § 118.*]

Appeal from Superior Court, Burke County; Long, Judge.

Action by the Table Rock Lumber Company against A. J. Branch. From a judgment in part for plaintiff, both parties appeal. Reversed and remanded for new trial on defendant's appeal, and plaintiff's dismissed.

Avery & Ervin, for plaintiff. S. J. Ervin and Spainhour & Mull, for defendant.

WALKER, J. This case has been before us several times, and is reported in 63 S. E. 171, 948. At the fall term, 1910, of this court, we granted a new trial for newly discovered evidence. The appeal had been taken by the plaintiff, who had recovered in all respects at that trial, except as to the land within the boundary of what is known in the case as the "Brite grant," containing 300 acres. When the case was heard the last time, the court held that the new trial was limited by the order of this court, though general in its terms, to the Brite grant, and that the defendant could not reopen issues upon which he had lost at the former trial, and to this ruling defendant excepted. We think the court erred in thus restricting the new trial. Our order, as we have said, was general in its terms, and extended to all the matters involved in the case. We were not asked to limit the new trial to any particular question and did not do so.

[1] This court, upon application, can grant a general or a partial new trial, as it may see fit under all the circumstances, but when a new trial is granted, nothing more being said, it means a new trial of the whole case of all the issues, and not merely of one of them, or, as in this case, of a part of one. The new trial refers to the issue, and is not restricted by the answer to the issue, unless the court in the order confines its scope to a particular issue or a particular question. It is settled beyond controversy that it is entirely discretionary with the court, su-

perior or Supreme, whether it will grant a partial new trial.

[2] It will generally do so, when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others, and it is perfectly clear that there is no danger of complication. *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Rowe v. Lumber Co.*, 133 N. C. 433, 45 S. E. 830. In the last-cited case we said: "The issue submitted at the first trial was: Are the plaintiffs the owners of the land in controversy or any part thereof, and, if of any part, what part? The answer to that issue was, 'No.' There were three tracts of land in dispute, and, if an error was committed as to any of them, this court must of necessity give a new trial as to all, though there may have been no error committed as to one of them. This results from the form of the issue. If a separate and distinct issue had been submitted as to each tract, and an error had been committed as to one only, the court even in that case could have given a general new trial; but in its discretion could have restricted the new trial to the issue or issues as to which the error was committed. When the issue is general, embracing within its scope several distinct pieces of property or tracts of land, the new trial must be general, because the issue and consequently the verdict are in their very nature indivisible. This seems to have been expressly decided. *Beam v. Jennings*, 96 N. C. 82 [2 S. E. 245]; *Holmes v. Godwin*, 71 N. C. 306." Of course, in the latter part of the passage taken from that case, we referred to a verdict which merely gives a general answer, affirmative or negative, to the issue. In that case the issue was general in its terms, and embraced several tracts of land, and the answer thereto was, "No." Besides, in this case, there may be danger of doing injustice to the defendant by granting a partial new trial. But the fact remains, after all has been said, that we ordered a general, and not a partial, new trial, and the court should have tried the case below in accordance therewith. It was error not to do so, for which there must be another trial.

[3] There is one question we must decide before remanding the case. The plaintiff offered as evidence a deed from A. C. Avery and wife to John Cheever, dated August 27, 1878, and defendant objected to it, upon the ground that while the probate, as appears by the annexed certificate, is full and correct in form, there was no flat or order of the clerk of the court, D. C. Pearson, for the registration thereof. The objection was overruled, and the deed admitted. Defendant excepted. We think the ruling was correct. The statute does not seem to require an order to registration when the deed is proven before the clerk, but merely a cer-

tificate of the proof. Revisal 1905, § 1004. When he passes upon a probate taken by some other officer, he must certify to the correctness of the probate and the certificate, and order the instrument to be registered (Revisal, § 999) according to the form prescribed by Revisal, § 1001, or one substantially the same.

[4] The court excluded a copy of the will of Geo. Hice, Sr., certified by W. S. Sudderth, clerk of the county court, to be a true and correct copy of his will on November 12, 1855. The handwriting of Sudderth was duly proven by the examination of L. A. Bristol. The defendant then offered the minute book of the county court, from which it appeared that the will of Geo. Hice, Sr., had been offered for probate by his executor, G. W. B. Hice, who appeared by his attorney, W. W. Avery, and that a caveat filed thereto by Elizabeth Hice and an issue of devisavit vel non ordered to be made up, which was done, and the case docketed for trial. The caveat was afterwards withdrawn and the executor qualified. Then appears this entry: "By consent of parties, the defendant, Elizabeth Hice, is permitted to withdraw the issue heretofore made in this case, and confess judgment for the costs heretofore incurred. Whereupon the executor, George W. B. Hice, offered for probate the last will and testament of George Hice, which was duly proven by the oath of John Parks and Thomas Carleton, the two subscribing witnesses thereto, according to law. And the said G. W. B. Hice took the sundry oaths as executor, and letters testamentary issued. The said Elizabeth Hice, widow of George Hice, came into court in proper person and entered her dissent to the provisions of the said will, and refused to accept the legacy therein given her, and filed her petition for her year's allowance, which is granted. (See trial docket.)" We are inclined to the opinion that the certified copy, as authenticated by the entries on the records of the court, was competent evidence of the due execution of the will, and that it should have been admitted. The plaintiff objected to it upon the ground that it did not appear by the records or the copy of the will that the two subscribing witnesses named in the entry we have set forth actually subscribed as witnesses in the presence of the testator, though it is admitted that it sufficiently appears that Geo. Hice, Sr., signed the will in their presence. It is not stated expressly in the entry that he so signed the will, but only inferentially from the words, "which was duly proven by the oath of John Parks and Thomas Carleton, the two subscribing witnesses, according to law," and we do not see why the other fact may not as well be inferred from those words.

[5] They could not well be subscribing witnesses unless he signed or acknowledged his signature in their presence, and they, as witnesses, subscribed it in his presence. Revisal, § 3113; *In re Snow's Will*, 128 N. C. 100, 38 S. E. 295; *Burney v. Allen*, 125 N. C. 314, 34 S. E. 500, 74 Am. St. Rep. 637; *Graham v. Graham*, 32 N. C. 219. The statement that the will was duly proven by the oath of the two subscribing witnesses, according to law, would seem to clearly imply by irresistible inference that there was legal proof of his signing in their presence, and they in his, for otherwise the will would not have been duly proven. *Cochran v. Linville Improvement Co.*, 127 N. C. 386, 37 S. E. 496. No doubt a full certificate of probate was filed, and recorded with the will, showing all the facts which should appear. It was admitted that the records of the court had been burned many years ago. We need not decide this question, though, as the defendant succeeded at the trial without the necessity of resorting to the will as evidence, so it is stated. We merely advert to it for the purpose of suggesting that, if the defendant wishes again to rely upon the will as evidence, he may perhaps restore the lost record under the provisions of Revisal, c. 11, entitled, "Burnt and Lost Records," and thereby avail himself of it as proof. It is too important and far-reaching a question to decide finally without a more extended argument and consideration of it.

We must regretfully order another trial of this much litigated case, because of the error in restricting the last trial to the consideration only of rights arising under the Brito grant.

New trial.

Plaintiff's Appeal.

WALKER, J. As we have ordered a new trial of this case in the consideration of the defendant's appeal, it is useless to pass upon the alleged errors which are assigned in the plaintiff's appeal. The rulings may be different on the next trial, and the case presented in an entirely different aspect. Besides, the plaintiff will derive from the new trial granted in the other appeal all the advantage he now seeks. The whole matter is reopened for a new investigation, and we can do no more than this for him, should we review the rulings of the court to which he has excepted. If we sustained any one or all of his assignments, the result would be the same as it is now; that is, a new trial. We must therefore take the usual course in such cases, and dismiss the appeal.

Appeal dismissed.

(171 N. C. 337)

PATTON v. W. M. RITTER LUMBER CO.
(Supreme Court of North Carolina. Dec. 20, 1911.)

1. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—NEGLIGENCE—METHOD OF WORK.

Defendant's mill sawed cross-ties, which were run out on rollers, from which they fell to a dock a few feet lower, and then dropped 12 or 18 feet to the ground below, where they were loaded on cars. Plaintiff, a foreman in charge of a loading gang, went to the dock to prevent the ties being thrown on his men while a train was being loaded, and asked one of the laborers if any more ties were coming out, and was informed that there would be no more for about 30 minutes. Plaintiff then motioned to his hands to load the ties onto the car, when another tie was rolled out of the mill, fell on the dock, struck plaintiff, and seriously injured him. *Held*, that defendant was guilty of actionable negligence in failing to stop the ties while the car was being loaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 273; Dec. Dig. § 137.*]

2. MASTER AND SERVANT (§ 201*)—FELLOW SERVANTS—NEGLIGENCE.

The negligence of plaintiff's fellow servant in informing him that no ties would come out of the mill for 30 minutes was not the cause of the injury, and was not material on the question of defendant's liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

3. LIMITATION OF ACTIONS (§ 2*)—EFFECT OF LIMITATION—WHAT LAW GOVERNS.

Since statutes of limitation affect the remedy and not the cause of an action, the statute of the place of the trial or *lex fori* governs.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

4. APPEAL AND ERROR (§ 253*)—VARIANCE—EXCEPTIONS.

A variance between the pleadings and the proof will be disregarded, where no exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1491; Dec. Dig. § 253.*]

5. TRIAL (§ 76*)—EXPERTS—COMPETENCY—OBJECTIONS.

Where a physician has been admitted, and has testified as an expert, without objection, a question as to his competency as an expert may not thereafter be raised by a general objection to a proper question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 183-190; Dec. Dig. § 76.*]

6. EVIDENCE (§ 478*)—MENTAL CONDITION—NONEXPERTS.

A person's mental condition may be shown by a nonexpert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

7. EVIDENCE (§ 408*)—PAROL EVIDENCE—RECEIPT.

Where a receipt is given by an injured employé to his employer, it is only *prima facie* evidence of a settlement, and may be shown to have been intended to apply only to compensation for lost time, and not to constitute an acquittance for the injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.*]

Appeal from Superior Court, Burke County; Lane, Judge.

Action by Charles F. Patton against W. M. Ritter Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. C. Bell and Avery & Avery, for appellant. Spainhour & Mull and Avery & Ervin, for appellee.

CLARK, O. J. The plaintiff was injured in August, 1907, while acting as foreman of a squad of hands who were loading cross-ties on a car on defendant's railway. The cross-ties were sawed by the defendant's mill, whence they were run out on rollers, from which they fell upon a dock a few feet lower; thence they were dropped 12 to 18 feet to the ground below, from which place they were loaded on the defendant's train. When the train came in, the plaintiff went upon the dock to prevent the ties being thrown down on his men while the train was being loaded. He asked one of the laborers if any more ties were coming out, who replied that there would be no more for about 30 minutes. The plaintiff then motioned his hands to get up the ties and load them on the car. About that time another tie was rolled out from the mill, which fell over on the dock, striking the plaintiff and seriously injuring him.

[1] The motion for a nonsuit was properly refused. The evidence tended to show that the defendant was guilty of negligence in not furnishing the plaintiff a safe place to work, and it was properly submitted to the jury. It was negligence in the defendant to permit its mill to run out the cross-ties to fall upon the dock, and, thence 12 to 18 feet to the ground, while the plaintiff and his men were engaged in picking up the ties to place them on the car. It was incumbent upon the company to stop the ties from coming out while the plaintiff and his men were engaged in loading them. The plaintiff was sent there with his men to load the car, and he had no control over the operations of the mill.

[2] The negligence of the fellow servant in informing the plaintiff that no ties would come out of the mill for one-half hour has no bearing upon the negligence of the defendant. At most, it could only have thrown light upon the question of contributory negligence, and in that aspect it tended to show that the plaintiff acted, not negligently, but prudently. It was therefore immaterial as to whether, under the law of West Virginia, the doctrine of liability for the negligence of a fellow servant obtained or not.

[3] The statute of limitations of West Virginia need not be considered, for such statutes affect the remedy, and not the cause of action. It follows that the statute of limitations of the place of trial—the *lex fori*—

governs. 25 Cyc. 1018, 1020 (3). This action was begun within less than two years after injury was sustained.

[4] It is true the cause of action set out in the complaint differs in many of the circumstances from the proof, but variance between the pleadings and the proof will be disregarded when there is no exception made at the trial. In *Handon v. Clark*, 127 N. C. 114, 37 S. E. 156, this court said: "If the cause had in fact been tried upon a substantially different aspect from that alleged in the complaint, the defendant, after acquiescing in such variance and making no objection to the issue submitted, cannot now be heard to make this objection to vitiate the trial. If necessary, the pleadings would be reformed even, after judgment, as authorized by Code, § 273, to conform to the facts proven."

[5] As to the exception to the question asked Dr. Riddle, it was really not answered by him. But, if it had been, and he had been admitted, and had testified as an expert without objection, a question of his competency as an expert could not be raised by a general objection to a particular question thereafter. *Summerlin v. Railroad*, 133 N. C. 551, 45 S. E. 898; *Lumber Co. v. Railroad*, 151 N. C. 220, 65 S. E. 920.

[6] The testimony of Patton as to plaintiff's mental condition was competent. It was not necessary to show that he was an expert. *Clary v. Clary*, 24 N. C. 78, and cases cited thereto in the Annotated Edition.

[7] The jury found upon the evidence that the alleged receipt was intended to apply only to compensation for the lost time, and that the plaintiff did not give defendant an acquittance for the injuries received by him. The receipt is only *prima facie*. *Shaw v. Williams*, 100 N. C. 272, 6 S. E. 196; *Barbee v. Barbee*, 108 N. C. 584, 13 S. E. 215. This was a matter of fact for the jury and has been determined by them. It is not necessary to consider the other exceptions.

No error.

(158 N. C. 86)

REID v. KING.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. PARTY WALLS (§ 10*)—RIGHTS OF PARTIES—CONTRIBUTION.

While there can be no recovery at law for the use of a party wall built by one of the adjoining proprietors, the party building the wall may compel contribution in equity.

[Ed. Note.—For other cases, see *Party Walls*, Cent. Dig. §§ 54-64; Dec. Dig. § 10.*]

2. ACTION (§ 25*)—FORM—LEGAL OR EQUITABLE.

Since the distinction between legal and equitable actions is abolished, if plaintiff alleges facts entitling him to equitable relief, it will be awarded without regard to the form of his allegations.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 147, 157; Dec. Dig. § 25.*]

3. PARTY WALLS (§ 1*)—EFFECT OF AN AGREEMENT.

The effect of a party wall agreement is to create cross-easements as to each owner, binding all persons succeeding to the estates to which the easements are appurtenant.

[Ed. Note.—For other cases, see *Party Walls*, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. EASEMENTS (§ 21*)—EQUITABLE EASEMENTS—PERSONS BOUND—PURCHASERS—NOTICE.

One who purchases lands on which the owner has imposed an easement or created an equitable charge takes the title subject to such easements and equities, if he has notice thereof.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 59; Dec. Dig. § 21.*]

5. FRAUDS, STATUTE OF (§ 60*)—PARTY WALL AGREEMENTS.

The statute of frauds would not apply to prevent a suit for contribution for half the cost of a party wall, though erected under an oral agreement between the owners that one should pay the other half of the cost of completing it; the right to contribution being implied in law, regardless of any promise.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 83; Dec. Dig. § 60.*]

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by George P. Reid against R. V. King. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the plaintiff to recover one-half the cost of erecting a party wall on the line dividing the lots of the parties.

The following are the facts, as gathered from the pleadings and proofs: In 1904 the plaintiff and one Edward Thompson were the owners of adjoining lots in the town of Forest City, N. C. The plaintiff in 1905 erected a two-story brick building on his lot in such manner that the eastern wall thereof rested one half on his lot and the other half on the lot of Thompson. At the time plaintiff erected his building he entered into a verbal agreement with Thompson, providing that he might construct the east wall of the building on the dividing line of the two lots, so that one-half thereof would rest on each lot, and that the said Thompson, should he ever build on his lot, might join his building to the east wall of plaintiff's building upon his paying plaintiff one-half the value of the wall at the time he should make use of the same, and if Thompson should decide not to build on his lot, but should sell the same, then and in that case he should give plaintiff the first offer to purchase his lot, and, if he sold to another, he would make known to him the terms of the contract between him and the plaintiff in reference to the use of the wall. After plaintiff had erected his building, Thompson sold his lot to defendant, but, before selling it to him, he informed him of the terms of his agreement with the plaintiff. Thereafter the defendant erected a two-story brick building on his lot, and in doing so used the east wall of plaintiff's

building as the west wall of his (defendant's building). The defendant at the time he purchased the lot from Thompson and at and prior to the time he used plaintiff's wall had actual notice and full knowledge of the agreement between plaintiff and Thompson. Defendant testified, in part, as follows: "After Dr. Reid had built, I went to Mr. Thompson, and told him I wanted to buy the lot, and he said he was thinking of building himself. He further told me that, when Dr. Reid built the wall, he came to him and said his lot was narrow, and he wanted to build the wall half on his, Thompson's, lot. He said he told Reid to go ahead, and, if he, Thompson, built, he would pay for one-half the wall, and, if he did not build, he would give Reid the refusal of the lot so he could get the advantage of the wall. That was all he ever said to me about the wall until after he made me a deed."

The jury returned the following verdict:

"(1) Is defendant indebted to plaintiff?

Ans.: Yes.

"(2) What was the actual cost of erecting the wall as of the date that defendant joined to the wall? Ans.: \$825.00."

The court instructed the jury that, upon the admissions in the pleadings and evidence, they should answer the first issue "Yes," and that they would find, upon the testimony, the actual cost of erecting the wall as of the date the defendant joined his building to it, and answer the issue accordingly.

Judgment was entered upon the verdict, and defendant appealed.

Ryburn & Hoey and M. L. Edwards, for appellant. McBrayer, McBrayer & McRorie, for appellee.

WALKER, J. (after stating the facts as above). [1] It has generally been held in cases of this kind that there can be no recovery at law for the use of a party wall built by one of the adjoining proprietors, against the other, but the remedy must be sought in a court of equity. The governing principle is nowhere better expressed than by Chancellor Kent in the leading case of *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570. It will be well to state the facts before referring directly to the opinion of the court: Two parties living in the city of New York on adjacent lots, and having on the common line of their buildings a ruinous party wall unfit to stand, and one of the persons thus situated, being desirous of rebuilding, proposed to the other coterminous proprietor to unite with him in rebuilding the party wall, but this request was refused. Whereupon Campbell, the proposer, proceeded to tear down his own house, as well as the party wall, and rebuild both. Thereafter Mesier, who had refused to assist in rebuilding the party wall, devised his property to his son, who thereafter sold the lot to Dunstan, and in the deed expressly conveyed to the latter

the use of the party wall for building, and covenanted to indemnify him for so using it. Dunstan then pulled his house down and erected a new one, and in so doing made use of the party wall, but refused to pay his proportionate share of that wall. Campbell then sued him in an ordinary action, but was nonsuited on the ground that he had no remedy at law. On this Campbell filed his bill against both Mesier and Dunstan, praying that the defendants be decreed to come to a settlement with him touching the building of the party wall, and to contribute and pay one-half of the value thereof, etc. Upon this state of facts, the prayer of the bill was granted, and a decree entered accordingly; Chancellor Kent remarking: "I have not found any adjudged case in point, but it appears to me that this case falls within the reason and equity of the doctrine of contribution which exists in the common law, and is bottomed and fixed on the general principles of justice. In Sir William Harbert's Case, 3 Co. 11, and in Bro. Abr. tit. 'Suite and Contribution,' many cases of contribution are put, and the doctrine rests on the principle that, where the parties stand in equal jure, the law requires equality, which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is stated in F. N. B. 162b that the writ of contribution lies where there are tenants in common, or who jointly hold a mill pro indivisa, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill. The form of a writ is given to compel the other to be contributory to the reparations. In Sir William Harbert's Case, it was resolved that, 'when land was charged by any tie, the charge ought to be equal, and one should not bear all the burden; and the law on this point was grounded in great equity.' * * * The doctrine of contribution is founded, not on contract, but on the principle that that equality of burden as to a common right is equity, and the solidity and necessity of this doctrine were forcibly and learnedly illustrated by Lord Chancellor Baron Eyre in the case of *Dering v. Earl of Winchelsea*, 1 Cox's Cases, 318. * * * The obligation arises not from agreement, but from the nature of the relation, or quasi ex contractu; and, as far as courts of law have in modern times assumed jurisdiction upon this subject, it is, as Lord Eldon said (14 Ves. 164), upon the ground of an implied assumpsit. The decision at law stated in the pleadings may therefore have arisen from the difficulty of deducing a valid contract from the case. That difficulty does not exist in this court, because we do not look to a contract, but to the equity of the case, as felt and recognized according to Lord Coke in every age by the judges and sages of the law." And the cause was referred to a master to ascertain the cost of the wall. Afterward, the cause coming on again before the

chancellor, he ruled that the expense of rebuilding the wall was an equitable charge on the wall, and the owner for the time being, exercising his right in the new wall, was equitably bound to contribute ratably to the expense of the necessary reparation. And Dunstan, having purchased with actual notice of the charge or claim, was ordered to pay the moiety of the expense of rebuilding the wall. That decision, which has been approved and followed in many jurisdictions, would seem to be sufficient authority against the contention of the defendant in this case, and we deem it to be the only just and reasonable view to take of the question.

[2] It is not important for us to inquire or to decide whether an action at law will lie for one-half the cost of erecting the wall, as we have abolished all forms of actions and the distinction between legal and equitable remedies, and a party now recovers according to the allegations of his pleadings (*Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 81, 65 L. R. A. 736; *Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442), so that, if the plaintiff has made a sufficient allegation of facts in his complaint to entitle him to equitable relief, the court will award it without regard to the form or manner in which they are alleged. We think he has done so, and there was proof to establish them, as will appear from the foregoing statement of the facts. It has been said, though, that *indebitatus assumpsit*, being of an equitable nature, will lie for an adjoining owner's share of the cost of building a party wall, and a recovery has been allowed in that form of action. *Huck v. Flentye*, 80 Ill. 258. A case much like ours in its facts is *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475, in which it appeared that two adjoining proprietors entered into a parol agreement to jointly build a party wall, one-half on the premises of each, and accordingly built a portion of the wall, but one of them refused to proceed with its construction. The other, having planned his building in reliance on the contract being performed, was held not confined to his remedy for specific performance, but was permitted to complete the wall and to recover of the other proprietor, in an equitable action, one-half of the expense. To the same effect is *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598. Numerous authorities sustain the proposition that such a recovery may be had under the equitable principle of contribution against the defaulting proprietor, or his assignee with notice of the contract; one of the strongest of them being *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 483, where the subject is treated exhaustively and with great learning and a copious citation of cases by Justice Sherwood.

[3] The effect of such an agreement is to create cross-easements as to each owner, which binds all persons succeeding to the es-

tates to which the easements are appurtenant, and a purchaser of the estate of the owner so contracting would take it burdened with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. 88 Mo., 57 Am. Rep., *supra*.

[4] The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice. 88 Mo., 57 Am. Rep., *supra*. Lord Cottenham said in *Tulk v. Moxhay*, 2 Phil. (Eng. Ch. 774): "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and, when this is the case, subsequent assignees will have the rights and be subject to the obligations which the title or liability to such easement creates. A purchaser of land with notice of a right or interest in it existing only by agreement with his vendor is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser. 88 Mo., 57 Am. Rep., *supra*; *Spencer's Case*, 1 Smith L. C. (6th Ed.) p. 167. See, also, *Spaulding v. Grundy*, 126 Ky. 510, 104 S. W. 293, 13 L. R. A. (N. S.) 149, 128 Am. St. Rep. 328, and cases cited; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; 30 Cyc. 788, 795. It would be useless to multiply authorities, as the most of them will be found in the cases already cited. There can be no question but that the defendant had full notice of the transaction when he bought from Thompson, and is as much affected by the equity as Thompson would have been, if he had not sold the lot.

[5] The statute of frauds does not apply. The equity arises regardless of any promise, except, perhaps, that which is fairly implied by law. 20 Cyc. 282; *Pitt v. Moore*, 99 N. O. 85, 5 S. E. 389; 6 Am. St. Rep. 489; *Ray v. Honeycutt*, 119 N. C. 510, 26 S. C. 127; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169. No point was made as to the amount of the liability, and it seems that the plaintiff recovers less than one-half of the amount it cost him to build the wall.

We find no error in the case.
No error.

(90 S. C. 233)

DAVIS v. WHITLOCK.

(Supreme Court of South Carolina. Dec. 16, 1911.)

1. MARRIAGE (§ 60*)—STATE COURTS—SOUTH CAROLINA COURT OF COMMON PLEAS.

Under Const. art. 1, § 15, providing that every person shall have a speedy remedy in the courts for wrongs sustained, and article 5, § 15, providing that the court of common pleas shall have jurisdiction of all civil cases, that court has jurisdiction to declare void marriages prohibited by Civ. Code 1902, §§ 2658, 2661, 2664, respectively providing that marriages between relatives of certain degrees and those between parties, either of whom have a former spouse living, and those between white persons and negroes, shall be utterly void.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. § 60.*]

2. MARRIAGE (§ 57*)—ANNULMENT.

Rev. St. 1893, § 2158, authorizing a suit to have a marriage doubted or denied by one of the parties declared valid, does not affect the jurisdiction of the court of common pleas to declare void marriages prohibited by Civ. Code 1902, §§ 2658, 2661, 2664.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. § 57.*]

3. MARRIAGE (§ 58*)—ANNULMENT.

Civ. Code 1902, § 2660, providing that the court of common pleas shall have power to declare marriages void for the want of consent of either of the contracting parties or for any other cause, showing that at the time the supposed contract of marriage was made it was not a contract, provided that it has not been consummated by the cohabitation of the parties, does not affect the jurisdiction of the court of common pleas to declare void those marriages prohibited by sections 2658, 2661, and 2664, for the word "consummated" shows that section 2660 was intended to apply only to those marriages in which the parties may at a later time be able to contract the relation, and not to those who are forbidden to marry.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. § 58.*]

4. MARRIAGE (§ 11*)—STATUTES—CONSTRUCTION.

Under Civ. Code 1902, § 2661, declaring that all marriages contracted while either of the parties has a former spouse living shall be void, but that the section shall not extend to a person whose husband or wife shall have been absent for seven years, the one not knowing the other to be living at that time, a second marriage, by a woman whose first husband was living, though he had been absent for more than seven years, was not valid, for, under the constitutional provision that no divorce shall be allowed, marriages are indissoluble, though the second marriage was entitled to a presumption of validity until the existence of the former spouse was established.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 30; Dec. Dig. § 11.*]

5. MARRIAGE (§ 54*)—VALIDITY—STATUTE.

Where a woman whose first husband had been absent for more than seven years married a second time, without knowing that the first husband was still alive, and she and her second husband lived together after the first husband's death, the marriage was valid under Civ. Code 1902, § 2661, even though it was invalid until the death of the first husband.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 93-109; Dec. Dig. § 54.*]

6. MARRIAGE (§ 58*)—FRAUD.

A woman's first husband deserted her, and, after seven years of absence without knowing he was alive, she re-married, and the second husband died. Some time after his death, she again married, but did not tell the last husband of her first matrimonial experience. Held that, as he made no inquiry into her past life, she was not guilty of such fraud as would entitle him to be relieved from the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 122; Dec. Dig. § 58.*]

Appeal from Common Pleas Circuit Court of Cherokee County; J. W. De Vore, Judge.

Action by Wylie S. Davis against Araminta Whitlock, alias Araminta Davis. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Otts & Dobson, for appellant. J. E. Boggs, for respondent.

WOODS, J. This action by the plaintiff to have his marriage with the defendant declared null rests on the allegation that the defendant's former husband, William Whitlock, was living at the time of her attempted marriage with the plaintiff, that the defendant concealed the fact of her first marriage from the plaintiff, and that he was ignorant of its existence until just before the commencement of this action.

The facts, which are in the main undisputed, we find to be as follows: The defendant, whose maiden name was Araminta Lockhart, married William Whitlock and lived with him for about two years, when he abandoned her and went away. The first year of their residence was spent at Whitlock's home near Jonesville, the second about 20 miles away, near Gaffney. In 1873, having heard nothing of Whitlock since his departure, defendant married one Joe Terry. Six months later Terry, in turn, deserted her, and has never been heard of since. In the early part of 1879 defendant married A. H. Wood, with whom she lived until his death in 1881. Finally, she married the plaintiff on May 8, 1887, having first met him at Central, S. C., where she was conducting a boarding house in 1886. They lived at Central for 12 or 14 years, then went to Atlanta for two years, and finally returned to Cherokee county, where they resided until the separation in 1907, a few days before this action was brought. The evidence as to Whitlock's movements after he abandoned his wife is very indefinite. His cousin, Munro Whitlock, testified that he came back to Jonesville in 1874 or 1875 for a short while. About 1886 he came home once more, but soon wandered off. A year or two later he returned again, and remained until his death in October, 1896, though during this time he went away for short intervals. Defendant testified that she had not seen or heard of Whitlock during all

these years from 1868, and that she received about 1901 her first intimation that he had come back to South Carolina, and, after living here for some time, had died in 1895. It appears that plaintiff and defendant lived agreeably together from the time of their marriage, until a few years before their separation, when plaintiff took to drink, and when under its influence he was abusive of defendant, for which cause she left him. He admits that up to a few years before the separation she was a faithful and dutiful wife. She admits that, when she married him, she did not know whether Whitlock was dead or alive, and that she made no inquiry about him, and that she did not tell plaintiff of her marriage either to Whitlock or to Terry, saying: "He never told me of his past life, and I never told him of mine. He never asked me." The couple are now between 65 and 70 years of age. During their life together by their joint efforts and industry they accumulated about \$2,500 worth of property, real and personal, the title to which is in plaintiff.

The special referee to whom the issues of law and fact were referred found that as Whitlock was alive at the date of the marriage, and as no effort was made by defendant to ascertain whether he was dead or alive, the presumption of his death, which would arise from seven years absence unheard of by her after reasonable diligence and inquiry to ascertain if he were alive, could not avail to sustain her marriage with plaintiff, though she entered into the contract in good faith, and he held the original marriage void. But he held further that, the parties having lived together as man and wife and recognized each other as such for more than 10 years after the death of Whitlock, which removed the only impediment to a valid marriage between them, that was sufficient to establish a common-law marriage, notwithstanding the invalidity of the original contract.

The circuit court concurred in the former, but overruled the latter, conclusion, and held that the original marriage, being void, could not be validated by ratification, and that the relation of the parties to it was therefore adulterous, and that the relation would be presumed to continue until changed by the mutual consent of the parties. Therefore the cohabitation of the plaintiff and defendant subsequent to the death of Whitlock, without any new agreement, would be referred to the original unlawful relation, and could not afford ground for inferring a subsequent valid marriage. Therefore the marriage was adjudged to be null and void.

[1] The jurisdiction of the court of common pleas to declare a marriage void was not called in question in the court below, nor in this court; but, since the court of equity in *Mattison v. Mattison*, 1 Strob. Eq. 387, 47 Am. Dec. 541, decided in 1847, and *Bowers v. Bowers*, 10 Rich. Eq. 551, 73 Am. Dec.

99, decided in 1857, held that such jurisdiction was denied to the courts of this state, we shall first endeavor to show that changes in the constitutional and statute law of the state have destroyed the force of these cases, and that jurisdiction to declare marriages void ab initio has been conferred on the courts of common pleas.

The Civil Code of 1902 contains the following provision as section 2661: "All marriages contracted while either of the parties has a former husband or wife living, shall be void: Provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time; nor to any person who shall be divorced, or whose first marriage shall be declared void by the sentence of a competent court." This law first appears in the Revised Statutes of 1873, and is found in the Codes of 1882 and 1893. A similar provision as to the absence for seven years is found in the act of 1712 (2 Stat. 508), but that related only to exemptions from criminal prosecution, and conferred no civil rights. Section 2658 of the Civil Code expressly forbids marriage between persons sustaining to each other any of the close relationships therein set out, and so makes all attempts to contract such marriages of no effect. Section 2664, taken from the statute passed in 1879 (17 Stat. 3), enacts that any "marriage or attempted marriage" between a white person and a person of the Indian or negro race shall be "utterly void and of none effect."

Here are three statutes of the state declaring that no ceremony and no attempted contract of marriage can have the effect of establishing the relation of husband and wife between persons of the status and the classes mentioned in the statutes. There are no limitations except those contained in the proviso to section 2661. It makes no difference if the persons undertaking to contract marriage were not aware of the disability, and so were innocent of any intention to violate the law, or that they have cohabited together as man and wife. Their status is that of unmarried persons and their cohabitation unlawful. Do not such statutes necessarily carry with them the right to persons affected by them to have their status under them adjudicated by the courts? Or are we forced to the conclusion that, in cases of doubt, innocent persons must remain all their lives in uncertainty whether they are married or single, whether it be a duty or a crime to discharge the obligations incident to the marriage relation? The evils to society as well as the hardships to individuals which would result from a denial of the power of the courts to determine these questions are manifest. No less manifest would be the incongruity and reproach to the law of holding that, if in the course of the life of the individuals concerned or after their death it

should happen that in any contest over property the validity of the marriage should incidentally arise, the court could declare the marriage void under the statute law of the state, but could never adjudicate the question in a direct proceeding which would determine not only all property rights, but the many other marital rights recognized by the law, and so important not only to the individual, but to society. We think it can be made manifest on both principle and authority that such incongruity in the law does not exist, and that the court of common pleas has jurisdiction to decide in a direct proceeding that what purported to be a marriage was and remains in fact a nullity, and that neither party acquired any marital rights thereunder. There ought to be no doubt of the proposition that, when the legislative department of the government enacts a law, it is not necessary to provide that the courts shall have jurisdiction to determine any substantial controversy between individuals that may arise under that law. Such jurisdiction is necessarily implied. Indeed, it seems clear that it would be beyond the power of the lawmaking body to deny to the citizen the right to have adjudicated substantial claims or obligations arising under the statute law of the state. As soon as a statute is enacted, the judicial power attaches to it, and every citizen who has a controversy with respect to a substantial legal claim arising thereunder has a right to invoke the judicial power in the assertion of rights. Not only does this conclusion result from the essential qualities and relations of legislative and judicial powers, and the right of the citizen to invoke the judicial power, but it is directly and clearly expressed in the provision of the Constitution that "all courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." Article 1, § 15. The word "wrongs" is here used in its broadest legal sense, embracing every injury to or impairment of legal rights of person or property. It is too obvious for discussion that a suit to have a marriage declared void ab initio involves the assertion and determination of substantial legal rights; for marriage imposes in all cases the legal obligation to refrain from marrying again while the status continues, and the legal obligations of service and support, and in most cases confers the legal right to the custody of children, as well as the right of dower and other property interests. It seems equally obvious that one sustains a legal wrong, that his rights of person and property are impaired, when he is restrained from marrying and lives in doubt as to the most solemn and important legal obligations and duties affecting both his person and his property. It is well established that the owner of land or other property states a legal wrong when he alleges that his title is impaired by that which purports to be title in another, but which is in fact a nullity. This being so, on what possible legal distinction can it be held

that one whose rights of both person and property are impaired by a ceremony which purported to impose the obligations of marriage states no wrong sustained within the meaning of the Constitution when he alleges such impairment of his rights?

These general principles would seem to be conclusive of the matter without further discussion but for the cases above cited, denying the jurisdiction under the law as it then stood. In *Mattison v. Mattison*, 1 Strob. Eq. 387, 47 Am. Dec. 541, the court of equity was asked to declare a marriage void on the ground that the complainant was suffering from delirium tremens at the time of the marriage. The court held that such causes were cognizable in England by the ecclesiastical courts alone, that the jurisdiction of the ecclesiastical courts was not conferred on the courts of equity in this state, and that, therefore, the court of equity had no jurisdiction of the cause. *Bowers v. Bowers*, 10 Rich. Eq. 551, 73 Am. Dec. 99, was a suit for partition involving the validity of a marriage between uncle and niece. The court reaffirmed the rule stated in *Mattison v. Mattison*, holding that proximity of relationship was altogether a canonical disability, and was therefore not cognizable by the courts of this state. But, when these cases were decided, there was in this state no statute law declaring marriages between certain persons void. In the case last cited the court distinctly holds in the language quoted below that, if there had been such statutes, they would have conferred on the courts of this state jurisdiction to hear suits brought to declare void marriages falling under such statutes. "But the incapacity in respect of proximity of relationship is a canonical, and not a civil, disability. Neither the courts of chancery in England nor any of the law courts had cognizance of canonical disabilities. When Parliament thought proper to interfere and by St. 5, 6 William IV, c. 54, declared that all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely void, then the objection came within the cognizance of the courts of common law. 2 Steph. Com. 254. So, when the Legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen, and enforced by the courts." In addition to this, even if we lay out of view the changes in the statutes, notwithstanding the decisions in *Mattison v. Mattison* and *Bowers v. Bowers*, the jurisdiction of the court of common pleas may be asserted with confidence on the difference between the jurisdiction conferred by the Constitution of 1790 in force when those cases were decided, and the Constitution of 1895. The reasoning of the court, as we have seen, was that the jurisdiction to declare a marriage void did not belong under the common law to the courts of common law or to the courts of equity, but to the ecclesiastical

courts, and the jurisdiction of those courts was not conferred by the Constitution of 1790 or by the statutes passed under the power conferred upon the General Assembly by article 3 of that Constitution upon any court in South Carolina. But this argument does not apply to the Constitution of 1895, which declares that the courts of common pleas "shall have jurisdiction of all civil cases." Article 5, § 15. The Constitution of 1868 contained a similar provision. Article 4, § 15.

In discussing the right under the Constitution of 1868 to apply to the court of common pleas for the assertion of the homestead right, the court thus states and applies the principle under discussion: "The court of common pleas is the general fountain of justice; and where the rights of a citizen, either derived from the common law or the statutes, are invaded and the power to protect is conferred upon no special jurisdiction, he may seek redress in that court." *Ex parte Lewie*, 17 S. C. 153; *Howze v. Howze*, 2 S. C. 229. The great weight of authority elsewhere is to the effect that courts of equity have jurisdiction to declare marriages void even where there is no statute regulating the subject. *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343; *Freda v. Bergman*, 77 N. J. Eq. 46, 76 Atl. 460; *Bickford v. Bickford*, 74 N. H. 478, 69 Atl. 579; 2 Bish. Mar. & Div. §§ 291, 292.

[2] The jurisdiction conferred on the courts by the provisions of the Constitution and the statutes above quoted to entertain a suit to have a marriage declared void is clearly not affected by section 2158 of the Civil Code (Rev. St. 1893), authorizing the institution of a suit to have a marriage doubted or denied by one of the parties declared valid.

[3] It remains to consider the effect of the following statute enacted in 1832 (17 Stat. 681), and appearing now as section 2660 of the Civil Code: "The court of common pleas shall have power to hear and determine any issue affecting the validity of contracts of marriage, and to declare such contracts void for want of consent of either of the contracting parties, or for any other cause going to show that, at the time the said supposed contract was made, it was not a contract: Provided, that such contract has not been consummated by the cohabitation of the parties thereto." This statute, it may be contended, should be construed to mean that in all cases the court is denied jurisdiction to declare any attempted marriage contract void where there has been cohabitation thereunder between the parties. This construction leaves out of view the significance of the word "consummated" used in the statute. To consummate means to complete, or make perfect. To illustrate, a ceremony having the form of a marriage when one of the parties is a lunatic or under compulsion would not be binding, but the lunatic, when reason is restored and the person under compulsion when force is re-

moved, may consummate—that is, complete—the marriage by cohabitation under the attempted contract. In such cases, under the proviso of the statute, that which was not binding before becomes binding and complete by cohabitation, and cannot be declared null by the courts. But clearly the proviso can have no application to that which is in form a marriage contract, but which can never be consummated—that is, made effective—as a marriage. Marriage of a white person and a negro, or of a person having a living spouse, or of a brother and sister, is declared void, and is forbidden by the public policy of the state, as expressed in its statutes. It is impossible, therefore, that such attempts at marriage can be consummated by cohabitation into complete and lawful marriages; and so the proviso cannot be intended to refer to such marriages. The proviso having no application, there is no escape from the conclusion that the statute expressly authorizes the courts to declare such attempted marriages void. There may have been analogy on the question of jurisdiction between a suit for divorce and a suit to have a marriage declared void *ab initio* when both depended on the common or the canonical law alone; but there is certainly no such analogy now when the Constitution has expressly forbidden divorce, and, on the other hand, the statutes enacted in accordance with the Constitution have expressly declared certain marriages void. There is no doubt, therefore, that the court of common pleas had jurisdiction of this action.

[4] On the merits of the case, however, the judgment of the circuit court must be reversed, and the complaint dismissed. The defendant testified that her husband Whitlock left her about the year 1868, that she had not since heard of him when she married the plaintiff in 1887, and that she did not know him to be living at that time. Upon this point there was no substantial dispute as to the facts. On this branch of the case questions of difficulty arise in the construction of section 2661. That section enacts: "All marriages contracted while either of the parties has a former husband or wife living, shall be void: Provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time. * * * It is manifest that the statute must be limited in its force and effect by the constitutional provision that no divorce shall ever be allowed in this state; for evidently the General Assembly could not by indirection provide for divorce to take place by reason of seven years absence.

It is important to observe, in the first place, that the act of 1712 (2 Stat. 508; 1 James I, c. 11) was a criminal statute, and provided only that the seven years absence should exempt from criminal prosecution. It had no effect on the matrimonial bond or

civil status of the parties. 4 Black. Com. 164; *McCarty v. McCarty*, 2 Strob. 6, 47 Am. Dec. 585; *Duke v. Fulmer*, 5 Rich. Eq. 121. But by legislative authority section 2661 has been introduced into the Civil Code of the state in the chapter relating to marriage, and it must be given effect according to its terms in fixing the civil status of the persons whose matrimonial relations fall under it. If this last section stood alone, there can be little doubt that the statute would have this meaning and effect: When a husband had departed and had not been heard of for seven years, and was not known by his forsaken wife to be alive, a second marriage contracted by the wife would not be void. If the first husband should afterwards be discovered alive, the second marriage would not become void even then, but would be voidable at the instance of any of the parties concerned. The children of the second marriage before the decree of annulment would be legitimate, and property rights acquired on the faith of the second marriage would not be lost. Such was the construction put upon a similar statute by Chancellor Walworth in *Valleau v. Valleau*, 6 Paige (N. Y.) 207. But this broad construction is not admissible in this state, for under it the statute would be unconstitutional as an attempt to provide in effect for a dissolution of the marriage tie. Marriage being indissoluble in this state, the General Assembly cannot enact a statute providing that absence or any other fact shall produce dissolution while both parties are alive, so that a second marriage would be valid in any sense whatever. The second marriage during the life of the first husband must under the Constitution be absolutely void. But the statute, notwithstanding, does have a very important effect on the status of the spouse who has been abandoned for seven years as indicated by the statute. He or she may marry again, and, while the wife or husband remains absent, the parties under the second marriage are entitled to full legal recognition as man and wife with regard to the enforcement of rights and the assumption of obligations as such; but all this must be at the risk that, if it turns out that the first spouse was alive at the time the second marriage was undertaken, then the second marriage will be void, and all supposed rights acquired under it will fall to the ground. The second marriage in such a case is like administration on the estate of one supposed to be dead. When such person is shown to be alive, the administration is held void. It follows that in this case, as *Whitlock*, the first husband, was in fact alive and the husband of the defendant at the date the ceremony of marriage was performed between the plaintiff and the defendant, that ceremony was without effect, and the attempted marriage void.

[5] But this is not decisive of the case, for

the important fact remains that the plaintiff and defendant lived together and held themselves out as husband and wife after the death of *Whitlock*, and when neither knew that he had been alive at any time during their coverture. In the case of *Campbell v. Campbell*, 1 H. L. Sc. 182, known as the "Breadalbane Case," a married woman eloped and lived in adultery with her paramour under the public pretense by both that they were married. After the death of the woman's husband, they continued to live as before, still holding themselves out to the world as husband and wife. The House of Lords adjudged that though the beginning of the connection was adulterous, yet the relation of marriage commenced as soon as the parties were made capable of contracting marriage by the death of the woman's husband. The tendency of the courts of this country is to condemn this case as going too far, and to hold that, where the relation began as meretricious, it cannot be converted into a marriage by the mere removal of the obstacle to marriage without some subsequent agreement to be husband and wife. But the authorities are unanimous in holding that if a man and woman enter into a contract of marriage believing in good faith that they are capable of entering into the relation notwithstanding a former marriage, when, in fact, the marriage is still of force, and after the removal of the obstacle of the former marriage the parties continue the relation and hold themselves out as man and wife, such action constitutes them man and wife from the date of the removal of the obstacle. *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Am. & Eng. Ann. Cas. 199, and note; *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 736, 62 Atl. 680, 6 Am. & Eng. Ann. Cas. 483, and note, 3 L. R. A. (N. S.) 244, and note, 111 Am. St. Rep. 658, and note; *Land v. Land*, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171, and note. In *Collins v. Voorhees*, 47 N. J. Eq. 555, 22 Atl. 1054, Chief Justice Beasley thus criticises the "Breadalbane Case," and states the true rule: "The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous, and it seems to me it was properly rejected by this court. In the case the court acted upon the principle that, if a man and woman agreed to live together adulterously with a simulation of marriage, there should be an inference of a subsequent valid marriage from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence, the adulterous purpose is controverted into a matrimonial purpose without a particle of reasonable evidence in support of the alleged change of intention. * * * Lord West-

bury strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery; their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations, for when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial subsequent to the removal of such impediment is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest."

It may be of interest to note that, before the decision of the cases just cited, it was said in Bish. Mar. & Div. § 508: "The rule ought to be—the writer regrets that he cannot refer to any case establishing the rule to be so in actual adjudication—that where the desire for actual, lawful marriage, as distinguished from a living together in the way of concubinage, is shown to exist in the minds of both the parties, and, such desire continuing, they are shown to dwell together as husband and wife but for a single day after the impediment is removed, this shall be held, not merely as raising a *prima facie* presumption of marriage solemnized after the impediment is removed, but as constituting marriage itself. Indeed, there are in such circumstances both the matrimonial consent and the actual dwelling together in marriage, and there is the legal capacity to intermarry. If these do not constitute matrimony itself, in distinction from the mere evidence of it, where no formal solemnization is required, it is difficult to say what does."

It is not easy to say what was the extent of the holding in *State v. Whaley*, 10 S. C. 500, cited by the circuit court as conclusive of this case. The decision turned on the following instruction to the jury: "But assuming Pleasants to have been his legal wife, if after her death defendant acknowledged the second marriage to Betsy and recognized her as his legal wife, that this at common law would constitute such marriage as would constitute the third marriage to Charity bigamous." The ground as we understand, upon which this instruction was held erroneous, is thus stated in the opinion: "This part of the charge may readi-

ly have been construed as meaning that if after the death of Pleasants the defendant acknowledged the fact of having been married to Betsy Moore during the lifetime of Pleasants that such an acknowledgment was entitled to be received as evidence of marriage. Such an inference would clearly be erroneous, as that marriage, assuming the original illegality could not become the source of the legal relation of marriage through any acknowledgment of the fact of its existence." This we think all that the case decides on this subject. It is perfectly obvious, as held by the court, that no mere acknowledgment or admission by the defendant in that case or by the plaintiff in this that he had contracted a second marriage while the first was in existence could make the second marriage valid. To produce that effect, there must be, as there was in this case, not only profession that the marriage relation was assumed, but the actual continuation in it after the removal of the obstacle which made it invalid at the beginning. We are not inclined to accept any dictum of Chief Justice Willard going beyond this, because we think it contrary to the reason of the matter, and to the entire current of judicial thought and expression on the subject.

[8] The position that the defendant was not innocent, and that she perpetrated a legal fraud on the plaintiff, in that she did not disclose to him her former marriage with Whitlock, is, we think, unsound. The plaintiff made no inquiry as to defendant's past life, and the defendant made no false representation to him with respect to it. Whitlock, her former husband, having been absent seven years unheard of, and not known to be alive, neither the criminal nor the civil law forbade her to enter again into the relation of marriage, and no wrong or fraud can be imputed to her for doing so. The attempt to be relieved from the marriage tie comes with ill grace from the plaintiff, and his charge of fraud does not commend itself to the court; for the evidence produces the conviction that his cruelty drove from her home a woman who had been faithful to him in all the duties of a wife for many years, and that this suit was commenced because of the separation thus brought about by the misconduct of the plaintiff, and not because of the former marriage of the defendant.

The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

JONES, C. J., and GARY, A. J., concur.
HYDRICK, J., concurs in the result.

(80 S. C. 290)

STATE v. JONES.

(Supreme Court of South Carolina. Jan. 6, 1912.)

1. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—COMMENT ON TESTIMONY.

A charge: "You are prepared to hear the charge * * * and to retire after hearing that charge and go over the testimony and extricate from the testimony the truth of the case"—is not a charge on the facts, as stating that there was both truth and falsity in the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1781-1748; Dec. Dig. §§ 763, 764.*]

2. CRIMINAL LAW (§ 823*)—MANSLAUGHTER—SELF-DEFENSE—INSTRUCTIONS.

A statement, in charging on the distinction between murder and manslaughter, that when a man strikes another a blow, and that man, acting under the influence provoked thereby, shoots and kills, he is guilty of manslaughter, is not objectionable as excluding self-defense, where that defense is presented by a charge immediately following.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902-1996; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—REQUISITES.

Where the instructions as a whole declare the law applicable to the case, the instructions are sufficient, and all the law of the case need not be stated in a single proposition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990-1996; Dec. Dig. § 822.*]

4. HOMICIDE (§ 118*)—SELF-DEFENSE—RETREAT.

Where one can with reasonable safety to himself retreat and thereby avoid the necessity to kill in self-defense, the necessity for killing does not exist, but one need not retreat where by so doing he will probably endanger his safety, and the necessity to kill must be either real or apparent to be determined by the jury, in view of the circumstances, and by applying the rule that accused must believe and act as a man of ordinary reason and firmness under such circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 168-171; Dec. Dig. § 118.*]

5. CRIMINAL LAW (§ 1144*)—INSTRUCTIONS—REQUESTS—COMPLIANCE.

Where accused presented written requests to charge, and the court read them to the jury without objection or modification or refusal to charge any of the requests, the court on appeal must assume that the court intended to give the requests as read.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781; Dec. Dig. § 1144.*]

6. CRIMINAL LAW (§ 789*)—SELF-DEFENSE—INSTRUCTIONS.

Where the court expressly charged that accused need only establish self-defense by a preponderance of the evidence, and that the guilt of accused must be shown beyond a reasonable doubt, a charge that every element of the case must be proved beyond a reasonable doubt was not objectionable as leading the jury to believe that self-defense must be established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

7. CRIMINAL LAW (§ 923*)—NEW TRIAL—DISQUALIFICATION OF JURORS.

Accused, seeking a new trial on the ground of the disqualification of a juror, must show

the disqualification, that it was unknown before the verdict, and that he was not negligent in failing to discover the disqualification before verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2219-2237; Dec. Dig. § 923.*]

8. CRIMINAL LAW (§ 923*)—NEW TRIAL—DISQUALIFICATION OF JURORS.

Where the trial court, on motion for new trial on the ground of the disqualification of a juror because over 65 years old, found that the jurors had been drawn for 14 days, that their names had been published in the county papers a week or ten days before the court convened, that the juror was well known in the community, and that the slightest inquiry would have made known the fact that he was over age, a finding of failure to exercise diligence in discovering the disqualification before trial was justified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2219-2237; Dec. Dig. § 923.*]

Appeal from General Sessions Circuit Court of Orangeburg County; R. W. Memminger, Judge.

"To be officially reported."

John J. Jones was convicted of manslaughter, and he appeals. Affirmed.

Wolfe & Berry, Glaze & Herbert, and C. P. Brunson, for appellant. P. T. Hildebrand, Sol., for the State.

JONES, C. J. The appellant, John J. Jones, tried under an indictment charging him with the murder of Abe Pearlstine, was convicted of manslaughter and sentenced to ten years and one month in the penitentiary.

[1] The court instructed the jury: "You are prepared to hear the charge of the court and to retire after hearing that charge and go over the testimony and extricate from the testimony the truth of the case." By his first exception appellant contends that this was a charge on the facts, in that it in effect declared that there was both truth and falsity in the testimony.

The charge was general and did nothing more than require the jury to ascertain the truth of the case from the testimony. No testimony was singled out as true or false, and there was nothing to indicate the court's opinion of the testimony one way or the other.

The second and third exceptions were withdrawn.

[2] The fourth exception complains of the following language in the charge: "So when a man strikes another a blow, and that man, acting under the influence provoked by the blow, shoots and kills, that is a clear case of manslaughter." The contention being that the charge excluded self-defense and was a statement of facts in the case. The context shows that the court was instructing the jury as to the distinction between murder and manslaughter, and that the facts

were stated hypothetically, as appears by the following extract embracing the portion to which exception is taken: "Now the killing of a human being in sudden heat and passion is not always manslaughter. A man may kill another that way and it may be murder. The test is: Was the sudden heat and passion engendered by such provocation as the law recognizes? The law recognizes a blow as a provocation. If a man strikes another a blow, and he becomes provoked by the blow and acts under the influence of that provocation and shoots and kills, then the law reduces the killing from murder to manslaughter, unless sufficient time elapsed between the striking of the blow and the killing in which a man of ordinary reason, prudence, and caution should have cooled, and would have cooled, from the provocation. That is a matter for the jury. The law says that a man must cool in such time as a man of reasonable firmness and prudence and caution would have cooled in and should have cooled in; *so when a man strikes another a blow, and that man, acting under the influence provoked by the blow, shoots and kills, that is a clear case of manslaughter*, but, if any time intervenes between the striking of the blow and the firing of the fatal shot, then it is for the jury to say whether that time that has elapsed was sufficient to constitute cooling time; that is, if a man of ordinary reason and firmness and prudence would have cooled. If such time has elapsed, then the provocation cannot be invoked as an excuse."

[3] After this charge the court immediately proceeded to instruct as to the law of self-defense. It was not error, in stating the distinction between murder and manslaughter, to omit immediate reference to the law of self-defense. All the law of a case need not be stated in a single proposition. It is sufficient if the charge as a whole declares the law applicable to the case. *State v. McKellar*, 85 S. C. 240, 67 S. E. 314.

[4] The fifth exception complains that the court erroneously charged the law regarding the rule or doctrine of retreat, in respect to the plea of self-defense, limiting the right to stand one's ground to cases where a firearm or some dangerous weapon was actually drawn for use or being used, thus depriving the defendant of the right to act on appearances and stand his ground if he reasonably apprehends that his assailant is armed and seeks favorable opportunity to draw and use his weapon.

The charge is not subject to the criticism stated, as a reference thereto will show that the court charged that one assailed is not required to retreat, "if by so doing he would probably endanger his safety." The whole instruction on this point gave the defendant the benefit of the law that the necessity to kill must be either real or apparent, to be

determined by the jury, in view of the circumstances surrounding the defendant, and by applying the rule that the defendant must believe and act as a man of ordinary reason and firmness would in such circumstances. The law was correctly declared in conformity with the rule thus stated by Mr. Justice Hydrick in *State v. McKellar*, supra: "If one can with reasonable safety to himself retreat and thereby avoid the necessity to strike in self-defense, then the necessity for which the law will excuse him for striking cannot be said to exist."

The sixth exception was abandoned, and the seventh, eighth, and ninth exceptions will be considered last.

[5] The tenth exception complains that the presiding judge refused to charge defendant's first, third, fifth, eighth, ninth, and tenth requests to charge. The record shows that defendant presented 11 requests to charge in writing, and that the court read them all to the jury, and that he did not object to, modify, or refuse to charge any of the requests mentioned in the exception. Under these circumstances, we are bound to assume that instruction was intended to be given in accordance with the requests read to the jury. Moreover, the general charge as a whole substantially covered the law applicable to the case.

[6] The eleventh exception assigns error in the charge to the jury: "The law is that every material element of the case must be proved beyond a reasonable doubt." The ground of objection being that defendant had interposed a plea of self-defense, and that such material element in the case was only to be proved by the preponderance of the evidence. We fail to see any merit in this exception. The court was instructing the jury with respect to the case which the state was required to prove, and in another portion of the charge the jury were instructed to acquit the defendant if his plea of self-defense was made out by the preponderance of the evidence, and further to acquit defendant unless they were satisfied beyond a reasonable doubt that his plea of self-defense was not made out. The defendant has no ground to complain of the charge, as it gave him full benefit of the rule established in this state that, where self-defense is pleaded to an indictment, the defendant must establish it by the preponderance of the evidence; but at the same time the guilt of the accused must be made to appear beyond a reasonable doubt. *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 33 S. C. 132, 11 S. E. 624; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661.

[7] The seventh, eighth, and ninth exceptions allege error in the refusal to grant a new trial because one of the jurors, A. E. Rutland, was disqualified by age to serve as a juror. The Constitution (article 5, § 22) provides: "Each juror must be a qualified

elector under the provisions of this Constitution between the ages of twenty-one and sixty-five years and of good moral character." It is contended that the juror was over 65 years at the time of the trial in January, 1911. At the time of the motion, Juror Rutland was absent, and no affidavit from him as to his age was presented. There were affidavits in which the affiants swore that Rutland told them that he was 65 years old in September before the trial. It also was made to appear that Rutland was not registered as an elector in Liberty township where he was residing, but was registered in Willow township, Orangeburg county, in 1908, where his age was stated to be 62, which if true would make him less than 65 at the time of the trial. It appeared also by affidavit that neither defendant nor any one of his counsel knew at the time of the trial that Rutland was over age.

It was incumbent on movant to show (1) the fact of disqualification, (2) that it was unknown before verdict, and (3) that he was not negligent in making discovery of the disqualification before verdict.

[8] The circuit court ruled as follows: "My finding is that, considering the facts set out in the affidavits, there was no sufficient diligence shown. The jurors had been drawn for 14 days before court, and I believe that it is conceded that the names were published in the county papers a week or ten days before court convened, this gentleman was well known in the community, and the lawyers had the list of the jurors in their hands, and there were important cases to be tried, and as every one knows the list was gone over by the lawyers and every one interested in the case. The slightest inquiry would have made known the fact that the juror was over age. If he had been asked, I have no idea but that he would have told the truth. The juror was brought up and presented, and it was quite possible that he might have been near the age of disqualification. You went ahead and swore him on the jury and did not exercise that diligence which is required. I would certainly overrule the motion for a new trial on that ground, considering the facts that are before me. I think it is a fair question for debate as to whether the gentleman was over 65 years or not. Very often a gentleman of that age is uncertain as to his age, very possibly he might have been under 65. It is very unfortunate that he was not asked the question as to his age before he was sworn, instead of waiting until afterwards."

It thus appears that movant failed to satisfy the court as to the fact of disqualification and as to the exercise of due diligence in making discovery of the disqualification, if such existed. We cannot upon the record say that the conclusion of the circuit court

was contrary to all the evidence, or that the ruling was an abuse of discretion.

The failure to exercise due diligence in the use of easily available means of discovering whether a juror is disqualified by age or by not being a qualified elector precludes raising the objection as a ground for new trial. *Blassingame v. Laurens*, 80 S. C. 48, 61 S. E. 96.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 288)

STATE ex rel. LYON, Atty. Gen., v. BRADY et al.

(Supreme Court of South Carolina. Jan. 5, 1912.)

NUISANCE (§ 84*)—INJUNCTION—ORDER TO SHOW CAUSE—RETURN—ABATEMENT BY PARTIES.

A party who has been ordered to show cause why he should not be enjoined from maintaining a public nuisance cannot arrest the proceeding by a return merely alleging that he no longer maintains the nuisance at the particular place mentioned in the petition; but to authorize the court to dismiss the proceedings, on the ground of a bona fide abatement, there must be a satisfactory showing that the acts alleged to constitute the nuisance are no longer done by the parties anywhere within the jurisdiction of the court.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 84.*]

Action by the State, on the relation of J. Fraser Lyon, as Attorney General, against P. A. Brady, State Agricultural & Mechanical Society, and others. On preliminary returns on an order to show cause why they should not be enjoined from maintaining a public nuisance, proceedings dismissed as to State Agricultural & Mechanical Society, and other defendants ordered to file final and complete returns.

Asst. Atty. Gen. M. P. DeBruhl for petitioner. Nelson, Nelson & Gettys, for respondents.

PER CURIAM. In response to the order heretofore made by the Chief Justice, requiring the defendants to show cause why they should not be enjoined from maintaining a public betting place, alleged in the petition to be a public nuisance, the defendants have submitted preliminary returns, averring that the horse racing upon which it was alleged the bets were made, and all that pertained to it, had been discontinued, and that none of the acts complained of are now done at the fair grounds, near the city of Columbia—the place where it was alleged the nuisance was maintained.

A party to a proceeding to enjoin the maintenance of a public nuisance cannot arrest

the proceedings by alleging merely that he no longer maintains the nuisance at the particular place mentioned in the petition. For the court to exercise its discretion to dismiss the proceedings, on the ground that there has been a bona fide abatement by the party charged, there must be a satisfactory showing that the abatement is complete. The averments of discontinuance, except that of State Agricultural & Mechanical Society, are therefore insufficient, in that they do not show that the acts alleged to constitute a nuisance are no longer done by the parties anywhere within the jurisdiction of the court. The return of State Agricultural & Mechanical Society comes up to this requirement.

The court can take no cognizance of any alleged verbal agreement between the Attorney General and counsel for defendants.

It is therefore ordered that the proceedings be dismissed as against the State Agricultural & Mechanical Society, upon its payment of the costs incurred in the proceedings against it. It is further ordered that the other defendants do present their final and complete returns to this court at 10 o'clock on Monday, January 8, 1912.

(90 S. C. 296)

STATE v. HYDE.

(Supreme Court of South Carolina. Jan. 6, 1912.)

1. JURY (§ 108*)—COMPETENCY—VIEWS AS TO CAPITAL PUNISHMENT.

In a capital case, though the punishment is in the province of the court, a juror who states on his voir dire that he is opposed to capital punishment is properly excluded.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 491; Dec. Dig. § 108.*]

2. CRIMINAL LAW (§ 1166½*)—HARMLESS ERROR—JURY—CHALLENGES AND OBJECTIONS.

Where a defendant completes his jury without exhausting his right of peremptory challenge, any error of the court in excluding or presenting jurors is cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. § 1166½.*]

3. CRIMINAL LAW (§ 478*)—OPINION EVIDENCE—EXAMINATION OF EXPERT—FACTS FORMING BASIS OF OPINION.

A witness is competent to give his opinion as an expert when the facts upon which it is based are within his own knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1065; Dec. Dig. § 478.*]

4. CRIMINAL LAW (§ 470*)—OPINION EVIDENCE—EXPERT—HYPOTHETICAL QUESTION.

Where the partial insanity of defendant was in issue in a murder case, the testimony of medical experts, who had no knowledge of his condition at the time of the murder, as to his mental condition at that time, was inadmissible, except upon a hypothetical state of facts, since the province of the expert is to draw inferences from, but not to decide, the facts of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 470.*]

5. CRIMINAL LAW (§ 656*)—EXAMINATION OF EXPERT—QUESTION BY JUDGE.

In a trial for murder, where the defense was partial insanity, defendant's medical witness was asked by the court as to his opinion whether every man who commits a deliberate, premeditated murder was crazy. *Held* that, as the question was asked merely for the purpose of understanding the testimony, it was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

6. HOMICIDE (§ 237*)—MURDER—"INSANITY."

In order for defendant in a murder case to establish the defense of insanity, he must prove by a preponderance of the evidence that at the time the act was done he did not realize either that it was morally or criminally wrong.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 237.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3635-3644; vol. 8, p. 7688.]

Appeal from General Sessions Circuit Court of Anderson County; G. E. Prince, Judge.

"To be officially reported."

Samuel N. Hyde was convicted of murder, and he appeals. Affirmed and remanded.

The court charged in part as follows:

"Excusable homicide, Mr. Foreman, is where a man is insane, whether it be monomania, or whether general insanity to such an extent that at the time the act is done he doesn't realize either that it is morally wrong or that it is criminally wrong.

"Every man is presumed, in the absence of any showing to the contrary, to be sane. And when it has once been shown to the satisfaction of the jury beyond a reasonable doubt that a defendant has taken the life of his fellow man unlawfully, and he seeks to be excused on the ground that he was insane, whether generally or merely on one subject, then the burden of proof as to insanity is cast by the law on him, and he must establish that by the greater weight of the evidence."

Leon L. Rice, for appellant. Solicitor Bonham, for the State.

GARY, A. J. The defendant was convicted of murder, and sentenced to be hanged, and this is an appeal from that sentence.

The facts are thus stated in the record: "This case came on to be heard before his honor, Judge Prince, and a jury in the 1911 fall term of sessions court for Anderson county, and resulted in a verdict of guilty of murder. The defendant was sentenced to hang on October 20th, and execution was stayed by defendant's appeal. The defendant was duly arraigned and pleaded guilty. The court refused to accept the plea, and appointed Leon L. Rice, a lawyer of the bar, to defend the prisoner. The details of the homicide are not disputed, and for the purposes of this appeal a brief statement only

will be made as to the homicide. In the dead hours of the night, the defendant stole into the room of his sleeping wife, wherein slept his little sister-in-law, his father-in-law, and his mother-in-law. Turning up the lighted lamp in the room, he began firing a pistol into the body of his wife, three bullets taking effect, and two striking but not mortally wounding his sister-in-law. His father-in-law, in an effort to restrain defendant, was shot in the scuffle and killed. Defendant's pistol was found in the hall empty, and shells, some loaded and some empty, were found scattered around the floor. The state's witnesses testified that defendant said: "Turn me loose! I am going to kill myself." And others testified that after he had left the room he asked some one to get a gun and shoot him. The defendant, after committing the awful deed, surrendered himself to the sheriff, and stated that he was satisfied with his little deed; that he had not slept for two weeks; but that he slept well the night of the homicide. He stated that he was sorry he killed the old man, but that his wife was the only woman he ever loved, and her people would not let her live with him, so he decided to end it all. The defendant, by counsel, set up the plea of monomania, or partial insanity."

[1] The first exception is as follows: "Because his honor erred in refusing to present the juror W. W. White, after examination on his voir dire. The error being that the jurors' view as to capital punishment could not affect his right to sit as a juror, when the punishment is in the province of the court."

The case of *State v. James*, 34 S. C. 49, 12 S. E. 657, shows that this exception cannot be sustained.

[2] Furthermore, it was held, in the case of *State v. Anderson*, 26 S. C. 599, 2 S. E. 699, that where the prisoner completes his jury, without exhausting his right of challenge, this cures any error on the part of the presiding judge, in excluding or presenting a previous juror.

[3] The second exception is as follows: "Because his honor erred in refusing to allow the physicians, who testified that they were graduates of a medical school, and had been for a long time engaged in the practice of medicine, to answer the question of defendant's counsel as to the mentality of defendant. The error being that to require hypothetical questions was to deprive the defendant of the opinion of an expert witness, on the very point of his defense, that of partial insanity, or monomania." The questions excluded were intended to elicit the opinion of the doctors as to the defendant's mental condition, not at the time they examined him, but at the time of the homicide, and they knew nothing of his mental condition at that time.

[4] The ruling of his honor, the presiding

judge, is sustained by the case of *Easler v. Railway*, 59 S. C. 311, 37 S. E. 938, in which the court says: "Without undertaking to review in detail the different cases in this state upon this subject, we will state the rules that have been followed: First. A witness is competent to give his opinion as an expert, when the facts upon which it is based are within his own knowledge. Second. If the facts upon which his opinion is formed are in issue, his testimony is not admissible, except upon a hypothetical state of facts. Third. If the mode in which an injury was inflicted, or the extent thereof, is itself one of the disputed facts in the case, the witness will not be allowed to testify that in his opinion the injury was inflicted in a certain manner, or to a certain extent. In such case he must testify as to a hypothetical state of facts. The province of the expert is to draw inferences from, but not to decide, the facts of the case; and, in order to draw proper inferences from the facts in the case, they must either be within his own knowledge or undisputed, otherwise he would usurp the powers of the jury."

[5] The third exception is as follows: "Because his honor erred in asking the question of defendant's witness Dr. Ashmore relative to his opinion of any man who committed a horrible murder and his sanity. The error being that said question, coming as it did from the court, was prejudicial to defendant's defense in the eyes of the jury."

The court propounded this question to the witness: "Do I understand it to be your opinion that every man who commits a deliberate, premeditated murder is crazy?" To this question the witness answered: "No, sir; not necessarily so." The question was propounded, for the purpose, merely, of understanding the testimony, and the appellant has failed to show that it was prejudicial error.

[6] The fourth exception is as follows: "Because his honor erred in charging the jury that, in order to establish the defense of insanity, it is incumbent on the defendant to prove by a preponderance of the evidence that he did not know right from wrong. It being submitted that the very nature of defendant's defense presupposed that he was sane on all subjects save one, that of his love for his wife, and being therefore a plea of partial insanity, it was error to charge the broad principle of knowledge of right and wrong, and thereby convey the idea to the jury that, if defendant knew right from wrong, his insanity on the one subject could not avail him as a defense. This charge absolutely precluded the jury from inquiring further than defendant's general knowledge of right and wrong, and made the defendant guilty upon the admitted facts of his defense."

The charge of his honor, the presiding judge, conformed to the doctrine announced

in the case of *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 263.

Appellant's attorney was granted permission to review said case, but he has failed to satisfy this court that it should be overruled.

The fifth exception is as follows: "Because his honor erred in failing to charge defendant's fifth request to charge which was submitted in writing within the rule of court, and which it is submitted was a proper statement of the law. Since it was directed at the state's own proof of reason, as a necessary element of murder, the failure to charge was thereby prejudicial."

The fifth request to charge was as follows: "I charge you that an indictment for murder substantially alleges, not only the facts of homicide, but also a criminal intent, which presupposes reason."

When his honor, the presiding judge, overruled the motion for a new trial, he also made the statement that the fifth request was overlooked, and that counsel should have called attention to the oversight.

In the light of the entire charge, the appellant has failed to show that the overlooking of this self-evident proposition was prejudicial error.

The sixth exception is as follows: "Because the jury erred in finding the defendant guilty of murder, when the greater weight of the evidence clearly showed that he was incapable of forming the malice necessary to constitute murder. The error being that the charge of knowledge of right and wrong was erroneous and necessarily prejudicial."

What has already been said disposes of this exception.

It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to that court, for the purpose of having another day assigned, for the execution of the sentence.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 283)

MONTGOMERY v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of South Carolina. Jan. 4, 1912.)

Motion for the vacation of an order staying remittitur. Granted, and the clerk ordered to transmit remittitur.

For former opinion, see 71 S. E. 1084.

JONES, C. J. This is a motion, upon due notice, for an order vacating the order of his honor, Justice C. A. Woods, staying the remittitur in the above-entitled case; and, after duly considering the same, it is ordered that the motion of the respondent be, and the same hereby is, granted, and the order here-

tofore issued by the said justice, staying the remittitur herein, is vacated and discharged, and the clerk of this court is ordered to forthwith send down the remittitur.

(90 S. C. 363)

ATLANTIC COAST LUMBER CORPORATION v. LITCHFIELD et al.†

(Supreme Court of South Carolina. Jan. 6, 1912.)

LOGS AND LOGGING (§ 3*)—TIMBER DEED—CONSTRUCTION.

A deed of the timber on land described which grants all the timber of a specified diameter and upwards to have and to hold the timber and exclusive rights of way specified unto the grantee, successors and assigns, and which gives to the grantee 10 years, beginning from the time the cutting and removal of the timber is begun, in which to cut and remove the timber, requires the grantee to commence the cutting and removal of the timber within a reasonable time.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3*]

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

"To be officially reported."

Action by the Atlantic Coast Lumber Corporation against John Litchfield and another. From a judgment for plaintiff, defendants appeal. Reversed.

The following is the deed referred to in the opinion:

"This deed and contract, made by and between A. J. Litchfield of the county of Berkeley, in the state of South Carolina, party of the first part, hereinafter called the first party, and the Atlantic Coast Lumber Company, a corporation chartered under the laws of the state of Virginia, the principal office of which is in the city of Norfolk, in said state, party of the second part, hereinafter called the second part, witnesseth: That the said first party, for and in consideration of the sum of one hundred and eighty and no-100 dollars, cash in hand paid, by the said second party, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents does grant, bargain, sell and release, unto the said second party, its successors and assigns, all the timber of every kind and description, both standing and fallen, of twelve (12) inches stump diameter and upwards, twelve inches from the ground, at the time of cutting, on all of that certain piece, parcel or tract of land known as 'Hickory Grove' situate in St. Stephen's township, in the county of Berkeley and state of South Carolina, containing five hundred and ninety-five (595) acres, more or less, and bounded and described as follows, to wit: On the north by the lands of J. W. Thornley; on the east by the lands of W. M. Williams; on the south by the lands of — Iramer; and on the west by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† For opinion on petition for rehearing, see 73 S. E. 728.

the lands of George Wright, or the lands formerly of the estate of I. R. Brinson, deceased.

"And the said first party further reserves the right to use any timber from the aforesaid tract or tracts of land for ordinary plantation purposes connected with said land, this reservation, however, not to include the right to clear the said land or any of it.

"This deed further witnesseth, that the party of the first part does also grant, bargain, sell and convey to the party of the second part, its successors or assigns, a permanent and exclusive right of way (80) feet wide upon and across the tract or tracts of land, described as aforesaid and on all contiguous lands, to be selected and located by the said second party, its successors or assigns, whenever or wherever so desired, to be used for a permanent railroad or tramway, or for any permanent branch railroad or tramway.

"Together with the following rights and privileges, to be exercised at any and all times during the continuance of this contract at the pleasure of the said second party, its successors or assigns, namely: To enter freely upon the above-described tract or tracts of land, to have and enjoy all necessary or convenient rights of way, to be located by said second party, its successors or assigns, over said land and contiguous lands, for ingress and egress, at any and all times, for men, teams and vehicles; to cut and make roads over said lands; to build, construct, maintain and operate railroads, tramways, cart and wagon ways across said lands on such routes as may be selected by said second party, its successors or assigns; to establish and maintain stables and other fixtures or buildings on said land; and to do any and all other things that may be necessary or convenient for the cutting, handling, hauling and removing of the timber as aforesaid from the above described tract or tracts of land, and for the transportation of any other timber, and articles of every kind and description that the second party may desire to transport over the said roads, or any of them; with the right to cut and use all such small timber and bush, as may in the judgment of the second party, its successors or assigns, be required to build, construct and maintain the aforesaid railroads, tramways, cart and wagon ways, roadways and buildings; fixtures and structures during the continuance of this contract, for the removal of the timber herein before conveyed; and together also with the right of the second party, its successors or assigns, to remove, at its or their pleasure, at any time during this contract, or at any time after its termination, all rails, buildings, structures, fixtures and other property it or they may have placed on said land.

"To have and to hold all and singular the aforesaid timber situate on the aforesaid tract or tracts of land, except that above reserved, unto the said second party, its suc-

cessors or assigns, and to have and to hold the aforesaid permanent and exclusive rights of way unto the said second party, its successors or assigns forever.

"And the said first party for himself or themselves and for his or their heirs, executors and administrators, do covenant with the said second party, its successors or assigns, as follows:

"First. That the said first party will warrant and forever defend all and singular the title to the timber upon the aforesaid premises, and also the title to the said permanent and other rights of way and other privileges hereby granted unto the said second party, its successors or assigns, against his heirs and all others lawfully or otherwise claiming or to claim the same or any part thereof.

"Second. That the said second party, its successors or assigns, shall have, and the same is hereby granted to it or them, the period of ten (10) years, beginning from the time that the said second party, its successors or assigns, begins the cutting and removing of the aforesaid timber from the tract or tracts of land above described, in which to cut and remove the said timber from the said land, and that in case the said timber is not cut and removed before the expiration of said period, then the said second party, its successors or assigns, shall have such additional time therefor as it, or they may desire, but, in the last mentioned event, the said second party, its successors or assigns, shall, during the extended period, pay interest on the original purchase price above mentioned year by year, in advance, at the rate of six (6) per cent. per annum.

"Third. The said first party further agrees that the timber cut by the said second party, its successors or assigns, for the purpose of opening, clearing, building and construction of the railroads, tramways, etc., as hereinbefore provided for, shall in no way whatsoever affect the time granted for cutting and removing the timber conveyed under this deed from the tract or tracts of land aforesaid.

"Fourth. That the first party shall and will promptly pay all taxes that are now due, or that hereafter may become due, on the said land and timber.

"The said second party, for itself, its successors or assigns covenants with the said first party, his heirs, administrators and assigns, that the said second party, its successors or assigns, shall and will pay any damage done to growing crops in the selection and location of the rights of way above provided for; also any damage that may accrue to the first party, by reason of any negligence on the part of the agents or employees of the second party, its successors or assigns, during the continuance of this contract, said damages to be assessed and ascertained by two disinterested persons, one to be chosen by each of the parties to this contract, and, in case they disagree, the two so chosen to

select a third, and the decision of any two of the persons so selected shall be made in writing and shall be final and binding upon all the parties hereto.

"All the covenants, stipulations and agreements herein assumed or undertaken by either party to this contract, shall be binding upon their respective heirs, executors, administrators, successors or assigns, and all benefits and advantages herein provided for either of the said parties, shall accrue to their respective heirs, executors, administrators, successors or assigns, as the case may be."

E. J. Dennis and W. A. Holman, for appellants. Octavus Cohen and Willcox & Willcox, for respondent.

JONES, C. J. The plaintiff brought this action against defendants to perpetually enjoin them from cutting timber from certain lands described, situated in Berkeley county, in violation of plaintiff's rights alleged to have been acquired under a timber deed and contract executed by A. J. Litchfield and the Atlantic Coast Lumber Company on August 21, 1899. The plaintiff claims as successor of the Atlantic Coast Lumber Company, and the defendants claim as grantees of A. J. Litchfield.

The question submitted to the circuit court was whether upon a proper construction of the deed the plaintiff was required to begin to cut the timber within a reasonable time. Judge Memminger, presiding, granted permanent injunction, holding that the deed did not require the plaintiff to commence removal of the timber within a reasonable time after its execution. The timber deed and contract in question is substantially in the terms of the deed and contract construed in *Flagler v. Atlantic Coast Lumber Corporation*, 89 S. C. 328, 71 S. E. 849, and *McClary v. Atlantic Coast Lumber Corporation*, 72 S. E. 145, and it is conceded by respondent that these cases warrant reversal if the court adheres to the construction therein made. The court is not disposed to disturb the authority of those cases. Judge Memminger's ruling was previous to the filing of the decision in the above-named cases.

The judgment of the circuit court is reversed.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

(90 S. C. 330)

STATE ex rel. LYON, Atty. Gen., v. BRADY et al.

(Supreme Court of South Carolina. Jan. 8, 1912.)

NUISANCE (§ 84*)—INJUNCTION—ORDER TO SHOW CAUSE—RETURN—ABATEMENT BY PARTIES.

The petition and order to show cause in a proceeding to enjoin a nuisance will be dis-

missed, the return showing a complete abatement and discontinuance by respondents, in good faith, of the nuisance, within the jurisdiction of the court, and their declaration that they do not contemplate doing within its jurisdiction any of the acts complained of.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 84.*]

Proceeding by the State, on the relation of J. Fraser Lyon, Attorney General, against P. A. Brady and others to enjoin a nuisance. Petition and rule to show cause dismissed.

See, also, 73 S. E. 179.

Attorney General Lyon, for petitioner. Nelson, Nelson & Gettys, for respondent.

JONES, C. J. Returns to the rule to show cause herein issued having been made by the respondents, Charles J. Lynch, J. W. Rice, A. N. Elrod, F. W. Armbruster, and T. A. Heise, and said returns being sufficient, in that they show a complete abatement and discontinuance in good faith of the alleged nuisance within the jurisdiction of this court, and the declaration that the respondents do not contemplate doing any of the acts alleged in the petition herein as a nuisance within the jurisdiction of this court.

It is ordered that the petition and rule to show cause herein be dismissed; that the respondents herein do pay the costs of this proceeding; and that the same be taxed and adjusted by the clerk, and submitted to the court for approval.

(90 S. C. 126)

MYERS v. BURNSIDES.

(Supreme Court of South Carolina. Dec. 19, 1911.)

On petition for rehearing. Petition dismissed.

For former opinion, see 71 S. E. 977.

PER CURIAM. After due consideration, we discover no ground for rehearing. It is therefore ordered that the petition herein be dismissed, and the stay of remittitur be revoked.

DU BOSE v. KELL et al.

(Supreme Court of South Carolina. Dec. 19, 1911.)

On petition for stay of remittitur and rehearing. Petition dismissed.

For former opinion, see 71 S. E. 371.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted, staying the remittitur, be revoked.

(90 S. C. 278)

BUTLER v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina. Dec. 29, 1911.)

1. RAILROADS (§ 243*)—MUNICIPAL REGULATIONS—CONSTRUCTION.

A city ordinance requiring every railroad company to maintain at every crossing a man with a white flag during the daytime and with a red light during the nighttime to display the flag or light when a train may be approaching is intended to subserve all useful purposes to prevent injuries at crossings, and a failure to comply with the ordinance renders crossings more dangerous to the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

2. RAILROADS (§ 308*)—OPERATION OF TRAINS—NEGLIGENCE PER SE.

The failure of a railroad company to comply with a city ordinance regulating the speed of trains within the city limits, and requiring every railroad company to maintain at every crossing a man with a flag during the daytime and with a red light at night to display the flag or light when a train is approaching, is negligence per se.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 978-980; Dec. Dig. § 308.*]

3. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

Where, in an action against a railroad company for the death of a person struck by a train at a crossing, there was evidence of the negligence of the company in failing to comply with a city ordinance regulating the operation of trains, and of decedent's negligence, the question whether the negligence of the company or the negligence of decedent was the proximate cause was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge.

Action by George F. Butler, administrator of Jeremiah F. Butler, deceased, against the Southern Railway, Carolina Division. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial granted.

Logan & Grace, for appellant. J. W. Barnwell, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained through the negligence and recklessness of the defendant in causing the death of plaintiff's intestate.

The allegations of the complaint material to the consideration of the questions involved are as follows:

"That on or about the 12th day of December, 1909, plaintiff's intestate, Jeremiah F. Butler, was on the public crossing and traveled place, and place where the public and people generally have been accustomed to pass and re-pass for more than 20 years last past, at the intersection of Russell street and Grove street, two of the public streets of the city of Charleston, and was endeavoring to drive off from the track of

said defendant railway corporation which crosses said public crossing and traveled place and place where the public and people generally have been accustomed to pass and re-pass for more than 20 years last past, at the intersection of said Russell and Grove streets, a horse which was the property of said Jeremiah F. Butler; and, while so engaged, his attention being occupied in his efforts to control the horse and prevent him from being run down and killed by any train of said defendant corporation, being in open and plain view of an approaching locomotive and tender from the north for a quarter of a mile or more, a locomotive with a tender attached run, managed, and operated by said defendant corporation, its servant and servants, without any signal or warning whatsoever, running at a rapid and reckless rate of speed through the public streets of the city of Charleston, and without having a man with a white flag in advance of said engine to display said flag as such train approached Grove street, one of the public streets of the city of Charleston, in violation of section No. 726 of the city ordinances of the city of Charleston, came upon the said plaintiff, who was not aware of its approach, on account of his being so engaged in endeavoring to get the horse off of said track, and so terribly injured him that he immediately died." The defendant denied the allegations of negligence and recklessness, admitted that it did not have a man with a flag in advance of the engine as it approached the place where plaintiff's intestate was killed, and interposed the defense of contributory negligence.

At the close of the plaintiff's testimony, the defendant's attorney made a motion for a nonsuit on the following grounds: "That even conceding that Russell street was a public street, and therefore required the ringing of the bell or blowing of the whistle, there is no evidence on the part of the plaintiff to go to the jury on account of the fact that his death was caused by his own negligence, by his want of slight care, and under those circumstances he was guilty of contributory negligence, even supposing that the statutory signals were not given. Supposing that to be true, even conceding that then he himself was guilty of gross negligence—that is to say, the absence of slight care—and therefore the proximate cause of his death was not the failure to ring the bell or blow the whistle, and, even if the train was or was not going at a high rate of speed, the proximate cause of his death was his own negligence in entering on the track, and that applies to all the causes of action stated in the complaint." The motion was granted, and the plaintiff appealed upon the ground that the testimony was susceptible of more than one inference, and that his honor, the presiding judge, there-

fore erred in ruling that the negligence of the plaintiff was the proximate cause of the injury.

For the purpose of this appeal, it must be regarded as conceded that the place where the injury occurred was a public street or crossing, which required the defendant to ring its bell or blow its whistle in the manner provided by statute, and that there was a failure to comply with this statutory requirement; also, that the train was running at a high rate of speed.

[1] Section 726 of the Revised Ordinances of the city of Charleston mentioned in the complaint is as follows: "It shall be unlawful for any railroad train to run at a speed exceeding four (4) miles an hour within the limits of the city of Charleston south of a line drawn from the Cooper river through Shepard street to the Ashley river, except in territory not intersected by streets, and it shall be the duty of every railroad company whose tracks run within the city limits (street railways not included) to have at the crossings of every lane, street or alley, except those not used by the public, across which its tracks may run, a man with a white flag during the daytime and a man with a red light during the nighttime in advance of the engine or train, whose duty shall be to display said flag or light whenever a train may be approaching such streets, lanes or alleys." There was testimony tending to show that the engine was running about 10 miles an hour. There was no positive testimony to the effect that the plaintiff's intestate knew that the engine was approaching. There was testimony tending to show that in attempting to drive his horse from the track plaintiff's intestate stumbled and fell. It cannot be successfully contended that the ordinance requiring that a man should display a flag in advance of the engine was merely intended to give notice of the approaching train. It was intended to subserve all useful purposes rendered necessary for the prevention of injuries at the place therein mentioned. It may reasonably be supposed that one of the objects was to clear the track of all obstacles; and the failure to comply with this requirement of the ordinance rendered said place more dangerous.

[2] A failure to comply with the requirements of the ordinance that a train should not exceed four miles an hour or the requirement that a man should display a flag in advance of the train was negligence per se. In the case of *Dyson v. Railway*, 83 S. C. 354, 65 S. E. 344, it was held that the violation of an ordinance regulating the rate of speed of trains within the municipal limits, resulting in injury to another, is negligence as matter of law. In the case of *Lindler v. Railway*, 84 S. C. 536, 66 S. E. 995, the court ruled that the violation of a municipal or-

dinance by leaving an engine standing on a street crossing is negligence per se. It was held in *Craig v. Railway*, 89 S. C. 161, 71 S. E. 983, that it is the duty of a railway company to keep a lookout for persons and pedestrians on its track at a highway crossing.

[3] It will thus be seen that there was testimony tending to show negligence on the part of the defendant; and, even considering that there was negligence, also, on the part of plaintiff's intestate, the question whether the negligence of the defendant or that of the plaintiff's intestate was the proximate cause of the injury should have been submitted to the jury.

Judgment reversed, and new trial granted.

WOODS, J. I concur in result.

HYDRICK, J., did not sit in this case.

(90 S. C. 281)

WHALEY v. OSTENDORFF et al.

(Supreme Court of South Carolina. Dec. 29, 1911.)

MUNICIPAL CORPORATIONS (§ 705*)—REGULATION OF SPEED OF VEHICLES—NEGLIGENCE.

A violation of a city ordinance regulating the speed of automobiles on the public streets is negligence per se, but whether the negligence is actionable depends on whether it was the direct and proximate cause of the injury complained of.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705; * *Highways*, Cent. Dig. §§ 460-469.]

Appeal from Common Pleas Circuit Court of Charleston County; R. C. Watts, Judge.

Action by George Thomas Whaley against Eugene F. Ostendorff and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

Logan & Grace, for appellant. Mitchell & Smith, for respondents.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence and reckless misconduct of the defendants in running an automobile, whereby the plaintiff was injured while he was upon the crossing of two of the public streets in the city of Charleston. The complaint alleges that at the time the plaintiff was struck by the said automobile it was being driven at a greater rate of speed than 10 miles an hour in violation of an ordinance of the city of Charleston prohibiting the running of automobiles at a greater rate of speed than 10 miles an hour, along the streets of Charleston, and four miles an hour where said streets cross each other. The jury rendered a verdict in favor of the defendants, and the plaintiff appealed. The exceptions assign error on the part of

his honor, the presiding judge, in charging the jury that, "to violate a city ordinance regulating the running of an automobile is in itself prima facie evidence of negligence. It is not conclusive. It is only prima facie." The charge was not in accord with the doctrine announced in *Dyson v. Railway*, 83 S. C. 354, 65 S. E. 344, *Lindler v. Railway*, 84 S. C. 536, 66 S. E. 995, and *Butler v. Railway*, 73 S. E. 185, in which the opinion has just been filed. When evidence of negligence is only prima facie, it is subject to rebuttal, but, when there is negligence per se, it is conclusive of that question. The fact that there is negligence per se does not, however, tend to show that such negligence is actionable. The question whether negligence is actionable depends upon the further question whether such negligence was the direct and proximate cause of the injury. The exceptions raising this question are sustained.

Under this view of the case, it will not be necessary to consider the other exceptions. Judgment reversed, and new trial granted.

HYDRICK, J., did not sit in this case.

(90 S. C. 267)

HAND v. CATAWBA POWER CO.

(Supreme Court of South Carolina. Dec. 28, 1911.)

1. EVIDENCE (§ 501*)—NONEXPERT OPINIONS—ADMISSIBILITY.

When the matter to which evidence relates cannot be reproduced or clearly described to the jury, a witness, though not an expert, may give his opinion, after stating the facts and circumstances upon which it is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

2. EVIDENCE (§ 474*)—NONEXPERT TESTIMONY—EFFECT OF DAM.

In an action for obstructing a stream to the injury of plaintiff's dam, his nonexpert witnesses were properly permitted to state their opinions that defendant's dam caused plaintiff's injury, where the witnesses had for many years known and observed plaintiff's water power, were familiar with the creek and the surrounding country, and had observed the results of freshets in the streams involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

3. EVIDENCE (§ 131*)—ADMISSIBILITY—RELEVANCY.

In an action for maintaining a dam in a river in such manner as to obstruct the use of plaintiff's dam in a tributary creek above defendant's dam, defendant could not show similar conditions as to deposit of sand, etc., in another creek, emptying into the river below defendant's dam.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 131.*]

4. WATERS AND WATER COURSES (§ 53*)—WATER POWER—RIGHTS OF UPPER PROPRIETORS.

While an upper riparian owner's rights are infringed by maintenance of a dam below in such manner as not to give him all the fall between his upper and his lower line as the water is accustomed to flow, the rights may be infringed without decreasing the fall, as where,

by throwing backwater to the upper owner's line, sand collects in the stream above, so as to raise the bed uniformly from the upper owner's lower line to his upper line.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 45; Dec. Dig. § 53.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

In an action for obstructing a stream by maintenance of a dam, error in instructing that if plaintiff was injured by water backed upon his water power and consequent deposit of sand in the stream, caused by defendant's dam, defendant was liable, there being no evidence that backwater reached plaintiff's lower line, was harmless, where it appeared that plaintiff's damage was caused by the dam, and there was no claim that backwater reached plaintiff's dam; plaintiff relying on a claim that defendant caused sand to be deposited in the bed of the creek.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Special Judge.

Action by A. S. Hand against the Catawba Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Osborne, Lucas & Cocke, Witherspoon & Spencers and J. E. McDonald, for appellant. Thos. F. McDow and J. H. Manon, for respondent.

HYDRICK, J. Plaintiff owns a mill and water power on Allison's creek, a tributary of Catawba river, which he purchased in September, 1906. In February, 1904, defendant completed a dam across the river about 3 miles below the north of the creek. Plaintiff's mill is about 4 miles up the creek from the river. Defendant's dam backs water up the river and up the creek to about 2½ miles below plaintiff's mill. Before defendant's dam was built, plaintiff's water power was good, and little or no trouble was experienced by the owner on account of the deposition of sand in the creek. Occasionally a freshet would deposit sand in the creek below the mill, but not enough to interfere seriously with its operation, and usually the next freshet would take it away. There was testimony that after the closing of defendant's dam, and before plaintiff acquired title to the property, the water power had been affected at times, though not seriously, by the deposition of sand in the creek, which was supposed to have been caused by the defendant's dam. After plaintiff bought the property, the deposition of sand in the creek increased to such an extent that, in December, 1907, he was compelled to abandon his mill and water power, same having been, for all practical purposes, totally destroyed. This action was brought to recover damages for its destruction; plaintiff alleging that defendant's dam obstructed the natural flow of sand and water in the creek, caused the

sand to be deposited therein, and the bed of the creek to be raised thereby, till his water power was destroyed. Defendant denied that its dam was the cause of the injury complained of. According to the testimony of the defendant's engineers, the fall in the creek from plaintiff's mill to the backwater from defendant's dam is about 28½ feet, and they say that it is a physical impossibility for defendant's dam to have caused plaintiff's injury. Notwithstanding, there was testimony which reasonably warranted a contrary opinion, and the jury took the contrary view, and found a verdict for the plaintiff, upon which judgment was duly entered.

[1, 2] The court allowed plaintiff's witnesses, who were not experts, but who had for many years known and observed plaintiff's water power, and were familiar with the creek and the surrounding country, and had observed the results of freshets in the creek and river, to express their opinions that defendant's dam caused plaintiff's injury. Defendant contends that this ruling was erroneous. The rule is well settled that, when the matter or thing to which the evidence relates cannot be reproduced or clearly described to the jury, the witness, though not an expert, may give his opinion, after stating the facts and circumstances upon which it is based. *Seibels v. Blackwell*, 1 McMul. 56; *Jones v. Fuller*, 19 S. C. 70, 45 Am. Rep. 761; *Chemical Co. v. Kirven*, 57 S. C. 448, 35 S. E. 745. The principal difficulty lies in the proper application of the rule; that is, in deciding when the matter or thing to which the testimony refers can, and when it cannot, be adequately portrayed to the jury. Necessarily some discretion must be allowed the trial judge in determining the question, and his ruling thereupon should not be disturbed, unless it is clearly erroneous and prejudicial. In this case, the ruling was correct; for it would have been impossible for the witnesses to reproduce before the jury in detail the almost innumerable facts and circumstances which had occurred within their experience and observation, running through many years, and upon which their opinions were based. The case therefore falls within the rule above stated.

[3] The next assignment of error is in excluding evidence of similar conditions in another creek, which empties into the river below defendant's dam. This ruling is sustained by the case of *Lynn v. Thomson*, 17 S. C. 124.

[4] The jury were charged that "a riparian owner's water-power rights, as against an owner above, mediate or immediate, is to so construct his dam as to give the latter all the fall between his upper and his lower line as the water is accustomed to flow." Defendant contends that, inasmuch as it ap-

peared by undisputed evidence that the fall between plaintiff's upper and lower lines had not been decreased, the verdict was contrary to the charge, and should therefore have been set aside. Defendant's primary error is in assuming that the evidence that plaintiff's fall had not been decreased was undisputed. On the contrary, there was evidence from which it could have been reasonably concluded that his fall had been decreased. Several witnesses testified that the water did not run as swiftly through his premises as it had formerly, and it was evident that it did not carry off the sand, as it had formerly done. Moreover, while the proposition charged is sound as far as it goes, it falls short of being a complete statement of the law; for it is conceivable that a lower riparian owner may cause damage to his neighbor above without decreasing his fall. For instance, suppose he builds his dam just high enough to throw his backwater to his neighbor's line. According to well-known natural laws, this backwater might cause the sand to be deposited in the stream above, so as to raise the bed of it uniformly from his neighbor's lower line to his upper line. In that event, there would be no decrease in his neighbor's fall, yet damage might be done by the raising of the bed of the stream.

[5] There was no evidence that the backwater from defendant's dam ever came nearer to plaintiff's lower line than two miles. Nevertheless, the court charged the jury that, if plaintiff was injured by water backed to and upon his water power, and the consequent deposition of sand in the creek, caused by defendant's dam, defendant would be liable. Error is assigned in this instruction, in that the court assumed and allowed the jury to assume, contrary to the fact, that water was backed upon plaintiff's property. The court did not assume the existence of the fact involved in the instruction, but stated the proposition hypothetically; and, while there was no evidence upon which any such finding could have been predicated, still it clearly appears from the record that the instruction was a mere inadvertence, from which defendant could not have suffered prejudice. There was no contention that backwater from defendant's dam ever reached plaintiff's lower line, but plaintiff's contention was that it did cause the sand to be deposited in the creek, and the bed thereof to be raised, so that his water power was destroyed; and if the backwater from defendant's dam was the proximate cause of that effect it is immaterial that it did not extend up to plaintiff's lower line.

These considerations dispose of all exceptions.

Judgment affirmed.

(90 S. C. 279)

BUIST v. SULLIVAN et al.

(Supreme Court of South Carolina. Dec. 29, 1911.)

MORTGAGES (§ 86*)—EXECUTION—CAPACITY OF PARTIES—INSANITY.

Evidence held insufficient to show that a mortgagor was insane when he executed the mortgages in question.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 86.*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gage, Judge.

Action by G. A. Buist against Newton Sullivan and others to foreclose certain mortgages. Petition by E. Inman, guardian ad litem of the said Sullivan, to restrain the purchasers from interfering with Sullivan's possession of the land. From a judgment denying such relief, petitioner appeals. Affirmed.

H. H. Harris and H. C. Miller, for appellant. Townes & Martin, for respondent, H. K. Townes.

WOODS, J. The plaintiff, G. A. Buist, obtained by default a judgment of foreclosure on certain mortgages executed by Newton Sullivan. The mortgaged land was sold under the judgment in November, 1910, and purchased by H. K. Townes, who afterwards conveyed to R. D. Dawkins. In February, 1910, the defendant Newton Sullivan, by E. Inman as guardian ad litem, filed his petition in the foreclosure case, alleging that in the year 1900 Newton Sullivan was adjudged insane by the probate court of Greenville county, and committed to the lunatic asylum, and has ever since continued insane, though he was released from the asylum on probation after two years' confinement; that he was mentally incapable of executing the mortgages referred to in the complaint for foreclosure; that the summons and complaint were served on him, but no guardian ad litem was appointed to represent him in the suit for foreclosure. Under these allegations, an injunction was asked restraining Townes and Dawkins from interfering with Newton Sullivan's possession of the land. Judge Gage made a temporary restraining order in which he required Townes and Dawkins to show why the injunction should not be granted. After hearing the return, Judge Gage refused to grant the injunction, revoked the restraining order, and ordered the sheriff to put Townes in possession as the purchaser at the foreclosure sale.

There can be no doubt of the correctness of the order. The only evidence of insanity was the commitment of the petitioner to the asylum, and the statement of his wife's opinion unsupported by a single fact, expressed in her petition for the appointment of a committee for him. On the other side, there were before Judge Gage the fact that Sulli-

van had been released from the asylum, and the affidavit of a number of apparently disinterested persons that he conducted his business as a sane man, and had numerous transactions covering the period in which the mortgages were executed by Sullivan and the summons and complaint served upon him. The overwhelming weight of the evidence being to the effect that there was no disability of insanity affecting either the execution of the mortgages or the service of the summons and complaint, the injunction was properly refused.

The judgment of this court is that the judgment of the circuit court be affirmed.

(90 S. C. 273)

MORGAN et al. v. MOORHEAD.

(Supreme Court of South Carolina. Dec. 29, 1911.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDING OF FACT.

Where there is some testimony establishing the court's conclusions of fact in an action at law, they will be accepted as final on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

2. PRINCIPAL AND AGENT (§ 189*)—ACTION.

Under a complaint for goods sold and delivered, it was competent to show that defendant bought the goods through his agent whose acts he ratified, and for whose purchases he promised to pay.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 189.*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gage, Judge.

Action by J. H. Morgan and another against W. L. Moorhead. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wm. G. Sirrine, for appellant. B. A. Morgan, for respondents.

JONES, C. J. This was an action for building material sold and delivered by plaintiffs to defendant. An order was made by consent referring issues of law and fact to the master, who found in favor of plaintiffs. Exceptions were taken to the master's report. Judge Gage confirmed the findings of the master, and gave judgment for the plaintiffs in the sum of \$223.90.

[1] There being some testimony tending to establish the conclusions of fact by the circuit court, under the well-settled rule in actions at law, we accept such conclusions as final. From these findings it appears that defendant ratified the acts of J. A. Capell as agent in purchasing the materials from plaintiffs, and having them charged in defendant's name, and that defendant promised to pay for same.

[2] The only question of law presented to the circuit court was whether the master erred in allowing testimony to show a sub-

sequent promise by defendant to pay the debts of Capell, as there was no allegation in the complaint that plaintiffs relied on such agreement. Under a complaint for goods sold and delivered by plaintiffs to defendant, it was competent to show that defendant bought the goods through his agent whose acts he ratified, and for whose purchases he promised to pay. The appellant's contention that the debt sued on was the debt of Capell as an independent contractor is opposed to the facts as found by the master and circuit court.

The judgment of the circuit is affirmed.

(90 S. C. 302)

LOCKWOOD v. McLEAN.

(Supreme Court of South Carolina. Jan. 8, 1912.)

1. JUDGMENT (§ 106*)—DEFAULT—ANSWER—VERIFICATION—OMISSION.

Code Civ. Proc. § 178, with reference to a verification of pleadings, provides that the verification may be omitted when any admission of the truth of the allegation might subject the party to prosecution for felony, and that the verification of any pleading in any court of record may be omitted in all cases where a party called on to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading. *Held* that, where, in an action for alleged misappropriation of the proceeds of certain stock, defendant filed an unverified answer within the time required and an affidavit of his counsel, stating that the verification was omitted because an admission of the allegations in the complaint would subject defendant to a prosecution for a felony, and also because defendant would be privileged from testifying as to the truth of certain matters embraced in the complaint, the answer was sufficient to save a default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 106.*]

2. JUDGMENT (§ 106*)—DEFAULT—ANSWER—VERIFICATION—WAIVER.

Where defendant served an unverified answer in time, but the same was returned as not verified, and the court, on application of defendant, extended the time to answer, and thereafter the court struck out an answer tendered within the extended period, and held defendant in default, so far as the time was extended under a previous order, after referring to the first answer, served and returned because unverified, but provided that the order of default was without prejudice to any right the defendant might have to rely on that paper as a sufficient answer, defendant had not waived his right to stand upon such unverified original answer.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 106.*]

3. PLEADING (§ 301*)—ANSWER—VERIFICATION.

An answer, verified by a statement that its contents are true on the affiant's own knowledge, except as to those matters therein stated to be on information and belief, and as to those that he believes them to be true, is sufficient, though the answer contains no allegations on information and belief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 895; Dec. Dig. § 301.*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge. "To be officially reported."

Action by Joshua Lockwood against A. H. McLean. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. F. Von Kolnitz and Wm. Henry Parker, for appellant. Nathan B. Barnwell, for respondent.

JONES, C. J. On September 13, 1910, plaintiff commenced this action against defendant on a verified complaint, alleging two causes of action: First, that on June 21, 1910, plaintiff, being the owner of 15 shares of the stock of the United Wireless Telegraph Company, intrusted and delivered the same to the defendant, as broker, for sale at a price to net plaintiff \$37.50 per share, and that defendant sold and disposed of said stock, and fraudulently misapplied and appropriated to his own use the proceeds of sale, amounting to \$562.50, and refuses on demand to account for and pay over said proceeds. The second cause of action alleges that plaintiff deposited said stock with defendant, under an agreement that plaintiff, as broker, would either sell said stock at a price to net plaintiff \$37.50 per share, and immediately pay over the proceeds, or would return the stock on demand; that defendant failed to sell and account for the stock, and, although admitting that the stock was under his control, failed to return the same on demand, and wrongfully detained and has converted the same to his own use, to plaintiff's damage, \$562.50. At the time of the service of the summons and complaint, bail and arrest proceedings were instituted, and thereunder defendant was arrested and released on bail bond in the sum of \$650, with Thos. L. Molly, James G. Guardineer, and Wm. Minnie as sureties.

On October 3, 1910, the last day for answering, defendant's attorney, Wm. Henry Parker, Esq., delivered to plaintiff's attorney, N. B. Barnwell, Esq., an answer, which was immediately returned, because the same was not verified. There was no statement in or accompanying this answer, explaining the absence of verification. On same day, on the application of the sureties on the bail bond, Judge Watts issued a rule to show cause why the time for answering should not be extended. In the affidavit of Wm. Henry Parker, Esq., dated October 4, 1910, used on the hearing of return to the rule, he stated that the verification to the answer delivered to the plaintiff's attorney was omitted, because an admission of the truth of the allegations embraced in the complaint would subject defendant to a prosecution for felony, and for the further reason that the absence of the defendant made it impossible to secure his verification, and that

defendant would be privileged from testifying as to the truth of certain matters embraced in the complaint. Mr. Parker in his affidavit claimed the right to await the action of the court on the application for extension of time to answer before electing to stand on the answer served on October 3d, or to treat such answer as a nullity; and therefore he did not join formally in the request for extension, but he joined in the statement of petitioners that the cause of justice would be subserved by granting the extension. Judge Watts, by order dated October 5, 1910, granted defendant an extension of 25 days from the date of the order "within which to answer, demur, or take such action as he may be advised is proper in reference to the summons and complaint filed, or could have been taken previous to the granting of this order."

On October 29th, before the expiration of the extended time, defendant's attorney served on plaintiff's attorney an answer in terms precisely like the answer of October 3d, except that in the answer of October 3d the allegation of paragraph 1 of the complaint as to each cause of action was admitted "on information and belief"; whereas, in the answer of October 29th, this allegation was admitted without qualification.

The effect of both answers was to deny the allegations charging fraudulent misapplication and appropriation of the proceeds of the stock, or wrongful detention and conversion of same, with a further defense that defendant has tendered to the plaintiff and transferred in his name 15 shares of the stock of the United Wireless Company," made in accordance with the agreement between plaintiff and defendant," which tender defendant is now ready to renew and perform.

This answer contained a verification by plaintiff, omitting formal parts, in these words: "That the foregoing answer is true of his own knowledge, except as to those things therein stated to be on information and belief, and as to those that he believes them to be true. There was nothing in the answer stated to be on information and belief.

Plaintiff's attorney returned this answer, on the ground that it was not properly verified; and it appears that defendant's attorney also regarded the verification defective, as he obtained from Judge Watts an order, dated October 31, 1910, reciting that the verification was defective through clerical error or omission, and that application was made for an extension of 10 days for procuring the verification in a different form, and providing "that time for answering be further extended 10 days from date."

Then, on November 10, 1910, within the time as last extended, defendant's attorney served an answer in the precise terms of the answer of October 29th, without any verifica-

tion by defendant, but containing the affidavit of Wm. Henry Parker, as attorney for defendant, stating that the verification was omitted under section 178 of the Code, because an admission of the allegations of the complaint might subject defendant to prosecution for felony, and because defendant would be privileged from testifying as a witness to the truth of the matter denied in the answer. This was done after an effort to secure a verification by the defendant, who was out of the state and could not be reached in time. Plaintiff's attorney immediately returned this answer as not served within time, as not in compliance with the order of October 31st, and as not being verified as required.

Thereafter plaintiff's attorney made a motion to strike out the paper served as an answer on November 10, 1910, and to declare defendant in default. Judge Watts, by his order of November 17, 1910, struck out the answer, and held defendant in default, in so far as time was extended under the order of October 31st, but, after referring to the answer served on October 3d and returned to defendant's attorney as unverified, Judge Watts' last-named order provided as follows: "This order is made without prejudice to any right that the defendant may now have to rely on this paper as a sufficient answer under section 178 of the Code of Civil Procedure." Thereafter defendant's attorney moved, before Judge Ernest Gary presiding, to permit the answer of October 3d to be considered as a valid answer. Judge Gary, by his order of April 25, 1911, held as follows: "The defendant had an opportunity to hold to the position that an unverified answer was legal in this case, but, instead of so doing, his counsel accepted the benefit of Judge Watts' order for extending time for answering, and attempted to serve a verified answer. Moreover, opportunity was again afforded defendant to test the legality of his position when Judge Watts held him in default as to the answer served on November 10, 1910. He might have appealed from this decision. No attempt, however, has been made to stand on this position until now. It seems to me that the position of the defendant is simply this: By attempting to serve subsequent answers under the orders of Judge Watts, he abandoned his original answer. The subsequent answers have been held to be irregular, so the defendant is now in default. And it is so ordered."

After this judgment by default was rendered and entered against defendant for the sum claimed, and defendant has appealed from the judgment and from the said order of Judge Gary.

[1] Upon the foregoing facts and the exceptions of appellant, we think it was error to hold the defendant in default. Section 178 of the Code, in reference to the verification of pleadings, provides: "• • • The

verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony.

* * * That the verification of any pleading in any court of record in this state may be omitted in all cases where a party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading." Under this section, defendant had the right to omit verification of his answer; hence the answer served on October 3d was in time, and the absence of verification was accounted for by the affidavit of his attorney. While the Code does not specifically require that the paper containing the answer should state why it was not verified, it is doubtless good practice so to do; but the failure to make such explanation at the time of the service of the answer ought not to annul the answer, especially if such explanation is made the next day, as in this case.

[2] Defendant should not be held to have waived his right to stand upon his answer of October 3d, because the order of Judge Watts, on November 17th, was without prejudice to any right of defendant to rely on that answer. Viewing the matter broadly, the defendant's counsel has not by his conduct manifested the slightest intention not to serve proper answer in time, but, on the contrary, answers have been served three times within the time allowed by law or the orders of the court, and each answer was either properly verified, or the absence of verification promptly explained.

[3] The verification of the answer of October 29th was not defective, as all the parties seemed to think. In the cases *Hecht & Co. v. Friesleben*, 28 S. C. 181, 5 S. E. 475, *Burmester v. Mosely*, 33 S. C. 254, 11 S. E. 786, and *Addison v. Sujette*, 50 S. C. 200, 27 S. E. 631, the principle enforced was that it must appear with certainty from the pleading and verification which allegations are upon information and belief, and which upon knowledge. Such certainty appears in the answer and verification of October 29th; for nothing in the answer was stated to be on information and belief, and the verification was upon the affiant's own knowledge, except as to matters stated to be on information and belief, of which there were none in the answer. We, however, do not rely on the fact that a properly verified answer was duly served in this case, as the appeal does not strictly bring that point in review. The circumstance, nevertheless, shows how hard defendant's attorney has striven to serve an answer in time and to conform to the view of plaintiff's attorney as to the law concerning verification of pleadings. Substantial justice requires that defendant should be allowed his day in court, with opportunity to make defense. Whether the defenses sought to be interposed are meritorious is

not now involved, and need not be considered.

The judgment of the circuit court is reversed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(157 N. C. 544)

OVERMAN v. LANIER et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 496*)—COMMISSIONS—AMOUNT.

While 5 per cent. is the maximum allowed an administrator upon collections and disbursements, the compensation should be proportionate to the services, and rests in the discretion of the trial court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2107-2116; Dec. Dig. § 496.*]

2. EXECUTORS AND ADMINISTRATORS (§ 501*)—COMMISSIONS—ALLOWANCE BY CLERK.

The ex parte allowance by the clerk of commissions to an administrator is not conclusive.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2142-2148; Dec. Dig. § 501.*]

3. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF FACT.

Findings of fact by a referee, approved by the trial court, are conclusive on appeal, when supported by evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

4. EXECUTORS AND ADMINISTRATORS (§ 506*)—ACCOUNTING—BURDEN OF PROOF—STATUTE.

While Revisal 1905, § 1891, casts the burden of proof upon a creditor, seeking to recover upon a contract which the debtor has pleaded was a gambling transaction, distributees, seeking to charge an administrator for payments made by him upon notes given by his intestate in alleged gambling transactions, have the burden of proving the nature of the transaction.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2169-2177; Dec. Dig. § 506.*]

5. EXECUTORS AND ADMINISTRATORS (§ 109*)—MANAGEMENT—DISBURSEMENTS—NEGLECT OF ADMINISTRATOR.

Where an administrator in good faith paid insurance premiums to keep up a policy held as collateral to a note due the estate from insured, who was old and infirm, it does not show a negligent expenditure, even though it resulted in loss.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 435-447; Dec. Dig. § 109.*]

6. EXECUTORS AND ADMINISTRATORS (§ 109*)—ACCOUNTING AND SETTLEMENT—COMMISSIONS—CLERK HIRE.

Ordinarily administrators should not be allowed for clerk hire and the expenses of bookkeepers, for this is part of the ordinary services for which they receive commissions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 435-447; Dec. Dig. § 109.*]

7. EXECUTORS AND ADMINISTRATORS (§ 511*)—ACCOUNTING—COUNSEL FEES.

Where the heirs and distributees contested the commissions and credits claimed by the ad-

ministrator, the administrator was not entitled to counsel fees in that litigation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2257-2286; Dec. Dig. § 511.*]

8. EXECUTORS AND ADMINISTRATORS (§ 511*)—PERSONS ENTITLED TO COSTS—DIVISION OF COSTS.

Where the heirs and distributees of an estate contested an administrator's right to commissions and credits, and were successful only in part, costs should be apportioned.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2257-2286; Dec. Dig. § 511.*]

9. COSTS (§ 256*)—APPEAL—UNNECESSARY RECORDS.

In an action where both parties appealed, and the defendant at the time of making up the case objected to the inclusion of unnecessary parts of the record, the costs of the same, under rule of court 22 (88 S. E. vii), will be charged against the plaintiff.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

10. APPEAL AND ERROR (§ 560*)—ABSTRACTS—EVIDENCE.

Testimony reported by the stenographer should be sent up on appeal in narrative form, instead of in questions and answers.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2490-2493; Dec. Dig. § 560.*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Final accounting by L. S. Overman as administrator of J. B. Lanier, in which Mattie Lanier and others filed objections. From the judgment, both parties appeal. Affirmed on the administrator's appeal, and reversed and remanded upon that of the objectors.

See, also, 72 S. E. 575.

T. F. Klutz, E. C. Gregory, T. J. Jerome, E. J. Justice, L. H. Clement, and C. W. Tillett, for plaintiff. Walser & Walser, G. W. Garland, Burwell & Cansler, and Manly, Hendren & Womble, for defendants.

CLARK, C. J. J. B. Lanier of Salisbury died intestate in 1894, and the plaintiff was appointed administrator. In September, 1904, the plaintiff filed his petition for a final account and settlement, and the heirs at law and distributees filed an answer to the petition. The matter was referred to a referee, to whose report both parties filed exceptions. The judge overruled all exceptions, to which action both sides filed exceptions, and appealed.

Plaintiff's Appeal.

The plaintiff abandons all exceptions in his appeal except:

(1) The disallowance of \$250 attorney's fees to Watson & Buxton. The referee found as a matter of fact that it was unnecessary for the plaintiff to consult them in behalf of the estate, and this finding of fact has been approved by the judge. The ruling of law thereon that this fee should not be allowed to the administrator must be approved.

[1, 2] 2. The referee reports that the clerk's allowance of commissions to the administrator of 5 per cent. amounted approximately to \$10,000; that the expenditures for clerical services, attorney's fees, and expenses amount to over \$8,000, making a total of about \$18,000, or over 16 per cent. of the total receipts, the total collections being about \$110,000; that the largest part of the estate was settled in two years, but the entire administration lasted about nine years. The referee going over the record of the administration in full found that 4 per cent. upon the receipts and 2½ per cent. upon the disbursements would be a fair compensation to the administrator for his services. Five per cent. is the limit allowed by law, but within that limit the compensation should be proportioned according to the services rendered and in consideration of all the facts and circumstances. The ex parte allowance of commissions by the clerk is not conclusive. *Walton v. Avery*, 22 N. C. 405. In *Green v. Barbee*, 84 N. C. 72, the court said: "The compensation allowed the personal representative for his services within the limit of 5 per cent. on both sides rests in the sound discretion of the tribunal called to pass upon the question." The judge below in reviewing the entire dealings and acts touching the administration of the estate concurred in the allowance made by the referee, and we see no reason to disturb it.

(3) The other exception is that the referee held that the administrator should not be allowed more than \$1,000 for his attorney's fees in representing him in this present matter. The defendants except to the allowance of any attorney's fees at all to the administrator for defending himself in this action, and the whole matter will be considered on the defendants' appeal.

In the plaintiff's appeal the judgment should be affirmed.

Defendants' Appeal.

[3] Passing by the exceptions to the findings of fact, as to all which there was evidence and the rulings upon which by the judge are conclusive upon us, the first exception to be considered is to the allowance of \$30,000 paid upon the Rountree notes which the defendants contended were given for losses on "futures" in the New York market, and which was therefore a gambling debt and invalid under Rev. 1905, § 1691. The referee found as a fact that "the record does not disclose sufficient evidence either to show affirmatively that this was a gambling contract or that it was a legitimate contract made with the intention that the cotton should be delivered, and the referee finds that the administrator had no such knowledge of the nature of the transaction which resulted in the Rountree debts, nor could have procured the same upon reasonable in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quiry, as would have enabled him successfully to resist suits brought thereon on the ground that they were incurred under gambling contracts."

[4] We cannot agree with the defendants that, because in their answer in this proceeding they alleged that these were gambling debts, this cast the burden of proof upon the plaintiff under Revisal, § 1691. That provision applies where a party sues upon the contract, and the debtor denies it, and sets up the defense. But here the defendants are alleging that the payment by the plaintiff of his intestate's notes, valid on their face, is invalid because the contract was founded upon illegal consideration, and the burden was upon them to prove it. The matter has been very fully and ably argued by counsel on both sides. But, in view of the findings of fact by the referee that it is not shown that this debt was for a gambling contract and the approval of that finding by the court, we cannot sustain the exception.

[5] Nor can we sustain the exception that the referee paid out insurance premiums to keep up a policy which was held as collateral to a note due by Payne, who was a man in advanced years, and in somewhat feeble health. It is true that this turned out a loss to the estate. But it is found that the administrator acted in good faith, and it cannot be held that a reasonably prudent man would have acted differently under the circumstances. It has been forcibly said by some one that "our hindights are better than our foresights." Nor do the facts in evidence justify the contention of the defendants that the administrator should forfeit all commissions. The referee has not found evidence of negligence and unlawful mismanagement to justify it. The findings of fact in regard to the management and sale of the distillery interest and liquor belonging to the estate preclude our sustaining the exceptions of law in regard to the administrator's action in that respect.

[6] While ordinarily administrators should not be allowed for clerk hire and the expenses of a bookkeeper, this being usually a part of the ordinary services for which he receives a commission, in this case the evidence discloses that it was necessary to employ such clerical assistance, and the allowance thereof was doubtless considered by the court below in fixing the commissions below the limit allowed by law.

The defendants also except because at the time of the death of Lanier there was in the bank the sum of nearly \$5,000, and the defendants insist that commissions should not be allowed on this item, or at least not as high as 4 per cent. But doubtless this item was considered with others in fixing the amount of the commissions allowed the administrator. The administrator was allowed attorney's fees in the course of the administration of the estate; i. e. (prior to the present suit), to the amount of \$2,651.39, of

which approximately \$1,000 was paid to his resident counsel. The defendants except to this allowance, especially the latter, because the plaintiff was himself an excellent lawyer, which was doubtless one cause of his selection as administrator. While allowances for counsel fees should be carefully scrutinized, the court below and the referee have found that these amounts were not excessive, and, in reviewing the history of the management of this estate and the amount of litigation, we cannot overrule the conclusion of the judge below.

[7] The defendants further except because the plaintiff has been allowed \$1,000 counsel fees in this litigation. His final report disclosed that after handling the estate at a cost of \$18,000 out of which \$10,000 went to him as commissions, \$2,631 to lawyers for fees in regard to the litigation of the estate, and between \$5,000 and \$6,000 for clerk hire and incidental expenses, the plaintiff held in his hands for the heirs and distributees only \$685.34 out of an estate, whose total assets amounted to \$110,000. To this report the defendants excepted, and by the judgment of the court below the balance due them has been increased to \$5,346.33. This litigation has been not in the interest of the estate nor a mere formal proceeding to close it up, but in truth and in fact it has been a contest between the heirs at law on the one side and the administrator whom they sought to make individually liable on the other. The result shows that, while the administrator has not been fixed with large sums which the defendants allege he should be made liable for, the contest has been to protect himself individually from such liability, and the services of the attorneys were for his personal benefit in that regard. Besides, it has been adjudged that he is indebted to the estate nearly \$5,000 more than he returned in his report as due the heirs at law and the distributees. The counsel fees for opposing the recovery of such judgment should be charged against the administrator personally as is the judgment itself.

In *Stonestreet v. Frost*, 123 N. C. 644, 31 S. E. 838, it is said: "We think that the administrator should not have been allowed the \$100 fee which he paid the attorney out of the assets of the estate, for the reason that the service was rendered by the attorney for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them." And in *Allen v. Royster*, 107 N. C. 283, 12 S. E. 135, it is also said: "An administrator should not be allowed credit for fees paid counsel in defense of an action to compel him to a final account with the next of kin." The true rule that the fiduciary "is entitled to be credited for a reasonable sum paid to an accountant or attorney for stating the account. We think, too, if there is any difficulty in doing it, he is entitled to the advice of counsel and to credit for any reasonable

fee paid for that purpose. But for any payment beyond this it must be an exceptional case to entitle him to credit." *Whitford v. Foy*, 85 N. C. 276.

[8] For the above reasons, we also think that the cost of this litigation below should be divided between the parties. The final result is recovery by the defendants of about \$6,000 in excess of the amount which the administrator admitted to be due them in his final account. But for the fact that they sought to charge him with further large sums in which they are not successful, the entire cost of the litigation should have fallen upon the plaintiff. Notwithstanding its form, this is really an action by the defendants to charge the plaintiff individually with sums which he had received for the estate, and in which action the defendants have recovered judgment against him. The account should also be reformed to charge the administrator with interest from the date of filing the report on so much of the amount which is now adjudged to have been due by him at that date, on which interest is not calculated in the judgment below.

[9, 10] The defendants in accordance with rule 22 (86 S. E. vii) of this court objected at the time of making up the case to the sending up of the stenographer's notes in form of question and answer, instead of in narrative form, as we have often stated should be done. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53. These notes, however, were sent up on the demand of the plaintiff, together with other unnecessary parts of the record. The defendants contend that such unnecessary additions amount to 175 printed pages. Upon a careful estimate we think that at least 125 printed pages of the matter sent up over the objection of the defendants, and upon the demand of the plaintiff, were unnecessary, and the cost of copying and printing the same should be taxed against the plaintiff. *Land Co. v. Jennett*, 128 N. C. 4, 37 S. E. 954. This is in addition to the allowance of 60 pages to be taxed in favor of the defendant under rule 22.

In defendants' appeal there is error.

(157 N. C. 514)

COMMISSIONERS OF CUMBERLAND COUNTY v. COMMISSIONERS OF HARNETT COUNTY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. COUNTIES (§ 24*)—LEGISLATIVE CONTROL OF.

Counties as a rule are mere agencies of the state, constituted for the convenience of local administration in certain portions of the state's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 24; Dec. Dig. § 24.*]

2. STATUTES (§ 21*)—ENACTMENT—DIVISIONS OF COUNTY—ADDITION OF—PASSAGE.

Pub. Loc. Laws 1911, c. 591, purporting to amend Pub. Laws 1854-55, c. 8, creating Harnett county, by adding thereto a strip of territory detached from Cumberland county, was intended merely to annex additional territory to Harnett county without reference to the power of contracting debts or the levy and collection of taxes to pay the same, and was therefore not invalid, because not passed in the manner required by Const. art. 2, § 14, for the passage of laws relating to incurring state and municipal indebtedness.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 18-27; Dec. Dig. § 21.*]

3. COUNTIES (§ 16*)—CHANGE OF BOUNDARIES—APPORTIONMENT OF INDEBTEDNESS.

When a portion of a county is detached and added to another, the burdens of existing indebtedness and the apportionment thereof, in the absence of constitutional provision, and in so far as the inhabitants are concerned, are matters entirely of legislative discretion.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

4. COUNTIES (§ 16*)—CHANGE OF BOUNDARIES—APPORTIONMENT OF INDEBTEDNESS.

Pub. Loc. Laws 1911, c. 591, amending Pub. Laws 1854-55, c. 8, by detaching certain territory from Cumberland county and adding it to Harnett county, provides (section 6) that the commissioners of the two counties shall have full power to properly adjust the indebtedness of Cumberland county, outstanding on May 1, 1911, which is properly chargeable to such detached portion, and to make an equitable tax levy thereof. *Held* that, so far as such act provided for the adjustment of the Cumberland county floating debt, it not only conferred a power, but imposed a duty, that the commissioners were bound to exercise.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by the Commissioners of Cumberland County against the Commissioners of Harnett County to enjoin the latter from collecting taxes or exercising governmental authority over certain territory. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

On the hearing it was properly made to appear:

"(1) That the General Assembly of North Carolina, at its regular session of 1911, passed and ratified an act, the same being chapter 591 of the Public Local Laws of 1911, which act, as well as the same it purports to amend, to wit, chapter 8 of the Public Laws of 1854-55, is hereby referred to and made a part of these facts agreed.

"(2) That the territory purporting to be added to the county of Harnett by said act is approximately 12 miles in length and 4 miles in width at its widest point, embracing about 6 square miles of territory, containing about \$280 taxable property and 108 taxable polls and 120 voters.

"(3) That said act of 1911 was not read on three separate days in either branch of the General Assembly, nor was there any roll

call upon the passage of the same at any reading, nor were the ayes and noes recorded on the journals of either the House or the Senate; that the bill was originally introduced in the Senate; said bill being identical with said act, except that it did not contain the latter part of section 6 of said act, beginning with the word "provided," and including the remainder of said section. This proviso in said section was incorporated as a House amendment on its third reading in the House, and the bill was sent back to the Senate, and this amendment was concurred in by the Senate on March 4th, and was ratified on March 6th; neither the bill nor the amendment being passed as a roll bill.

"(4) That in the passage of the bill which forms the act establishing the county of Harnett, viz., chapter 8 of the Public Laws of 1854-55, said bill was not read on three separate days in either branch of the General Assembly, nor were the ayes and noes called or recorded in the journals."

That the commissioners of Cumberland had levied taxes on the detached portion of territory for general and specific purposes for the year 1911, and had placed the tax lists in the hands of the sheriff of Cumberland, who was proceeding to collect same or threatening to do so, and the commissioners of Harnett county had done the like. "That there had been no agreement between the boards of commissioners of the respective counties, either made or attempted, looking to the assumption on the part of Harnett county or said disputed territory of its proportional part of the bonded or floating indebtedness of Cumberland county, as provided in section 6 of said act; such agreement having been deferred, pending a judicial determination of this controversy. * * * That each of the respective boards of commissioners, through the officers of their respective counties, assert and are attempting to maintain general jurisdiction of the territory in question for all governmental purposes."

Upon these the controlling facts, relevant to the inquiry, it was contended for the commissioners of Cumberland that the act of 1911 is invalid and unconstitutional, and that the territory in question has always been and is now a part of Cumberland county; that the municipal authorities of Harnett county should be restrained and enjoined from collecting taxes or exercising any governmental authority over said territory. Defendants contend that the act is valid, and the commissioners of Cumberland be restrained. The court entered judgment, (1) declaring the act constitutional and valid, (2) restraining commissioners of Cumberland from collecting taxes in said territory, and (3) directing commissioners of the two counties to ascertain the proportionate part of the bonded indebtedness, etc., of Cumberland county properly chargeable to Harnett, etc.

To this judgment commissioners of Cumberland excepted and appealed.

Q. K. Nimocks, Newton, Herring & Oates, and V. C. Bullard, for appellants. J. C. Clifford, for appellees.

HOKE, J. (after stating the facts as above). [1] Numerous and repeated decisions of the court are in affirmance and illustration of the principle that: "Counties and townships are, as a rule, simply agencies of the state, constituted for the convenience of local administration in certain portions of the state's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision." Board of Trustees v. Webb, 155 N. C. 379, 71 S. E. 520; Lutterloh v. Fayetteville, 149 N. C. 65, 62 S. E. 758; Jones v. Commissioners of Stokes, 143 N. C. 59, 55 S. E. 427; State v. Commissioners, 122 N. C. 812, 30 S. E. 352; McCormac v. Commissioners, 90 N. C. 441; Mills v. Williams, 33 N. C. 558. Speaking to this question in Stokes Case, supra, the Chief Justice said: "The defendant suggests, however, that it infringes upon the provisions of the Constitution 'establishing and requiring them to be maintained in their integrity.' But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities, and towns as governmental agencies (White v. Commissioners, 90 N. C. 437 [47 Am. Rep. 534]), but they are all legislative creations, and subject to be changed (Dare v. Currituck, 95 N. C. 189; Harriss v. Wright, 121 N. C., p. 172 [28 S. E. 269]), abolished (Mills v. Williams, 33 N. C. 558) or divided (McCormac v. Commissioners, 90 N. C. 441) at the will of the General Assembly." The power of the Legislature then being ample, it is clear from a perusal of the statute that the territory in question has been detached from Cumberland and made a part of the county of Harnett, and except as to taxes already levied and civil and criminal cases already commenced, these limitations being expressly made by the act itself, the county of Cumberland and its officers may not further exercise direct authority in said territory.

[2] It is urged that the act in question is invalid, because the same was not passed as required by article 2, § 14, of the Constitution—that in reference to incurring state and municipal indebtedness. Connor & Cheshire, Constitution, pp. 117, 118. But this is not a correct apprehension of the terms and purpose of the act. The power to exercise ordinary governmental functions, collecting taxes or other, was given to the county of Harnett in the act creating the county, in 1855, and the present statute simply annexed additional territory to the county, thereby bringing the same within the power. As to contracting debts and the levy and

collection of taxes to pay the same, these questions will be referred to the statutes applicable and to the revenue acts, general or special, controlling in such matters.

[3] When, as in this case, a portion of territory is detached, etc., the burdens of existing indebtedness and the apportionment thereof, in the absence of constitutional provision, and in so far as the inhabitants are concerned, are referred entirely to the legislative discretion. *Lutterloh v. Fayetteville*, supra; *Commissioners of Dare v. Commissioners of Currituck*, 95 N. C. 189; *Currituck v. Commissioners of Dare*, 79 N. C. 565.

[4] Under the statute we are now considering, the Legislature intends that the existing indebtedness shall be apportioned, and in the proviso to section 6 has directed that the commissioners of the two counties "shall have full power and authority to properly adjust the share of the bonded and floating debt of Cumberland county, outstanding on the 1st day of May, 1911, which is properly chargeable to the detached portion of Cumberland county. And to make an equitable levy of taxes thereon to cover the same and to provide for the collection and payment thereof." This is a case where the conferring of power imposes the duty for its exercise. *Jones v. Commissioners of Madison*, 137 N. C. 580, 50 S. E. 291. And the final portion of his honor's judgment comes well within the purview of the statute and the precedents applicable to the facts presented. *Commissioners v. Commissioners*, 107 N. C. 291, 12 S. E. 89.

There is no error, and the judgment of the superior court is affirmed.

Affirmed.

(157 N. C. 487)

EPPLEY v. BRYSON CITY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. EMINENT DOMAIN (§ 9*)—STATUTORY PROVISIONS—PROCEDURE.

Priv. Laws 1911, c. 217, § 1, authorizing the commissioners of Bryson City to acquire land by condemnation for the construction of an electric light plant, was insufficient to confer power on the city to condemn land for failure to provide any procedure therefor, under the rule that the procedure necessary to give effect to right to condemn must also be prescribed.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*]

2. EMINENT DOMAIN (§ 9*)—RIGHT OF MUNICIPAL CORPORATIONS—STATUTES.

Though Priv. Laws 1911, c. 217, § 1, attempting to confer power of eminent domain on Bryson City to condemn land for an electric light plant, was insufficient for that purpose, the city was authorized to maintain such proceedings under Pub. Laws 1911, c. 86, § 1, amending Revisal 1905, § 2916, granting to all municipal corporations the right to build and operate a system of electric light plants, taken in connection with the sections of the Revisal of 1905, which it amends, which not

only confers in express terms the right to condemn property, but also prescribes the necessary procedure.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 9.*]

Appeal from Superior Court, Swain County; Webb, Judge.

Action by Marion Eppley against Bryson City to enjoin defendant from maintaining a dam on Deep River, and praying its abatement as a nuisance. From an order denying plaintiff's motion for an injunction, he appeals. Affirmed.

Bryson & Black, for appellant. F. C. Fisher, for appellee.

BROWN, J. The defendant, a municipal corporation, is duly authorized by law to erect, own, and operate an electric light plant. Chapter 217, Private Acts 1911. An election was held, and the voters approved the scheme. The bonds were issued and the work commenced, and several thousand dollars expended, and especially in the purchase of land and a water power on Deep river. The dam has been erected, and it turns out now that after a survey of the property adjacent to the site of the defendant's dam about 1²/₁₀ acres of plaintiff's rocky hillside mountain land is flooded. The dam has been finished, and the electric light plant well advanced towards completion.

It appears from the affidavits in the record that the only controversy between plaintiff and defendant is the value of the 1²/₁₀ of an acre of overflowed land. The plaintiff demands \$400 damages, which sum defendant avers is extortionate, and defendant offers to submit the question to arbitration.

[1] It is contended by plaintiff that the defendant has no power of eminent domain, and no right to condemn his land for municipal purposes. The act of 1911 (Private Laws of 1911, § 1) reads as follows: "That the board of commissioners of the town of Bryson City shall have power to lay out, build and construct a system of sewerage and sewerage pipes for said town; to build and construct an electric light plant and repair the streets and sidewalks in said town, and to protect the same by adequate ordinances; and if in the construction, extension or maintenance of said sewer system, electric light plant or repair work, it shall become necessary to acquire land, right of way of easement, both within or without the corporate limits of said town, said board shall have the power to condemn the same in the same manner as is now provided by law for the condemnation of land for streets."

It is contended that there is no method of procedure provided in the acts incorporating Bryson City for condemning land for streets, and that therefore there is no procedure provided for condemning plaintiff's land. This seems to be true, and, in order

that a municipal corporation shall lawfully exercise the right of eminent domain, the power must be expressly conferred or arise by necessary implication, and the procedure necessary to give it effect must be provided. 15 Cyc. 568. But the defendant is not confined to the act in question as the only source of its power to appropriate plaintiff's land and to have his damage assessed by a legal tribunal.

[2] Conceding that chapter 217, Private Laws 1911, is of no effect, so far as conferring, either in direct terms or necessary implication, the rights of eminent domain upon the defendant, still it is not without that right. Chapter 86, § 1, Pub. Laws of 1911, amending section 2916, Revisal 1905, grants to all towns, cities, and municipal incorporations the right to build, construct, maintain, and operate a system of electric plants, etc. That act, in connection with the sections of the Revisal of 1905, which it amends, not only confers in express terms the right to condemn property for such public purposes, but provides all necessary legal machinery for appropriating the property and assessing the owner's damage. Unless the plaintiff and defendant can come to some agreement as to the value of his overflowed land and the damages incident thereto, if any, the defendant can proceed under that act to have them assessed.

The judgment of the superior court is affirmed.

(157 N. C. 489)

EPPLEY v. BRYSON CITY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

Appeal from Superior Court, Swain County; Webb, Judge.

Action by Marion Eppley against Bryson City to enjoin defendant from erecting a dam for an electric light plant on Deep River. Plaintiff moved for a restraining order, which was denied, and he appeals. Affirmed.

Bryson & Black, for appellant. F. C. Fisher, for appellee.

BROWN, J. This action was commenced to restrain defendant from building the dam before its erection was begun.

As the court refused to enjoin them, the authorities of defendant proceeded to build the dam, and it is now completed. The matter involved is the same as in the other case between same parties (73 S. E. 197) at this term, and is governed by that decision.

The judgment is affirmed.

(157 N. C. 506)

HAYNIE v. NORTH CAROLINA ELECTRIC POWER CO. et al.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. PARENT AND CHILD (§ 7*)—LIABILITY FOR INJURY TO SERVANT—ACTION—THEORY—CONTRACT—BURDEN OF PROOF.

Where, in an action for the death of a boy in the employment of the defendant, the plain-

tiff based his claim upon a violation by the defendant of the contract of hiring by which the injury occurred, the burden is on plaintiff to show the breach of contract and that it was the proximate cause of the child's death.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

2. PARENT AND CHILD (§ 7*)—ACTION FOR CAUSE OF DEATH OF INFANT—THEORY—CONTRACT—BURDEN OF PROOF.

A father who hires his son out may stipulate as to the kind of work his child may be employed in (unless prohibited by statute), and the consent of the parent that the child may be employed at one kind of labor is not a consent that he be placed in another and more dangerous work.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

3. PARENT AND CHILD (§ 7*)—DEATH OF INFANT SERVANT—LIABILITY OF EMPLOYERS—CARE REQUIRED—CONTRACT OF HIRING.

Where persons hired an infant as water carrier under an agreement with his father that he should be kept on a certain side of a river, and not allowed to go near the engines and machinery, situated on the opposite side, they were bound to use due diligence to keep the child away from the machinery and at the work he was hired to perform, or to return him to his father, and a showing of his presence near the machinery with the knowledge of the defendants shows a violation of a duty to him which will support an action for his death.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

4. PARENT AND CHILD (§ 7*)—INFANT EMPLOYE—CONTRACT OF HIRING—BREACH—DEATH—PROXIMATE CAUSE.

In an action for the death of an infant, a showing of a failure of his employers to keep him away from dangerous machinery, as required by the contract of hiring, with knowledge of his habit of playing there, will permit the jury to infer that if the agreement had been carried out his death would not have been caused by such machinery, and is a sufficient showing of proximate cause to support a finding for the plaintiff.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

5. PARENT AND CHILD (§ 7*)—DEATH OF INFANT EMPLOYE—CONTRACT OF HIRING—CONTRIBUTORY NEGLIGENCE.

Where an action for the death of an infant is based upon an alleged violation of the agreement of hiring, made with the infant's father, by which it was stipulated that such infant should be kept away from machinery, etc., that the boy went near dangerous machinery in disobedience of orders was the thing the defendants contracted they would not allow him to do, and cannot be availed of as a defense on the ground of contributory negligence.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

6. PARENT AND CHILD (§ 7*)—LIABILITY FOR INJURY TO INFANT SERVANT—ACTION—CONTRACT—ACQUESCENCE IN BREACH—BURDEN.

Where, in an action for the death of an infant servant, the theory of the action is that a breach of the contract of hiring made with the deceased's father was the proximate cause of the injury, the burden is upon the defendants to show that the father acquiesced in the breach, unless the facts appear from the plaintiff's own evidence.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

Appeal from Superior Court, Madison County; Webb, Judge.

Action by Peter Haynie, administrator of William G. Haynie, deceased, against the North Carolina Electric Power Company and another. From a judgment of nonsuit granted at the close of plaintiff's case, plaintiff appeals. Reversed, and new trial granted.

Locke Craig, Moore & Rollins, and Jones & Williams, for appellant. Martin & Wright, for appellees.

BROWN, J. The evidence offered by plaintiff tends to prove that his son, the intestate, aged 13 years, was killed in the engine room of defendants situated on the west side of the French Broad river about July 12, 1910, by falling on the belt connected with the engine. The evidence tends to prove that the boy was employed by defendants Willard & Son as a water carrier, for the men engaged on the east side of the river, in building a railroad track, and that on the west side of the river were situated all the engines and machinery for blasting and moving rock, etc. The evidence shows that at the time the boy was killed the engineer in charge of the engine was Raymond Turner, aged 20. The boy was killed by falling on the belt. The belt threw him off between the belt and the wall. His skull was cracked, his leg broken, and he was mashed to pieces and died in four hours. The boy had often been seen playing around the belt by Turner, the engineer, Correll, the foreman, and he was notified of the danger, but kept on playing around the belt. The evidence tends to show further that C. R. Willard knew of the boy's conduct and that the engineer and foreman had repeatedly warned the boy. The foundation of plaintiff's action is the allegation that his son was non sui juris, inexperienced, and incapable of appreciating great danger, and, by reason of his youth and inexperience, careless in incurring danger; that he hired his son to defendants to work upon the east side of the river as a water carrier away from the dangerous machinery and he should be protected from such dangers by the defendants. Plaintiff avers that this agreement was violated by defendants and his son permitted to go in the engine house on the west side of the river and to be around and about the machinery in consequence of which he was killed.

[1] The plaintiff does not base his claim upon any defective machinery, but upon a distinct violation by defendants of the contract of hiring. Upon the allegations of the complaint, the burden rests upon plaintiff to show a breach of the contract and that it was the proximate cause of his son's death.

The plaintiff testifies that he consented to the employment of his son by defendants for the purpose of carrying water on the east side of the river; that he forbade them to let his son go on the other side where the

machinery was; that the foreman promised that his son would be kept at work on the east side; and that he would see to it.

[2] It is well settled that the father may stipulate as to the kind of work his child may be employed in (unless forbidden by statute), and the consent of the parent that the child may be employed at one kind of labor is not consent that he be placed in another and a more dangerous kind of work. *Braswell v. Oil Co.*, 7 Ga. App. 167, 66 S. E. 539. Thus it was held that the fact that a parent hired his son as a "doffer boy" did not authorize the employer to change his work and place him in more dangerous environments. *Cotton Mills v. King*, 51 Tex. Civ. App. 518, 112 S. W. 132; *Hendrickson v. Railroad*, 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311. The notes to this case are very instructive and contain many cases illustrating and supporting this view.

The sum and substance of the many cases cited in those notes are that it is a general rule that an employer putting a minor servant, against his parent's consent, to do work by which the child is injured, commits an actionable wrong for which the employer is liable, although there is no other evidence of negligence upon his part. *Union Pac. R. R. v. Fort*, 17 Wall. 553, 21 L. Ed. 739, and cases cited in *Rose's* notes annotating this case. And under such circumstances it is also held that the minor servant's contributory negligence is no defense to such action. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 South. 914, and cases cited. As illustrating this doctrine, we may refer to cases in ante bellum days, where slaves were hired out to perform certain kinds of work and within certain limits, and the owner was permitted to recover damages for a breach of the contract because of injury to the slave. *Slocumb v. Washington*, 51 N. C. 357; *Spivey v. Farmer*, 3 N. C. 339.

In the brief of the learned counsel for the defendant it is contended:

[3] 1. That plaintiff failed to show that defendants violated any duty to plaintiff's intestate. The evidence, if believed, shows that defendants violated the contract of hiring.

[4] 2. That there is no evidence that any act or omission of defendant was the proximate cause of the boy's death. From the evidence it is a just inference which a jury may draw that if the defendants had carried out the agreement and kept the boy away from the machinery, or returned him to his father, the injury would not have occurred.

[5] 3. That all the evidence shows that the boy was guilty of negligence and disobedience of orders in going into the engine room where he was killed. To guard against that was the very reason why the plaintiff restricted his child's employment and required the defendants to confine him to the east side

of the river. Under such circumstances, the defendants cannot avail themselves of such defense. *Marbury Lumber Co. v. Westbrook*, supra.

We do not mean to hold that the defendants became insurers of the intestate's life; but, if the agreement be as testified to by plaintiff, it was the duty of defendants to use due diligence and care to keep him away from the machinery and at the work he was hired to perform, or else to return him to his father.

[6] It may be that the father waived the terms of the agreement and acquiesced in his son working on the west side of the river; but the burden would be on defendants to show that unless the facts appear from the plaintiff's own evidence.

The judgment of nonsuit is set aside.

New trial.

(158 N. C. 32)

PATILLO et al. v. LYTLE et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. JUDGMENT (§ 668*)—JURISDICTION OF PROBATION—UNAUTHORIZED JOINDER AS PLAINTIFF.

Mere knowledge by a tenant in common, who had been joined as plaintiff in partition without authority, of the institution of the proceedings, is insufficient to bind him by a sale therein.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 668.*]

2. ESTOPPEL (§ 91*)—JUDGMENT—SALE—SETTING ASIDE—ESTOPPEL.

Where a tenant in common has been joined as a plaintiff in partition without authority, failure to object, or even an expression of willingness that the land should be sold, will not estop him to move to set aside the sale, in the absence of any act which will cause injury to the other parties, or the purchaser, if such tenant be not held bound.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 257-259; Dec. Dig. § 91.*]

3. PARTITION (§ 78*)—SALE—SALE OF FRACTIONAL INTEREST.

The sale of an undivided fractional interest less than the whole tract in partition proceedings, leaving the remainder to be held in severalty by one of the tenants in common, was not a compliance with Acts 1887, c. 214, § 1 (Revised 1905, § 2506), providing that in proceedings for partition actual division may be made of a part of the land and a sale of the remainder, or a part held by the cotenants may be partitioned, and the remainder held in common, and was unauthorized.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265-273; Dec. Dig. § 78.*]

4. PARTITION (§ 106*)—SALE—ABSENCE OF CONFIRMATION—EFFECT.

An intending purchaser at a partition sale is a mere preferred proposer, and not a purchaser, until after the sale has been confirmed.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 106.*]

5. PARTITION (§ 110*)—SALE—ABSENCE OF CONFIRMATION—EFFECT.

Revised 1905, § 2512, provides that on the coming in of a report of a partition sale and its confirmation, and payment of the purchase money, title shall be made to the purchaser as direct-

ed by the court. Section 2513 provides that the person authorized to sell property in partition shall file his report of sale, and, if no exception be filed thereto within 20 days, it shall be confirmed, providing that any party after confirmation may impeach the proceedings for mistake, etc., by petition. *Held*, that a deed executed by the commissioner without confirmation was unauthorized and void.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 398-400; Dec. Dig. § 110.*]

6. PARTITION (§ 107*)—SALE—VACATION—PROCEEDINGS—MOTION.

Nominal plaintiffs in partition, who did not in fact authorize the use of their names as such, properly assailed the sale by motion in the cause to set it aside.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 107.*]

7. PARTITION (§ 107*)—JUDGMENT BY CONSENT—PARTIES AFFECTED.

Parties to a suit cannot by agreeing to a consent decree affect the rights of persons in interest not parties; so that the fact that a decree of partition and sale which partitioned all of the land was by consent would not prevent the tenants in common, who were not parties, from moving to set it aside.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 107.*]

Appeal from Superior Court, Buncombe County; Webb, Judge.

Partition by John Patillo and others against James Lytle and others. From an order denying a motion by Hattie Moore and other plaintiffs to set aside the sale, they appeal. Reversed, and judgment and order of sale ordered set aside.

This is a proceeding for the partition of the land described in the pleadings among the heirs of Thomas Patillo. At June term, 1911, an order was made for the sale of the land, which was made by the commissioner on August 7, 1911, and D. W. Harrison became the highest bidder, and the land was knocked down to him at the price of \$1,205, which he paid to the commissioner. No report of sale was made by the commissioner, and the sale was, of course, never confirmed by the court. The commissioner, without any order authorizing him to do so, executed a deed for the land to the bidder, D. W. Harrison. At October term, 1911, Carrie Burgin, Hattie Moore, Rose Bradley, Della Davidson, and Ida Mims made a motion before the court to set aside the sale, because, while their names appeared in the list of plaintiffs, they had not authorized counsel for the other plaintiffs, or any one else, to make them parties, and that they were thus made parties without their knowledge or consent, and, further, that they are opposed to a sale of the land and desire an actual partition thereof. Judge Lane found as facts at the hearing of the motion that the land brought its full value at the sale; that three of the movers had notice of the suit after it was commenced, and made no objection thereto; that one of them at the sale expressed her willingness to have the

land sold, but that Carrie Burgin did not know of the proceeding, and therefore had given no authority to any one to make her a party, nor had she been notified what had been done. He further found that a sale of the land was necessary for a fair division of the same. He thereupon denied the motion of all the parties, confirmed the sale, and adjudged D. W. Harrison to be the owner of all the undivided interests in said land except that owned by Carrie Burgin, and, further, that they were tenants in common, Harrison owning all the undivided interests, except the one belonging to Carrie Burgin. The motioners excepted and appealed.

Mark W. Brown, for appellants. Craig, Martin & Thomason, for appellees.

WALKER, J. This case proceeded very irregularly in the court below from the beginning to the end of it. The court evidently found as a fact that the motioners had not authorized the proceeding to be brought, and that all except Carrie Burgin were bound by the orders and decrees therein, because they happened to know of it; one of them having shown a willingness at the sale that the land should be sold. It would have been better if his honor had distinctly found whether or not they had authorized themselves to be made parties, but without any such specific finding we think it a fair inference from the other findings that he concluded as a matter of fact that no such authority had been given.

[1, 2] We do not think, therefore, that they were in law parties to the proceeding. A mere knowledge of the proceedings, in the absence of authority given to make them parties, would not be sufficient to bind them, nor did a mere expression of willingness that the land might be sold have that effect as to Ida Mims. Before they could be estopped by conduct, they must have done something which caused the other parties or the purchaser to act in some way which will prejudice them if they are not held bound by what has been done in the proceedings, and no such result has followed. *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824; *Eaton's Equity*, p. 169.

[3] But there is another more serious question in the case. The court, if it had the power to confirm the sale and further adjudge as it did, without first bringing in all necessary parties, has in legal effect partitioned only a fractional interest in the land, instead of the whole thereof. It is true Acts 1887, c. 214, § 1 (Revisal, § 2506), provides that in all proceedings for partition actual division may be made of a part of the land and a sale of the remainder, or a part only of any land held by the tenants in common may be partitioned and the remainder held in common, but this provision does not sustain the judgment ren-

dered below upon the motion to set aside the order of sale. The court's order did not provide for a sale of a part and actual division of the remainder, or that a part only be partitioned and the remainder held in common, but it simply ordered the sale to stand as to a fractional interest, an undivided interest, less than the whole, and the remainder to be held, not in common, as the statute provides, but in severalty by Carrie Burgin. But there is direct authority upon the subject. In *Brooks v. Austin*, 95 N. C. 474, the court, adverting to a similar state of facts, says by Chief Justice Smith: "A three-tenths interest in the 30-acre tract is proposed to be sold for division, the tenant or tenants of the other seven-tenths not being before the court, nor could they rightfully be, since they have the property in common in the larger tract. *Simpson v. Wallace*, 83 N. C. 477. We have met with no case in which such an undivided interest has been the subject of partition and sale at the instance of those owning it, when the other tenants are not present in the action. The statute requires actual partition among tenants in common of the whole tract, though shares may be united and apportioned to several, or a single share may be allotted to one, the residue of the land being still held in common by the other tenants, but, however done, the partition must be of the whole. The sale as a mode of partition can only be resorted to when otherwise it would be to 'the injury of some or all of the parties interested.' Code, § 1904. The actual divisibility of the land into parts as an inquiry to be made before an order of sale can only be legally made when all the tenants are before the court." See also, *Gregory v. Gregory*, 69 N. C. 522.

[4] There is no innocent purchaser in this case who can be affected by setting aside the decree. Harrison is no such a purchaser. He is not a purchaser at all, but a mere "preferred proposer," as he is styled. *Miller v. Feezor*, 82 N. C. 192; *Joyner v. Futrell*, 138 N. C. 301, 48 S. E. 649. In the last-cited case it is said: "The only other question which we need consider—that is, as to the validity of the deed of the executor and its sufficiency to pass the title, without any confirmation of the sale by the court—is equally well settled. This court, and all courts, we believe, having jurisdiction to pass upon judicial proceedings for the sale of land, have uniformly held that it is necessary that the sale be reported to the court, and that it be confirmed, before the commissioner or other person appointed by the court to make the sale can have any power to make title to the purchaser. The commissioner is invested with a naked power, which must be exercised under the supervision and control of the court, and he has no authority to act save that which he derives from the court under its order or judgment. The bidder at a judicial sale, on

the other hand, acquires no right before the sale is reported by the officer and the sale is confirmed by the acceptance of his bid. Until then, the bargain with him is not complete, and he acquires no title of any kind to the land. He is regarded as a mere preferred proposer until he has been accepted by the court as the purchaser, and every bidder is presumed to know, because he should know, that his bid is made subject to the condition of its acceptance or rejection by the court. A formal direction to make title is not always necessary to confer upon the commissioner the power to convey the land to the purchaser by deed, but a confirmation of the sale cannot be dispensed with in any case, unless perhaps in some way it has been waived. It is a condition precedent to the exercise of the right to convey the title. This principle has been settled by numerous authorities. *Bost. Ex parte*, 56 N. C. 482; *Brown v. Coble*, 76 N. C. 391; *Mebane v. Mebane*, 80 N. C. 34; *Latta v. Vickers*, 82 N. C. 501; *Foushee v. Durham*, 84 N. C. 56; *Miller v. Feezor*, 82 N. C. 192; *Attorney General v. Navigation Co.*, 86 N. C. 408; *Dickerson, Ex parte*, 111 N. C. 108 [15 S. E. 1025]; *Vanderbilt v. Brown*, 128 N. C. 498, 39 S. E. 36; *Mason v. Osgood*, 64 N. C. 467; *Rorer, Jud. Sales*, § 122."

[5] We also held that the deed of the commissioner without confirmation, being unauthorized, was void. *Revisal*, §§ 2512, 2513. Harrison is to be treated, therefore, as a mere proposer, whose bid was awaiting acceptance by the court, and was subject to its rejection. But, if the sale had been confirmed, it would not have bound Carrie Burgin, who was not a party to the proceeding (*Henderson v. Wallace*, 72 N. C. 451) and without whose presence, as a party, the court could not, as we have seen, proceed under the statute to partition the land. The judge cannot make an order of sale or any other order in the case, which is contrary to the mandatory provisions of the statute. The court and the parties must proceed according to the statute, and not otherwise. It is a wise provision which requires all the land to be partitioned in some way pointed out by the statute, which we cannot repeal or modify by judicial construction, nor can we approve such a radical departure from statutory methods. What we have said in this case is supported by the decision of the court at this term in *Taylor v. Carrow*, 72 S. E. 76, as will appear in the opinion of which the following passage is a clear summary: "The judge in the beginning was vested with the power to decree actual partition, or a partial partition, or a sale for partition. Having set aside the report, as he had power to do, the matter was then open to him

as res nova. Being better advised by the report or further evidence, he could not only refer it to new commissioners, but he could direct actual partition of the whole tract, or a sale of the whole, or a partition of part and a sale of the remainder, just as he could originally. No title vested until the decree of confirmation upon the final report of the commissioners. Until the decree of confirmation the proceedings are not final, but interlocutory, and rest in the discretion of the court, even though the purchase money has been paid and the purchaser has taken possession of the premises. *Knapp on Partition*, 336."

[6] The parties took the proper course to set aside the decree by a motion in the cause, as they were parties nominally, though not so in fact. *Doyle v. Brown*, 72 N. C. 393; *Sumner v. Sessoms*, 94 N. C. 377.

[7] It is suggested that this is a consent decree. But parties to a suit cannot by consent impair the rights of those in interest, who are not made parties, and the decree directly affects their rights, though they were not heard. The whole of the land was partitioned, and the judgment, therefore, operates upon every interest in it.

The judgment will be set aside, as also the order of sale, and deed to the commissioner, the latter returning the purchase money to D. W. Harrison, and the case may then proceed by making all necessary parties, and in other respects as the parties may be advised.

Error.

(157 N. C. 496)

PATTERSON v. NICHOLS.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. MASTER AND SERVANT (§ 107*)—MASTER'S LIABILITY—NEGLIGENCE.

If the place where an employé was required to work was not in a reasonably safe condition, the employer was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 179; Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§ 234*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

In an employé's action for personal injuries, the court instructed that, before the jury could find contributory negligence, they must be satisfied that plaintiff knew of the danger he was incurring, or in the exercise of reasonable care could have known thereof, and that the work was so obviously dangerous that one of reasonable prudence would not have engaged in it, or that in the performance of his work he did not exercise reasonable care for his own safety. *Held*, that the instruction was proper.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 684-686; Dec. Dig. § 234.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES—INSTRUCTIONS—NEGLIGENCE.

Plaintiff was injured while extending a shaft in a laundry, which was suspended from the ceiling by hangers, by having his overalls

caught in the set screw which projected below the shaft; plaintiff at that time standing on a ladder placed against the wall to enable him to reach the shaft. The court on the first issue of negligence charged the jury to answer that issue, "Yes," if they found that defendant was negligent in not supplying plaintiff with a safer appliance while in the performance of his duty, and to answer it, "No," if they found that a collar with a projecting screw was in common use in such places. Permitting the screw to project was one of the grounds of negligence relied on. *Held*, that the instruction was inconsistent and misleading, since the jury might have properly found that both facts existed, in which case they were told how to answer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 293.*]

4. NEGLIGENCE (§ 139*)—INSTRUCTIONS.

When plaintiff relies upon several acts of negligence, it is proper to submit them separately and to charge that, if the jury do not find the facts as contended by plaintiff upon each question of negligence, the jury should find for defendant on that question.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 371-377; Dec. Dig. § 139.*]

5. MASTER AND SERVANT (§ 293*)—INJURIES—INSTRUCTIONS—APPLIANCES.

Plaintiff was injured while standing on a ladder engaged in extending a laundry shaft suspended from the ceiling by hangers. Plaintiff placed the ladder against the wall, instead of hanging it over the shafting by hooks attached to the ladder, and was standing upon it with his back toward the shafting, when his overalls were caught by a projecting set screw in the shaft. The court instructed that if defendant provided a ladder for plaintiff to stand on while putting on the belt, and that was a part of plaintiff's duty, and the ladder was the only appliance furnished by defendant upon which to stand while putting on the belt, and was a reasonably safe appliance to use for that purpose, and it was necessary for him to use the ladder while performing such duty, and that defendant was negligent in not supplying plaintiff with a safer appliance on which to stand in the performance of his duty, causing the injury, the jury should find that the plaintiff was injured by defendant's negligence. *Held*, that the instruction, fairly interpreted, referred to the ladder as an appliance and to its safety for the purpose for which it was used, and did not submit the question of any defect in the ladder.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

6. MASTER AND SERVANT (§ 107*)—EMPLOYER'S DUTY—SAFE PLACE TO WORK.

It is an employer's duty, in the exercise of reasonable care, to furnish a reasonably safe place of work, especially where the machinery is somewhat complicated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 179; Dec. Dig. § 107.*]

7. MASTER AND SERVANT (§ 105*)—MASTER'S DUTY—SAFE APPLIANCES.

It is an employer's duty to supply appliances and machinery, which are reasonably safe and suitable for the work, and such as are approved and in general use in similar plants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 186; Dec. Dig. § 105.*]

8. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—REPAIRING MACHINERY.

An employer is required to maintain machinery and appliances in a reasonably safe

condition by the exercise of reasonable care, as well as to originally put it in that condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 178; Dec. Dig. §§ 101, 102.*]

9. MASTER AND SERVANT (§ 278*)—INJURIES—SAFE APPLIANCES—EVIDENCE.

In determining whether a place of work is reasonably safe, evidence as to the appliances used therein is competent; but the fact that they are approved and in general use may not be conclusive as to their sufficiency, and where an employé was injured while attempting to put a belt on a pulley, and there was no evidence that it was practicable to use a shifter at a pulley so located, or that one had ever been used in any plant for any purpose, or that any other employé had ever been required to touch the pulley, it was error to submit the question of the use of the shifter to put the belt on.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 960; Dec. Dig. § 278.*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by Sherman Patterson against James J. Nichols. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

This is an action to recover damages for personal injury.

On the 6th day of March, 1909, the plaintiff, who had been employed in the wash-room of the defendant's laundry for four years, was engaged by the defendant as repairman, repairing defendant's machinery. He had been at this work about two weeks, when he was directed to extend a shaft so that another machine might be put in. In order to extend the shaft, it was necessary for the plaintiff to stop that part of the machinery, and that was done by throwing off the belt which connected it with the main shaft. This belt was usually thrown with a pole, but was put on by hand.

The shaft which was being extended was suspended from the ceiling. It was about 10 or 12 feet from the floor and 2 feet from the wall. Where the end went into the hangers, there was a collar, which was kept tight by a set screw which projected below the shaft about 4 inches. The set screw was close to the hanger and 12 or 14 inches away from the pulley on which the belt ran. After the plaintiff had made the extension, he undertook to put the belt on to see whether the shaft would run right. For the purpose of getting to the shaft to put the belt on the pulley, there was provided a ladder with hooks on it so that it could be hung over the shaft. And, when used in this way, a person putting on the belt would be working with his face towards the shafting and the set screw. The plaintiff, instead of hanging the ladder over the shafting, leaned it against the wall, on the side of the pulley where the set screw was, so that in climbing up he had his back to the shaft and the

screw, and a space of about two feet between the shaft and the wall, in which to work.

As the plaintiff was climbing the ladder, and reaching over to pull the belt on the pulley, the set screw caught in the back of the collar of his overalls, and he was thrown around the revolving shaft and injured. There was evidence that the hooks on the ladder were for the purpose of hanging over the shaft, to oil the machinery when not in motion, and that, in the performance of the duty imposed on the plaintiff, it was necessary to rest the ladder against the wall. There was no evidence of any defect in the ladder. No shifter was used by the defendant, and there was no evidence that a shifter was in general use for putting on and off belts at pulleys located as was the one at which the plaintiff was injured, or elsewhere. There was evidence that in modern laundries the set screw is countersunk, and not permitted to project from the collar.

The following verdict was returned by the jury:

(1) Was the plaintiff injured by the negligence of the defendant, Nichols, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff by his own negligence contribute to his injury? Answer: No.

(3) What damage, if any, has the plaintiff sustained? Answer: \$2,000.

His honor charged the jury on the first issue as follows, omitting his statement of the contentions of the parties:

"In order for the plaintiff to recover in this action, he must satisfy you by the preponderance or greater weight of the evidence: First, that this defendant was negligent, as alleged, and the plaintiff must satisfy you that he was injured, and that the negligence of the defendant was the proximate cause of his injury. If he fails to satisfy you in any one of these propositions, then he would not be entitled to recover.

"Now, what is negligence? Negligence is the failure to exercise such care, prudence, and caution, under all of the circumstances surrounding the situation, as an ordinarily careful, prudent, and cautious man would be expected to use and exercise under the circumstances. It is the failure to exercise such care and the failure to do something that an ordinarily careful, prudent, and cautious man would be expected to do under the circumstances, or it is the doing of something that an ordinarily cautious, careful, and prudent man would not be expected to do under all the circumstances that existed, surrounding the case. So it is the failure to use proper care under the circumstances, by the doing or the omission of some act that a reasonably prudent, careful, and cautious man would be expected to do.

"If the jury find by the greater weight of the evidence that the defendant, James J. Nichols, provided for the plaintiff a ladder to stand on while putting on the belt; that the putting on of this belt was a part of the

duty of the plaintiff while engaged in the service of the defendant; that this ladder was the only appliance furnished by the defendant upon which to stand while putting on the belt; that the ladder was a reasonably safe appliance to use for the purpose of putting on the belt; that it was necessary for him to use the ladder while in the performance of his duty; that the defendant was negligent in not supplying the plaintiff with a safer appliance on which to stand while in the performance of his duty; and that such negligence was the proximate cause of the injury to the plaintiff—the jury will answer the first issue, 'Yes.'

"If the jury find by the greater weight of the evidence that the defendant, James J. Nichols, did not equip his plant at the place where the plaintiff was changing the belt with a shifter and idler, that such shifter and idler would have been a safe appliance and suitable for the purpose of changing the belt, that the putting on and off of the belt without such shifter and idler was dangerous and uselessly dangerous to the plaintiff, that it was uselessly dangerous to require the plaintiff to put on and off this belt with a stick while standing on a ladder, that the defendant was negligent in not supplying his plant at this place with a shifter and idler, and that such negligence was the proximate cause of the injury to the plaintiff, the jury will answer the first issue, 'Yes.'

"But if you find that the defendant did provide proper appliances for the purpose of putting on and taking off this belt, and that the stick provided there for taking off the belt was a suitable and reasonably safe appliance for taking it off, and such as was in general use in plants and places of this kind for removing belts, and that the belt could have been put on by the use of this ladder in a proper manner, by standing it at the proper place, as the defendant contends, by pushing on the belt, that that was a reasonably safe and suitable way and appliance there for putting on and taking off the belt, then you would answer the first issue of negligence, 'No'; otherwise you would answer it, 'Yes.'

"Now if you find by the greater weight of the evidence that there was a set screw projecting about an inch from one of the shafts; that it was necessary for the plaintiff in the discharge of his duty to work in close proximity to this set screw; that had the set screw been countersunk, as described by the witness, it would not have been dangerous; that in the exercise of reasonable care it was the duty of the defendant to countersink this set screw; that it was dangerous for the plaintiff to perform his duty as he was required to perform it while this set screw was projecting from the shaft, as described by the witness; that it was negligent in the defendant to require the plaintiff to work in close proximity to the projecting set screw; and that such negligence was the proximate

cause of the injury to the plaintiff—the jury will answer the first issue, 'Yes.'

"I charge you further, gentlemen of the jury, that the law did not require the defendant to do more than to exercise reasonable care to provide reasonably safe machinery and appliances, and the defendant was not required to adopt the latest appliances or machinery, but only to use that which was in general use, in places of like kind and character. And if the jury shall find from the evidence that shafting with projecting set screws was in general use in steam laundries of the kind and character the defendant was operating, the use of shafting with a projecting set screw by the defendant would not be negligence, and the jury should answer the first issue, 'No.'

"The defendant, Nichols, was not required to use a shaft with a sunken set screw merely because such shafts were put upon the market and were being used and approved by others, and if the jury shall find from the evidence that machinery such as was being used by the defendant was in general use in other laundries, the use of such machinery with a projecting set screw would not be negligence, and the jury should answer the first issue, 'No.'

"That if the jury shall find from the evidence that a shaft collar with a projecting screw such as was being used by the defendant, Nichols, was in common use, and that the shaft which he was using was of the kind that was being used in other laundries, the use of a shaft with a projecting screw would not constitute negligence on the part of the defendant, and the jury should answer the first issue, 'No.'"

The defendant excepted to the different parts of the charge instructing the jury how the issue should be answered. At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted. There was a judgment upon the verdict, and the defendant appealed.

A. S. Barnard, for appellant. Philip C. Cocke, for appellee.

ALLEN, J. The motion for judgment of nonsuit was properly overruled.

[1] There was evidence for the consideration of the jury that the place, where the plaintiff was required to perform his duty, was not, under all the circumstances, reasonably safe, and that this was the cause of the plaintiff's injury, and, if so, there was evidence of negligence.

The absence of a shifter, the presence of a projecting set screw, the fact that a ladder had to be used, that the ladder had to be set against the wall, that the plaintiff had to go up the ladder in a space of two feet between the shaft and the wall, with his back to the screw, and had to reach over the pulley to put on the belt while the machinery was in motion, are all circumstances, if

found to exist, which enter into the question of a reasonably safe place.

[2] We are also of opinion that his honor correctly charged the jury on the second issue that: "Before you can answer the second issue, 'Yes,' you must be satisfied by the greater weight of the evidence that the plaintiff knew the danger which he was incurring, or in the exercise of reasonable care could have known it, and that the work required of him by the defendant was obviously so dangerous that a man of reasonable prudence would not have engaged in it, or that in the performance of his work he did not exercise reasonable care for his own safety. Unless the jury so find that the plaintiff was negligent as herein stated, you will answer the second issue, 'No'"—and that he could not, as matter of law, direct the jury to answer the second issue, "Yes."

[3] We think, however, there is error in the instructions on the first issue, which entitles the defendant to a new trial.

When the charge on the first issue is considered as a whole, there are inconsistent directions to the jury, which must have left them in doubt as to a correct finding upon the issue.

To illustrate: His honor charged the jury to answer the first issue, "Yes," if they found that the defendant was negligent in not supplying the plaintiff with a safer appliance on which to stand while in the performance of his duty, and to answer it, "No," if they found that a collar with a projecting screw was in common use. Suppose the jury found both facts to exist, how should the issue be answered?

[4] When several acts of negligence are relied on by the plaintiff and there is evidence to support them, it is proper to submit separate charges as to each, presenting the contentions of the plaintiff, upon which the issue of negligence may be answered in the affirmative, and telling the jury that, if they do not find the facts as contended, the defendant would not be negligent in that respect.

[5] The charge upon the use of the ladder as a safety appliance is not free from doubt. If, by proper construction, it was intended to leave to the jury the question of a defect in the ladder, we would hold it erroneous, because no evidence of such defect was introduced; but we think a fair interpretation of the language leads to the conclusion that his honor was speaking of the ladder as an appliance, and of its safety for the purpose for which it was being used.

We also think there was error in the charge as to the use of a shifter, upon the ground that there was no evidence to support it.

[6-8] It is the duty of the employer, "where the machinery is more or less complicated, and more especially when driven by mechanical power, to provide for his employees, in the exercise of proper care, a rea-

sonably safe place to work, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Witsell v. Railroad*, 120 N. C. 557 [27 S. E. 125]; *Marks v. Cotton Mills*, 135 N. C. 287 [47 S. E. 432].” *Hicks v. Manufacturing Co.*, 138 N. C. 326, 50 S. E. 705.

The rule is well stated by Justice Walker in *West v. Tanning Co.*, 154 N. C. 47, 69 S. E. 689: “The master does not guarantee the safety of his servant while engaged in the discharge of his duties. He is not an insurer, and is not bound to furnish him an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably fit and safe and in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment.”

[§] In determining whether the place is reasonably safe, evidence as to the appliances used is competent, but, if shown to be such as are approved and in general use, may not be conclusive, and it may be that, in the absence of evidence that shifters were in general use, circumstances might arise in which it would be proper to submit the question of negligence to the jury upon proof that no shifter was used, as in cases where the employé is working at the machine and is required constantly, in the performance of his duty, to shift the belt; but these conditions do not exist here.

The plaintiff was injured at a pulley 10 or 12 feet from the floor, and there is no evidence that it was practicable to use a shifter at a pulley so located, or that one had ever been used in any plant for any purpose, or that any employé of the defendant, except the plaintiff, had ever been required to touch the pulley, and the plaintiff does not show that he had done so, except when doing the work of extending the shaft, immediately before his injury.

In the absence of evidence, it was erroneous to submit this view of the case to the jury. *Burton v. Mfg. Co.*, 132 N. C. 17, 43 S. E. 480; *Jones v. Johnson*, 133 N. C. 487, 46 S. E. 1030; *Stewart v. Carpet Co.*, 138 N. C. 61, 50 S. E. 562.

There is also an exception to the charge on damages, which it is not necessary to

consider; but we call attention to the fact that the rule as to the measure of damages stated in *Wallace v. Railroad*, 104 N. C. 451, 10 S. E. 552, is full and comprehensive, and that elements of damage embraced therein, as to which no evidence is offered, should be eliminated.

For the errors pointed out, there must be a new trial.

New trial.

(157 N. C. 393)

ARTHUR v. HENRY et al.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. MASTER AND SERVANT (§ 323*)—INJURY TO THIRD PARTIES—INDEPENDENT CONTRACTOR.

An owner of a quarry began blasting in operating it, and thereby threw stones on the premises of the adjacent owner, who complained and gave notice of the danger to him. The owner then leased the quarry to a third person for the purpose of having the operations continued, and the third person agreed to indemnify the owner against damages. *Held*, that the owner was liable for the acts of the lessee in the operation of the quarry.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1264; Dec. Dig. § 323.*]

2. ADJOINING LANDOWNERS (§ 8*)—NEGLIGENCE IN BLASTING.

Where one in operating a quarry on his land threw stones on the land of the adjacent owner without the consent of the latter, the latter could recover the damages sustained.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 63; Dec. Dig. § 8.*]

3. ADJOINING LANDOWNERS (§ 8*)—NEGLIGENCE IN BLASTING.

An owner of land, who consents to the operation by the adjacent owner of a quarry on the adjacent land, may not recover for damages to his land unless there is negligence in the operation of the quarry.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 63; Dec. Dig. § 8.*]

4. ADJOINING LANDOWNERS (§ 8*)—NEGLIGENCE IN BLASTING—EVIDENCE.

Evidence *held* to show negligence in the operation of a quarry causing injury to adjacent land, authorizing a recovery for the damages sustained.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Dec. Dig. § 8.*]

5. APPEAL AND ERROR (§ 994*)—CREDIBILITY OF WITNESSES—QUESTION FOR COURT.

The court on appeal will not pass on the credibility of the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

6. DAMAGES (§ 91*)—PUNITIVE DAMAGES—WHEN RECOVERABLE.

Where the acts of a wrongdoer evince a reckless indifference to the rights of another, or the acts were done wantonly, or from a bad motive, punitive damages are recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

7. ADJOINING LANDOWNERS (§ 8*)—NEGLIGENT BLASTING—WANTONNESS—EVIDENCE.

Evidence *held* to justify a finding of wantonness in the operation of a quarry causing

injury to adjacent land, authorizing punitive damages.

[Ed. Note.—For other cases, see Adjoining Landowners, Dec. Dig. § 8.*]

8. ADJOINING LANDOWNERS (§ 8*)—NEGLIGENT BLASTING—NOTICE OF DANGER—EVIDENCE.

Where a lessee of a quarry wantonly operated it to the injury of the adjacent land, and the owner of the quarry executed the lease with knowledge of injury from the operation and for the purpose of continuing the operation, evidence of a conversation of the owner of the adjacent land and the owner of the quarry, prior to the execution of the lease, as to the operation and injuries resulting therefrom by rock falling on the adjacent land, was admissible to charge the owner of the quarry with notice of the danger to the adjacent land at the time of the execution of the lease.

[Ed. Note.—For other cases, see Adjoining Landowners, Dec. Dig. § 8.*]

9. DAMAGES (§ 181*)—PUNITIVE DAMAGES—EVIDENCE—WEALTH OF DEFENDANT.

Where punitive damages may be awarded, evidence of the financial condition of defendant is admissible in behalf of plaintiff.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 474, 499; Dec. Dig. § 181.*]

10. EVIDENCE (§ 211*)—ADMISSIONS.

A statement by plaintiff, while testifying in an action for injuries to his land, that he claimed no damages prior to a designated date, does not prevent an inquiry as to all damages not barred by limitations, for it does not amount to a retraxit, and does not show a contract for want of mutuality and consideration, but is a mere statement which ought to have weight with the jury in determining the damages.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 211.*]

11. TRIAL (§ 351*)—ISSUES—SPECIAL ISSUES—SUFFICIENCY.

Where the issues adopted by the trial court are sufficient to present all the contentions of the parties arising on the pleadings, the refusal to submit other issues is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. § 351.*]

12. LIMITATION OF ACTIONS (§ 85*)—INJURY TO PROPERTY — ABSENCE OF DEFENDANT FROM STATE.

A plaintiff suing for injuries to his land caused by the operation by defendant of a quarry on adjacent land is entitled, under Revisal 1905, § 366, to recover damages for acts done within three years before the commencement of the action, excluding from the computation the time defendant was absent from the state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 449-455; Dec. Dig. § 85.*]

13. TRIAL (§ 252*)—INSTRUCTIONS.

Where, in an action for the negligent operation of a quarry, there was no evidence of injury to the health or person of plaintiff, nor suggestion that he claimed damages on that account, but the evidence confined the damages to his land, the refusal to charge that there was no evidence that plaintiff sustained any personal injury was not erroneous, though the court might have given the charge as a precautionary charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from Superior Court, Buncombe County; Carter, Judge.

Action by John P. Arthur against Philip S. Henry and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought by the plaintiff against the defendant to recover damages alleged to have been sustained by the plaintiff on account of the operation of a stone quarry by the defendant Philip S. Henry on land belonging to the defendant and adjoining plaintiff's land. An injunction was sought in the case against all the defendants, but damages claimed only as against the defendant Philip S. Henry. The plaintiff claimed that the defendant had operated his quarry, which was within a few feet of the line between plaintiff and defendant, and about 400 feet from the plaintiff's house, in a negligent, careless, and reckless manner, and had thrown stones, dirt, dust, and other substances on the plaintiff's premises; had killed and destroyed his fruit trees, shade trees, herbs, and grass; had thrown stones and dirt and dust into and on the plaintiff's house; and had, by means of the noise caused in the operation of said stone quarry and in operation of a stone crusher as a part thereof, created a nuisance and seriously damaged his property. The plaintiff also claimed that the defendant had made a lease of his stone quarry for the purpose of avoiding liability for damages to the plaintiff, and that the lessee, Faragher Engineering Company, operated said quarry in a negligent, careless, and reckless manner, damaging his property; and, further, that all of these acts were done by the defendant willfully and wantonly and committed for the purpose of injuring the plaintiff, and with the knowledge that said action would injure the plaintiff and his property.

The quarrying was begun in May or June, 1904, and blasting was necessary and resorted to, and, in the progress of the work stones were thrown upon the plaintiff's land and on his house. The defendant carried on his operations from June, 1904, to some time in October, 1906. The evidence of the plaintiff himself shows that he had no personal knowledge as to the date of the commencement of these operations, being away from home at the time; that on his return he found that a rock had been thrown onto the roof of his house, injuring it, requiring an expense of \$1.50 for repairs, which defendant paid. Upon the throwing of the stone on the house appellant ceased his operations and did not resume until plaintiff consented he might. No stones were ever thrown upon the house after the first one, but were thrown in his yard. The plaintiff was never at home when the blasting was going on, but at his office in the First National Bank Building and Library Building, but could hear the ex-

plosions. He made no claim for the injury done the house, and makes none in this action, and said on his examination that he did not claim damages prior to the 4th day of August, 1906. In July, 1906, the attorney in fact of appellant leased the quarries to a corporation called Faragher Engineering Company, and this company began operating the quarries about August or September afterwards, and continued until March or April, 1907.

There was evidence showing that the plaintiff owned a lot of land in the city of Asheville, consisting of several acres, where he resided with his sister, both being unmarried; that defendant purchased a tract of land adjoining the plaintiff's; that the defendant's land was situated south and east of the plaintiff's land on the side of the Town Mountain in the corporate limits of Asheville; that the defendant's land lay considerably above the plaintiff's land; that in 1904 the defendant opened up a stone quarry on his land at a point about 30 or 40 feet from the plaintiff's line, and about 400 feet from the plaintiff's house, but at an elevation of 50 to 100 feet above the plaintiff's residence; that this stone quarry was operated by means of blasting; and that a stone crusher was operated at the quarry, where the stone was crushed into dust and small pieces of stone, which stone crusher was run by steam power. The evidence tended to show: That, beginning in 1904, the defendant had in person operated the quarry from time to time. That while he so operated it the plaintiff's lands were damaged, as alleged by the plaintiff. That in June and September, 1905, and February, 1906, the defendant told the plaintiff that he wanted an agreement drawn whereby the quarry could be operated without liability on his part, and proposed to make some arrangement with insolvent persons to conduct the quarry, and, after considerable talk about the matter, there were some bitter words between the parties; the defendant saying, "I will find a way to use that quarry without being liable." That in July, 1906, the defendant leased the quarry to the Faragher Engineering Company, to whom defendant had promised to lease it before he left for Europe. In this lease, defendant retained the right to have a representative at the quarries to measure the stone removed, and had the lessee to agree to indemnify him against all claims and actions for damages, but did not retain the right to supervise the proper and safe operation of those quarries, or require the lessee to agree to conduct them safely. Operations in the mine again began in 1909. There was also evidence that the defendant knew the injurious character of the operations at the quarry; that he knew the operations were calculated to injure the plaintiff; that he had endeavored to get the plaintiff to draw a contract whereby he would be released from liability, had

endeavored to get him to act as his attorney and adviser, had proposed to lease the quarry to insolvent persons for the purpose of being relieved of liability, and finally had told the plaintiff that he would find a way to operate the quarry without liability; and that he leased the quarry to the Faragher Engineering Company. The defendant was absent from the state from May, 1906, to October, 1907.

At the conclusion of the evidence, the defendant moved for judgment of nonsuit, upon the ground that the operation of the mine up to the time the Faragher Company began work was with the consent of the plaintiff, and that the defendant was not responsible for the acts of Faragher Company, which was overruled, and the defendant excepted.

The defendant tendered the following issues, which his honor declined to submit, and the defendant excepted:

"(1) Was the plaintiff's property injured by the willful and wanton acts and negligence of the defendant prior to August 4, 1906, as alleged in the complaint?

"(2) If so, what actual damages is plaintiff entitled to recover?

"(3) Is plaintiff entitled to recover punitive damages on account of said willful and wanton acts and negligence, and, if so, how much?

"(4) Was the cause of action, if any, of plaintiff against defendant prior to August, 1906, barred by the statute of limitations at the date of the commencement of this action?

"(5) Was plaintiff's property injured by the willful and wanton acts and negligence of the Faragher Engineering Company, as alleged in the complaint, after August 4, 1906?

"(6) Is the defendant liable to plaintiff for the willful and wanton acts and negligence of the Faragher Engineering Company, as alleged in the complaint?

"(7) If so, what actual damage is plaintiff entitled to recover?

"(8) Is plaintiff entitled to recover from the defendant punitive damages on account of the willful and wanton acts of the Faragher Engineering Company, alleged in the complaint?

"(9) If so, how much?"

The court adopted the following issues, to which defendant excepted:

"(1) Was the plaintiff, John P. Arthur, damaged by the negligent, wrongful, and unlawful acts of the defendant, Phillip S. Henry, as alleged in the complaint?

"(2) What amount of damages by way of compensation for such acts committed after 4th of March, 1905, if any, is the plaintiff entitled to recover?

"(3) Were such acts done by the defendant wantonly and willfully and in reckless and wanton disregard of the plaintiff's rights?

"(4) What amount of punitive damages, if any, is the plaintiff entitled to recover for such acts committed after the 4th of March?"

The defendant requested the court to in-

struct the jury as follows, which request the court refused, except as stated:

"(1) There is no evidence in the case to justify the awarding by the jury of punitive or exemplary damages for any of the alleged acts of the defendant committed prior to August 4, 1906.

"(2) Punitive or exemplary damages cannot be recovered by plaintiff against defendant for any acts of the Faragher Engineering Company, alleged in the complaint.

"(3) There is no evidence in the case of malice or wantonness toward plaintiff on the part of the defendant.

"(4) There is no evidence in the case that any of the alleged acts of the defendant were willful.

"(5) There is no evidence in the case to fix any liability upon defendant for any of the acts alleged against the Faragher Engineering Company, or for damages or injuries done defendant by said company.

"(6) If the jury shall find from the evidence in the case that the defendant conducted his blasting operation with the consent of the plaintiff, the plaintiff cannot recover damages against the defendant.

"(7) If the jury shall find from the evidence in the case that plaintiff from time to time in the progress of the quarrying operations of defendant, alleged in the complaint, requested defendant to continue his work and not to stop on his (plaintiff's) account, and defendant did continue until notified by plaintiff to desist and cease to carry on said operations, and the defendant, upon receipt of such notice, did desist and cease, the plaintiff cannot recover damages on account of injuries to his property resulting from said operations." The court modified this instruction by adding thereto the following: "Provided due care was exercised in the conduct of such operations." As modified, the said instruction was given.

"(8) That the cause of action of plaintiff for damage and injury to the plaintiff's trees and shrubbery, if any was done by the defendant, was barred by the statute of limitations when this action was begun.

"(9) There is no evidence that the plaintiff sustained any personal injury or injury to his health by any operations of defendant or his lessee."

There are also exceptions to evidence and to parts of the charge.

The jury answered all the issues in favor of the plaintiff, and from a judgment thereon the defendants appealed.

Jas. H. Merrimon and J. G. Merrimon, for appellants. Locke Craig, Jones & Williams, and Martin & Wright, for appellee.

ALLEN, J. There are 43 exceptions in the record, all of which may be considered under the following propositions:

(1) Is there evidence which justified submitting the case to the jury?

(2) Is there evidence upon which the defendant can be held liable for the acts of Faragher Company?

(3) Is there any evidence of wanton or malicious conduct on the part of the defendant which will support an award of punitive damages?

(4) Did the plaintiff consent to the operations of the defendant, and, if so, does such consent absolve him from liability?

(5) Does the evidence of the plaintiff that he claimed no damages prior to August, 1906, prevent a recovery of other damages, not barred by the statute of limitations?

(6) Is there error in refusing the issues tendered by the defendant, or in submitting those passed on by the jury?

(7) Is the plaintiff's cause of action, or any part thereof, barred by the statute of limitations?

Eliminating for the present the effect of consent by the plaintiff to the operations of the defendant, and also the plea of the statute of limitations, it is well to consider the first three propositions together, as much of the evidence bears on all of them, and it is also advisable to determine in the outset how far, if at all, the defendant is liable for the conduct of the Faragher Company.

[1] It is in evidence that, prior to the lease to the Faragher Company, the defendant had been operating his quarry; that blasting was necessary in the work he was doing; that he had thrown stones on the premises of the plaintiff; that complaint had been made, and he had been told of the danger to the plaintiff; and that the lease to the Faragher Company was for the purpose of having these operations continued. It is also in evidence that the quarry was within the corporate limits of the city of Asheville, and that there were several homes, including that of the plaintiff, near to it.

This evidence, if accepted by the jury, brings the case within the doctrine of *Hunter v. Railroad*, 152 N. C. 688, 68 S. E. 237, 29 L. R. A. (N. S.) 851, 136 Am. St. Rep. 854, in which the defendant began blasting on its right of way for a lawful purpose, and, after notice of danger to the plaintiff, entered into an agreement with another to do the work in the same way, under a contract which, by its terms, would establish the relation of independent contractor, and it was held that the defendant was liable for the acts of the contractor.

In *Thomas v. L. Co.*, 153 N. C. 358, 69 S. E. 275, 32 L. R. A. (N. S.) 584, Justice Manning reviews the cases holding that one cannot escape liability by entering into an independent contract, if the work to be done is intrinsically dangerous, and says, with reference to the *Hunter Case*, supra: "In *Hunter's Case*, this court ruled that the work there handed over to the independent contractor to be done, to wit, blasting of rock, fell within the established exception to the rule

of nonliability, by reason of its dangerous character."

These decisions were the result of the unanimous opinion of the court, and on their authority we must hold that the work to be done was of such character that the defendant could not protect himself by the lease he made, and that he is liable for the acts of the Faragher Company in the prosecution of the work.

If so, all the evidence as to the operation of the quarry may be considered in determining whether there was sufficient evidence to be submitted to the jury.

[2, 3] The plaintiff was entitled to recover damages, if the defendant threw stones upon his land without his consent, and, if he consented to the use of the quarry, he could also recover if the work was negligently done.

As we are not now considering the effect of consent on the part of the plaintiff, the question then arises: Was there evidence of negligence on the part of the defendant or Faragher Company?

[4] There was evidence that by the use of proper precautions there would be no danger to the plaintiff's property, and that persons 400 or 500 yards away would not be disturbed by the noises more than by ordinary traffic. There was also evidence that the precautions used were not sufficient; that the defendant used for smothering the blasts six small pine logs; that stones were showered on the premises of the plaintiff, and fell around the house the plaintiff and his sister were living in; that one stone as large as an ordinary letter box came over the house and shattered the limbs of a tree in front of the house; that stones fell on the sheds on the premises; and that grapevines and fruit trees were destroyed. There was also evidence that one of the blasters employed at the quarry was reckless, and that another said, just before a blast, that he was going to shell the town, and that when he fired the blast rocks and stones flew everywhere. This was, in our opinion, ample evidence of negligence.

[5] There was much evidence to the contrary, tending to prove that diligence was exercised by the defendant, and that he was careful to avoid injury to the plaintiff; but it is not within our province to pass on the credibility of the witnesses.

If there was evidence of negligence for the consideration of the jury, was there any view of the case in which the question of punitive damages could be submitted to them?

[6] If there was evidence that the acts of the defendant evinced a reckless indifference to the rights of the plaintiff, that they were done wantonly, or from a bad motive, punitive damages could be awarded.

[7] There was evidence that the defendant knew that the operation of the quarry was dangerous, and that it was injurious to the property of the plaintiff; that he had tried

to buy the plaintiff's property; that complaints had been made to him from time to time, and he had promised to correct the trouble; that he had endeavored to secure the services of the plaintiff to draw a contract for him with other persons, by which he would escape liability; that he had proposed to lease the quarry to insolvent persons for this purpose; that he had threatened the plaintiff, saying he was going to operate a power house all night; that the plaintiff told him that he would have him indicted, and he replied that he would find a way by which he could use the quarry without incurring any liability to the plaintiff; that within a few months he leased the quarry to the Faragher Company for the purpose of having it operated, in which lease there was no stipulation for prudent management, or that any precautions should be taken to protect the property of the plaintiff, but it was provided therein that said company would save the defendant harmless from any and all actions or claims for damages of all kind, character, or description caused by any operations, conduct, or work in, at, and upon the said quarries, by, through, and with its servants, agents, and employes, and would prosecute any and all actions necessary for the full, complete, and ample protection of the defendant against such claims; and that while the quarry was operated by the Faragher Company conditions were worse than before.

There was also evidence on the part of the defendant directly contradicting the evidence of the plaintiff, and tending to prove that he had treated the plaintiff at all times with neighborly consideration; that he had always discontinued the operations when the plaintiff asked him to do so; that he never resumed the operation of the quarry unless requested to do so by the plaintiff; that he made the lease to the Faragher Engineering Company in good faith and for the purpose of carrying out works of public improvement; that the Faragher Engineering Company was capable of carrying on these operations in an inoffensive manner; that Mr. Odell, the engineer of the Faragher Engineering Company, was an engineer of ability and knew how to carry on these operations without offense; and that it would be contrary to all the intercourse between the plaintiff and the defendant to find that the defendant had been actuated by the sinister motive of wishing to injure the plaintiff by this lease.

These were matters for the jury, and at least furnished some evidence that the defendant was recklessly indifferent to the rights of the plaintiff.

[8, 9] If there was evidence of negligence and wantonness on the part of the Faragher Company, the conversation of the plaintiff with the defendant in 1904, as to the operation of a quarry near him, the letter of February 16, 1906, and the rock which fell on

the house of the plaintiff in 1904, were competent as tending to fix the defendant with notice of the danger to the plaintiff's property at the time of the lease to the Faragher Company, and, whenever punitive damages may be awarded, evidence of the financial condition of the defendant is admissible in behalf of the plaintiff (*Tucker v. Winders*, 130 N. C. 147, 41 S. E. 8), and his honor carefully restricted the evidence to these purposes.

This brings us to the consideration of the evidence tending to show consent on the part of the plaintiff, and it must be remembered that the defendant has at all times denied that there was negligence in the operation of the quarry, and that his contention is that the plaintiff consented for him to work the quarry, and not for him to work it negligently.

There is evidence of such consent, but it is coupled with the condition that the quarry must not threaten injury to life or property, and the question was properly submitted to the jury, as follows: "If the jury shall find from the evidence in the case that the plaintiff, from time to time, in the progress of the quarrying operations of defendant, alleged in the complaint, requested defendant to continue his work and not to stop on his (plaintiff's) account, and defendant did continue until notified by the plaintiff to desist and cease to carry on said operations, and the defendant, upon the receipt of such notice, did desist and cease, the plaintiff cannot recover damages on account of injuries to his property resulting from said operations, provided due care was exercised in the conduct of such operations, but a request of the plaintiff to the defendant not to cease and discontinue his work on those premises will not be construed by the law to authorize the defendant to conduct these operations in a negligent or in an obviously dangerous manner, and if you find from the evidence that the operations of the defendant in this quarry and this stone crusher, during the period covered by your inquiry, were at the instance and express suggestion of the plaintiff, and you further find that these operations were conducted with due care, and that there was no other or further injury to the property of the plaintiff than was necessarily involved in the operation of the quarry, then the plaintiff would not be entitled to recover. But if you find that the operations were negligently carried on, and that unnecessary injury was done to the property of the plaintiff, the fact of the plaintiff's request or suggestion would not deprive him of the right to recover here."

[10] Nor did the statement of the plaintiff on the witness stand that he claimed no damages prior to August 4, 1906, prevent an inquiry as to all damages not barred by the statute of limitations. It is a statement

which ought to have had weight with the jury; but it does not amount to a retraxit, and as a contract there is no mutuality and no consideration.

[11] The issues adopted by the court were sufficient to present all the contentions of the parties, and they arose on the pleadings, and, when this is true, the refusal to submit other issues is not error.

[12] Nor do we find any error as to the statute of limitations. The action was commenced on the 4th day of August, 1909, and it was admitted that the defendant was absent from the state continuously for 17 months, from May 22, 1906, and his honor told the jury they could not award damages for acts done prior to three years before the commencement of the action, excluding from the computation the time the defendant was absent from the state, which is in accord with the statute. Rev. 1905, § 386.

[13] His honor might with propriety have given the ninth prayer for instruction as a cautionary measure; but he was not compelled to do so, as there was no evidence of injury to the health or person of the plaintiff, and there is no suggestion in the record that he claimed damages on that account, and the charge permits no recovery except for injury to property.

We have examined the record with care, and have considered all the exceptions, and find no error.

No error.

(157 N. C. 438)

ARTHUR v. HENRY.

(Supreme Court of North Carolina. Dec. 20, 1911.)

DAMAGES (§ 52*)—TRIAL—PHYSICAL INJURY.

One may not recover damages for fright unaccompanied by physical injury; but, where one is frightened to such an extent that he suffers physical pain and is made sick, the wrongdoer is liable provided the fright brought about by his negligence was the proximate cause.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 100; Dec. Dig. § 52.*]

Appeal from Superior Court, Buncombe County; Webb, Judge.

Action by Fanny V. Arthur against P. S. Henry. From a judgment for plaintiff, defendant appeals. Affirmed.

James H. Merrimon and James G. Merrimon, for appellant. Locke Craig, Martin & Wright, and Jones & Williams, for appellee.

ALLEN, J. The evidence in this case and the questions presented are practically identical with those in the case of *John P. Arthur v. Henry*, 73 S. E. 206, at this term, except in that case the plaintiff was seeking to recover damages for injury to his property, compensatory and punitive, while in this the

plaintiff, who is a sister of John P. Arthur and lived in the house with him, sues to recover damages for injury to her health. In this action punitive damages were not awarded.

There was evidence which, if accepted by the jury, established the fact that the plaintiff was made sick and suffered in body and mind, as the result of the operations of the defendant and of the Faragher Company, for whose acts the defendant was liable, and his honor was careful to exclude the idea that the plaintiff could recover for fright unaccompanied by physical injury. He said to the jury: "That mere fright is not actionable. Because a man or woman gets frightened at something, it is not actionable. If you find that the plaintiff in this cause was frightened, that she was put in fear, the court charges you that that is not actionable; but if you find that she was put in fear and frightened to such an extent that she suffered physical pain, suffered in body and mind, and was made sick, and that such fright and fear was brought about by the negligence of the defendant and was its proximate cause, then the law says it is actionable. If you find the defendant was guilty of negligence, and that rocks fell about the house, and that thereby she was put in fear or frightened, but if you find that she was not made sick by reason of such fright, but her sickness was caused by other causes, that her sickness came from some other cause, and that she was not made sick by reason of this fright, and that she was made sick by some other cause than the fright, she could not recover. As I have said, mere fright is not actionable, but if she was put in fear by reason of rocks falling around, if you find they did so fall, and she became sick, and that the sickness was the immediate result of the fright, that the sickness followed from the fright, and that, had it not been for such fright and fear, the sickness would not have come, then it is actionable; but, if it did not flow directly from that, she would not be entitled to recover. Or if you find that she was not put in fear and not frightened, and not made sick by the negligence of the defendant, if such acts were negligent, then she would not be entitled to recover. If you find that she was consulted and that she consented that they might go on with the blasting, on condition that they would come and give her notice before the blasts were set off, and that they did give her notice, then the court charges you that she could not recover."

This follows the principle announced in *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545, which has been affirmed at this term in *May v. Tel. Co.*, 72 S. E. 1059.

We find no error.

No error.

RITTER LUMBER CO. v. MOFFITT.

(Supreme Court of North Carolina. Dec. 20, 1911.)

APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SCOPE.

An exception to the whole charge on a certain issue which contains several distinct propositions, and which does not point out the errors complained of, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273; * Trial, Cent. Dig. § 694.]

Appeal from Superior Court, Macon County; Cline, Judge.

Action by the Ritter Lumber Company against George W. Moffitt. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff alleges in its complaint that on the 2d day of May, 1908, the defendant executed his five notes, by which he promised to pay the plaintiff, in the aggregate, \$987.84, and that on the same day he executed certain chattel mortgages to secure the payment of the same. The defendant in his answer admits the execution of the notes and mortgages, and alleges, by way of counterclaim, that he and the plaintiff had entered into a logging contract, which the plaintiff had failed to perform, and that he had been damaged thereby. Separate issues were submitted to the jury on the items of damage alleged in the answer, all of which were answered in favor of the defendant, except the third as to reskidding logs.

The allegation of the answer in reference to reskidding is as follows: "(2) And that the said plaintiff agreed with this defendant to keep the tramroads running and to remove all logs as fast as they were skidded, and this the said plaintiff failed and refused to do, so that this defendant was compelled to reskid about 1,000,000 feet of logs, to his great damage, to wit, in the sum of \$750." And the parts of the written contract relating thereto are: "The said party of the first part (Moffitt) agrees to cut all of said trees and timber into mill lengths of twelve, fourteen, and sixteen feet long, allowing on each log four inches to square the lumber, and will deliver the same at such place on the double-deck skidways along the tram as may be designated by the said party of the second part (the Lumber Company). The trees and timber cut and delivered as aforesaid shall be inspected and measured according to 'Lumberman's Favorite Log Scale Rule,' and all logs shall be measured at the small end, under the bark, narrow diameter, and all logs shall be delivered on the tramroad skidways, which are to be double-deck skidways, and shall be scaled at the mill."

The defendant, among other things, testified: That he and the plaintiff executed the contract set out, and attached to and made a part of the defendant's answer, and that this was the only written contract about the

transaction. That, pursuant to the terms of said contract, he commenced to build skidways along the line of tramway mentioned in said contract, the tramroad not being built at that time, but had been definitely marked out and surveyed and pegs placed along the line of survey. That he built 100 or more skidways along the line of the tramway that had been surveyed. That some of the skidways were double decked and some single decked. He admitted it was his duty to construct the skidways provided for in the contract, upon which the logs were to be delivered.

He further testified that, independent of the written contract, the defendant agreed to have the logs removed to the mill as fast as the defendant put them on the skids, and thus keep the skidways clear, and that it failed to do so, and that the skidways were consequently filled up with logs, and defendant was compelled to drag about 1,000,000 feet of the logs into the vicinity of the skidways and leave them there, and then, when the skidways were cleared of logs, defendant was obliged to take his hands and cattle back and reskid this 1,000,000 feet or hire other parties to do this for him; that is to say, to put these logs on the skidways in position to be loaded on the tram cars, and that this necessitated an additional expense of 50 cents a thousand to the defendant to reskid this 1,000,000 feet, or a total of \$500, which the plaintiff had not paid him for.

From a judgment rendered in accordance with the issues, the defendant appealed.

J. Frank Ray and Robertson & Benbow, for appellant. Johnston & Horn and L. C. Bell, for appellee.

PER CURIAM. There are seven exceptions in the record, all of which are formal, except three to parts of the charge.

The first of these must be disregarded, because it is to the whole charge on the third issue, which covers 3½ pages of the printed record, and contains several distinct propositions, and the errors complained of are not pointed out. *Gwaltney v. Assur. Co.*, 132 N. C. 929, 44 S. E. 659.

The second is to the part of the charge on the third issue, as follows: "The defendant obligated himself in this contract to skid logs, and on double-deck skids, along the skidways over the tram, and, as the court thinks, there is nothing in the written contract in regard to the time when the logs would be taken off the skidways by the lumber company; and so I charge you that, nothing else appearing, the defendant could not recover anything under this issue." An examination of the contract shows that there is no stipulation requiring the plaintiff to move the logs from the skidway in any particular time, and, if the defendant relied on the contract alone, there could be no recovery

on this item of damage, as stated by his honor, as the evidence shows that the defendant did not rely upon the position that under the contract the plaintiff could not unreasonably delay the removal of the logs, but on an independent agreement between him and the plaintiff. This question was submitted to the jury under proper instructions.

The third exception is to the statement of the contentions of the parties, all of which arose on the evidence.

Upon an examination of the whole record, it appears to us that the case has been tried impartially, and that there is no error.

No error.

(157 N. C. 449)

BEARD v. TAYLOR.

(Supreme Court of North Carolina. Dec. 20, 1911.)

DEEDS (§ 38*)—DESCRIPTION—SUFFICIENCY—INDEFINITENESS.

A deed, issued at an execution sale, called for a tract, owned by the debtor (naming him), "containing about 11 acres, where he now lives, excepting three acres including house and barn—which was allotted him as his homestead the remaining eight acres or so much thereof as may be necessary to satisfy said execution." *Held*, that the deed was void for indefiniteness, in that it could not be said what part of the eight-acre tract was intended to be conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

Appeal from Superior Court, Swain County; Webb, Judge.

Action by T. G. Beard against W. M. Taylor. From a judgment for defendant, plaintiff appeals. Affirmed.

The entire case on appeal is as follows: "This is an action of ejectment against Taylor, the judgment debtor, by Beard, judgment creditor, the grantee of the purchaser at the execution sale. The court submitted the fourth issue, set out in the record, and charged upon the same as follows: 'The court charges you that, if you believe all the evidence in this case, you will answer the fourth issue, "No."' The court is of the opinion, and so charges you, that the description in that deed from the sheriff to the party under whom the plaintiff claims is so vague and insufficient that it does not convey any property at all, or any part thereof. So the court charges you that, if you believe all the evidence, you will answer the fourth issue, "No."' To this charge the plaintiff, Beard, excepts, or, to be more specific, to the part: 'The court charges you that, if you believe all the evidence in this case, you will answer the fourth issue, "No."' Also to the part: 'The court is of the opinion, and so charges you, that the description in that deed from the sheriff to the party under whom the plaintiff claims is so vague and insufficient that it does not convey any property at all,

or any part thereof.' The plaintiff, Beard, excepts to that part of the judgment in this action on said fourth issue declaring that plaintiff is not the owner of the 11 acres, or any part thereof."

The following statement appears in the record: "Calls of Sheriff's Deed of 11-Acre Tract. Also another tract of land, owned by W. M. Taylor, containing about 11 acres, where he now lives, excepting three acres including house and barn—which was allotted him as his homestead the remaining eight acres or so much thereof as may be necessary to satisfy said execution."

There was a judgment in favor of the defendant, and the plaintiff excepted and appealed.

F. C. Fisher, for appellant. Bryson & Black, for appellee.

ALLEN, J. The case on appeal does not disclose what evidence was introduced on the trial, nor does it set out or identify the deed referred to, and as the action of the judge is presumed to be correct we must affirm the judgment. If, however, the exception is intended to present the correctness of a ruling by the judge that the description under the heading, "Calls of sheriff's deed for 11-acre tract," is void for uncertainty, we would hold that there is no error. If the description had stopped at the word "homestead," it would have been sufficient, but the additional clause makes it impossible to say what part of the eight acres is intended to be conveyed.

Cathey v. Lumber Co., 151 N. C. 592, 66 S. E. 580, is in point. In that case the grantor attempted to convey 324 acres, part of a tract of land of 724 acres, and it was held that no title passed; the court saying: "The deed under which defendant claims does not purport to convey the whole of a described tract of land, but only a certain number of acres thereof, to wit, '324 acres of land, part of a certain tract of land composed of Nos. 3044, 3097, and 3098, in Graham county.' The boundaries of the entire tract, from which the 324 acres are to be taken, are set out with exactness, and the entire tract, as stated in the deed, contains 724 acres. The deed furnishes no means by which the 324 acres can be identified and set apart, nor does the instrument refer to something extrinsic to it, by which those acres may be located. It is self-evident that a certain part of the whole cannot be set apart, unless the part can be in some way identified. Therefore, where a grantor undertakes to convey a part of a tract of land, his conveyance must itself furnish the means by which the part can be located; otherwise his deed is void, for it is elementary that every deed of conveyance must set forth a subject-matter, either certain within itself, or capable of being made

certain by recurrence to something extrinsic, to which the deed refers."

The judgment must be affirmed.

No error.

(157 N. C. 621)

STATE v. CORPENING.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. CRIMINAL LAW (§ 409*)—EVIDENCE.

The part of a letter which contained severable and distinct admissions by accused tending to show guilt were admissible in evidence, though the remaining part was lost or destroyed; distinct parts of a writing containing admissions favorable to the offering party being admissible in evidence, leaving the other party to put the remaining part of the document in evidence if it explains or qualifies the admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919; Dec. Dig. § 409.*]

2. CRIMINAL LAW (§ 719*)—TRIAL—IMPROPER ARGUMENT.

It was error for the state's attorney, in a seduction case, to read to the jury the facts in a similar case in an adjoining county, relied upon as supporting prosecutrix's evidence, and to state to the jury that a jury in the other county had convicted in that case, and that the supporting evidence was much stronger in the present case than in the other case, though the state's attorney may properly state the facts of the decisions relied upon by him to the extent of applying the law of such decisions to the instant case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 719.*]

Appeal from Superior Court, Macon County; Webb, Judge.

Will Corpening was convicted of seduction, and he appeals. Reversed, and new trial ordered.

Defendant assigned as error the fact appearing of record that, with other letters, complete in form and tending to establish guilt, the court, over defendant's objection, admitted a portion of a letter containing relevant admissions of defendant, the remaining portions of the letter having been lost or destroyed; that the plaintiff's attorney, over defendant's objections, was allowed to make improper use of the facts of another case in his argument to the jury.

Johnston & Horn and J. Frank Ray, for appellant. T. W. Bickett, Atty. Gen., Geo. L. Jones, Asst. Atty. Gen., and Robertson & Benbow, for the State.

HOKE, J. [1] The portion of the letter admitted in evidence contained severable and distinct declarations or admissions tending to establish guilt on the part of the defendant, and, in our opinion, the same were properly received in evidence.

The portion of the letter which remained afforded the best evidence of the ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

missions contained in it, and apart from this admissions of this character are not ordinarily considered to be within the best evidence rule. McKelvey on Evidence, p. 94. It is sometimes said that, when an admission appears in a writing, the whole instrument, or so much of it as relates to the matter embraced in the admissions, must be read; but this must be taken with some qualification, and a party may always offer a distinct and severable portion of a writing, containing declarations or admissions of his adversary which tend to establish his position, leaving to that other the right to put such remaining portions in evidence which may serve to explain or qualify the admission. 1 Ency. of Evidence, pp. 385, 609, and note 50, p. 610; Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337; Cramer v. Gregg, 40 Ill. App. 442; Jones v. Fort, 36 Ala. 449; 1 Elliott on Evidence, § 241, p. 349.

In this last citation, it is said: "Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. Thus, as is already shown, where part of a statement or document is introduced as an admission by and against a party, or even part of a conversation or correspondence is so used, he is entitled to introduce such other part thereof, if any, as modifies or explains the alleged admission. Indeed, there is some authority to the effect that the party offering the evidence as an admission must put in the entire conversation or document, but the better rule is that, while he may do so, it is generally sufficient for him to introduce such part as he desires to use, at least where it appears complete in itself, and nothing more appears to be necessary in order to understand it."

[2] We think, however, there must be a new trial of this cause, by reason of improper user of the facts in another prosecution for like offense, which had taken place in an adjoining county the preceding year. *State v. Maloney*, 154 N. C. 200, 69 S. E. 786. As we understand the record, the counsel for the prosecution read the facts in *Maloney's Case*, relied upon as supporting evidence to the prosecutrix, and, over defendant's objection, was allowed by the court to say in effect that a jury of Jackson county had convicted *Maloney*, and the supporting evidence was much stronger "than in *Maloney's Case*," etc. True, we have held that under our statute attorneys are allowed to argue the whole case to the jury, both as to the law and the facts, and they are permitted to state the facts of the decision relied upon to the extent of applying the law of such case to the one being tried. *Harrington v. Wadesboro*, 153 N. C. 439, 69 S. E. 399. It is also true that on perusal of the entire statement the

solicitor for the state, capable and conscientious as he is, was evidently using the facts of *Maloney's Case* to sustain his position that there was evidence, as required by the statute, in support of the testimony of the prosecutrix; but we are of opinion, as stated, that in the faithful effort to discharge his duty he exceeded the rule which should prevail in such cases by using the facts in *Maloney's Case*, and the action of another jury upon them, in aid of the prosecution here.

For the error in allowing the argument to proceed, the cause must be submitted to another jury, and it is so ordered.

New trial.

(157 N. C. 454)

BRAZILLE v. CAROLINA BARYTES CO.
(Supreme Court of North Carolina. Dec. 20, 1911.)

1. EVIDENCE (§ 474*)—OPINIONS—MENTAL CAPACITY.

On an issue of plaintiff's mental capacity when he signed a release of a claim against defendant for personal injury his wife was properly permitted to give her opinion as to his mental incapacity at that time.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

2. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUATION OF MENTAL CONDITION.

One suing for personal injury, though found to have been incompetent to sign a release of claim therefor on December 23, 1909, through physical and mental suffering, is not presumed to have so far remained in that condition as to affect his right to maintain the action in October, 1911.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

3. MASTER AND SERVANT (§ 296*)—INJURY TO EMPLOYÉ — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

In an employé's personal injury action, an instruction that, if he was negligent in any degree, and this was the proximate cause of his injury, he could not recover was properly refused, as tending to confuse the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

4. RELEASE (§ 57*)—EXECUTION—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a release of claim for personal injury was obtained through fraud.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

5. MASTER AND SERVANT (§ 296*)—BLASTING OPERATIONS—INJURY TO EMPLOYÉ—INSTRUCTIONS.

In an action for injury to an inexperienced employé while tamping dynamite in a hole for blasting, an instruction requested by defendant that, if the accident was caused by the manner in which the hole was loaded, defendant was not negligent was properly modified by requiring a finding that the way adopted was not a reasonably safe way of loading.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

6. MASTER AND SERVANT (§ 150*)—BLASTING OPERATIONS—DUTY OF EMPLOYER.

One is bound to instruct his employes in the use of dangerous machinery or dynamite before assigning them to such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 299-301, 305-307; Dec. Dig. § 150.*]

7. RELEASE (§ 56*)—EXECUTION—FRAUD—EVIDENCE.

Gross inadequacy of consideration for a release of claim for personal injury is a circumstance which may be considered on an issue of fraud in its procurement.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 101-105; Dec. Dig. § 56.*]

8. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—BLASTING OPERATIONS.

Unless plaintiff employe knew of the great danger in using iron tamping rods in a blasting operation and voluntarily risked their use, he did not assume the risk of injury therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

9. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—BLASTING OPERATIONS.

Use of an iron tamping rod by an employe in a blasting operation will not prevent him from recovering for injury resulting therefrom, unless the apparent danger was so great that its assumption would amount to a reckless indifference to probable consequences.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

10. MASTER AND SERVANT (§ 208*)—RISKS ASSUMED.

An employe assumes the risk ordinarily incident to his employment, but not dangers arising from the employer's failure to furnish reasonably safe and suitable tools, unless, in careful performance of the work with the tools furnished, the inherent probabilities of injury are greater than those of safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

11. MASTER AND SERVANT (§ 226*)—INJURY TO EMPLOYE—NEGLECT OF FELLOW EMPLOYE—EFFECT.

One is liable to his employe for injury proximately caused by a breach of the employer's duty, notwithstanding concurrent negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

12. COSTS (§ 256*)—UNNECESSARY RECORDS—TAXATION.

Under Supreme Court rule 22 (140 N. C. 661, 66 S. E. vii), providing for taxation of costs against a party on appeal who causes unnecessary records to be sent up, appellee is properly chargeable with costs created by his causing to be sent up contentions of the parties as a part of the charge, and putting in a large part of the testimony in the form of stenographer's notes, instead of in narrative form; the contentions of the parties not being material to any of the exceptions urged.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Appeal from Superior Court, Madison County; Lane, Judge.

Action by Charles Brazille against the Carolina Barytes Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin & Wright, for appellant. Guy V. Roberts, W. W. Zachary, and Moore & Rollins, for appellee.

CLARK, C. J. This is an action to recover damages for personal injuries. The plaintiff alleges that the company furnished him and other employes iron tamping rods, to be used in tamping dynamite, and while so being used the iron tamping rods caused an explosion which seriously and permanently injured the plaintiff. He further alleges that in a few days after his return from the hospital, and while blind and suffering in mind and body from said injuries, and mentally incompetent and incapable of transacting any business, the defendant company, by fraud and false representation, secured his signature to an alleged release. The defendant denied that the release was procured by fraud, and alleged that the plaintiff was competent to transact business at the time it was signed. There was evidence that the plaintiff was an inexperienced miner, and did not know the danger of using the iron tamping rods; that the defendant knew that it was highly dangerous to allow its employes to use them, but decided to take the risk, as the company could get along faster and do more work. The jury found, in response to the 13 issues submitted to it, that the plaintiff was injured by the negligence of the defendant company; that he was not guilty of contributory negligence; that he did not assume the risk; that he was not injured by the negligence of a fellow servant; that the plaintiff did not have sufficient mental capacity to execute the release; that the defendant had knowledge of plaintiff's mental incapacity; that the release was obtained by fraud and fraudulent representation; and that the amount (\$372) paid the plaintiff at the time he signed the release was not a fair and reasonable consideration, and assessed the plaintiff's damages at \$4,850.

[1] The first exception is because the plaintiff's wife was allowed to testify as to his mental incapacity the day he signed the release. This was competent. *Stewart v. Stewart*, 155 N. C. 341, 71 S. E. 808; *Clary v. Clary*, 24 N. C. 78; *Whitaker v. Hamilton*, 126 N. C. 466, 35 S. E. 815; *Horah v. Knox*, 87 N. C. 485; *Bost v. Bost*, 87 N. C. 479.

Exception 2, for refusal of the motion to nonsuit, cannot be sustained.

[2] Exception 3 is because the court did not set aside the verdict upon the motion of the defendant, on the ground that, the jury having found the plaintiff mentally incompetent when he signed the release, and he having failed to allege and prove sanity since, he could not bring this action. If there was estoppel, it was upon the defendant, who had alleged in its answer that

the plaintiff had mental capacity. It is true the jury found that the plaintiff was incompetent to sign the release December 23, 1909, by reason of his physical and mental suffering at that time, caused by his injuries; but there was no presumption that such suffering, with the consequent mental and physical inability to attend to business, continued down to the time of the trial in October, 1911.

Exception 4 was because the court signed judgment upon the verdict.

[3] Exception 5 is because the court refused to instruct the jury that if "the plaintiff was negligent in any degree and this was the proximate cause of his injury they will answer the tenth issue 'yes.'" An instruction that if the plaintiff was "negligent in any degree" would simply confuse the jury and has been condemned in ——— v.

———, at this term. Beach, Con. Neg. §§ 21-26; Thompson, Negligence, §§ 170-172, and 267; 7 A. & E. Enc. 383. The court properly refused to instruct the jury that if they believed the evidence to answer the tenth issue "yes" and also in refusing to instruct the jury to make the same response if the plaintiff knew the danger of using an iron tamping rod. These are the 6th and 7th exceptions. In lieu of them the instruction of the court on these propositions was in accordance with our precedents.

[4] The 8th, 12th and 18th exceptions are because the court refused to instruct the jury to answer the issue as to fraud in obtaining the release in the negative. There was evidence tending to show fraud which was sufficient if believed by the jury to justify the finding of the issue in the affirmative. Among them was the evidence that the plaintiff's wife and brother were not permitted to be present in the office when the release was signed but were left outside in the cold; that the release was executed in a few days after the plaintiff left the hospital, and while he was suffering great pain and mental anxiety occasioned by his injuries; that plaintiff was ignorant and unable to write, blind, and his hearing badly impaired; that, as he testified, he thought that he was giving a receipt for wages; that he had no friends or counsel to advise him; that the consideration paid was \$372, whereas the jury found that \$4,850 was reasonable and just compensation. These and other circumstances were sufficient to carry the case to the jury and justify its finding. *Hayes v. R. R.*, 143 N. C. 128, 55 S. E. 437; *Dorsett v. Mfg. Co.*, 131 N. C. 259, 42 S. E. 612; *Bean v. R. R.*, 107 N. C. 746, 12 S. E. 600.

[5] The ninth exception is because the court modified an instruction asked by the defendant, that if the accident was caused by the manner in which the hole was loaded to answer the issue as to the defendant's negligence, "No," by adding, "if this was not a reasonably safe way of loading a hole."

[6] Exception 10 is because the court instructed the jury "that it was the duty of the employers to instruct their employes in the use of dangerous machinery or dynamite before assigning them to such duty." This instruction was proper. *Horne v. Railroad*, 153 N. C. 239, 69 S. E. 132. Exception 11 was on substantially the same grounds.

[7] Exception 14 is because the court charged the jury that if they found that the consideration paid for the release was grossly inadequate that this was a circumstance which they could consider in passing upon the fourth issue, as to fraud in procuring the release. This charge was in accordance with *Dorsett v. Manufacturing Co.*, 131 N. C. 259, 42 S. E. 612.

[8] Exception 15 is because the court charged the jury: "That, unless you find by the greater weight of the evidence that the plaintiff knew of the great danger in using iron tamping rods, and voluntarily and willingly made up his mind to run the great risk incident to using the same, then you should answer the twelfth issue, 'No.'" This charge is in accordance with *Hicks v. Manufacturing Co.*, 138 N. C. 320, 50 S. E. 703; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611.

[9] Exception 16 is because the court charged the jury "that the use of an iron tamping rod, if it was obviously dangerous, will not prevent the plaintiff from recovering for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences." This is practically the language used by the court in *Coley v. Railroad*, 129 N. C. 411, 40 S. E. 195, 57 L. R. A. 817.

[10] Exception 17 is because the court charged: "That the servant assumed the risk ordinarily incident to his employment, but he does not assume the risk from dangers which arise from the failure of the master to furnish his servant reasonably safe and suitable tools with which to do the work required of him, unless, in the careful performance of the work with the tools furnished, the inherent probabilities of injury are greater than those of safety." The defendant admits that this language is substantially what was said in *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703.

[11] The eighteenth and last exception is because the court erred in instructing the jury: "Where the master falls in his duty to the injured servant, this failure is the proximate cause of the injury, and the fact that the negligence of a fellow servant also commingles with it as a proximate cause will not exonerate the master from liability." This exception cannot be sustained. *Thompson on Negligence*, §§ 4856, 4857, 4858.

This court said, in *Kornegay v. Railroad*, 154 N. C. 392, 70 S. E. 732: "The charge of the court, when properly considered as a whole, was in accordance with the principle settled in the cases just cited. We are not

permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other portions of the charge, they are readily explained, and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it."

[12] The defendant excepted at the time of settling the case on appeal, "for that the court, at the instance of the plaintiff, sent up the contentions of the parties as a part of the charge, and put in a large part of the testimony in the form of stenographer's notes, instead of in narrative form." This exception was in accordance with the provisions of rule 22 of this court (140 N. C. 661, 66 S. E. vii), and complies with the repeated decisions thereon. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53. As there was no point made on the judge's reciting the contention of the parties, and they were not needed to enlighten the court as to any of the exceptions, it was unnecessary to send them up; and it was also improper to send the stenographer's notes up in the form of question and answer, but the evidence should have been stated in narrative form, as we have so often ruled. The unnecessary matter thus sent up we estimate at 40 printed pages, the cost of copying and printing which will be taxed against the appellee, as provided in rule 22. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954.

No error.

(158 N. C. 1)

HERRING et ux. v. WILLIAMS et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. WILLS (§ 614*)—CONSTRUCTION—ESTATES—DEVISES.

Where a testator gave his wife all his property, real, personal, and mixed, and whatever the same should be at his death, "to have and to hold during her natural life," and at her death, the property, or so much thereof as might be then in her possession, over to another, the wife took only a life estate, subject to a remainder in fee, and hence the wife having conveyed her estate, her grantee was liable for waste committed upon the property during her life.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 614.*]

2. POWERS (§ 33*)—CONSTRUCTION—DEED.

Where a devisee had an estate for life and the power of disposition, her deed to the property, which did not refer to the power, conveyed only her life estate.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

Walker and Hoke, JJ., dissenting.

On petition for rehearing. Petition allowed, and former opinion overruled.

For former opinion, see 153 N. C. 231, 69 S. E. 140, 138 Am. St. Rep. 659.

BROWN, J. We have given this case a re-examination, and have been forced to the conclusion that our former construction of the will of the testator Williams was erroneous. The writer holds himself as much responsible for the conclusion reached in the first opinion as if he had written it himself instead of the learned and able judge whose name is prefixed to it. But further examination having convinced us that we were in error, it is our duty to say so, and to hold that the original judgment of his honor, Judge Guion, is correct.

The facts are fully and accurately stated in the first opinion. By reference to the report of the case it will be seen that the defendant Carrie Williams, widow of the testator, executed an ordinary deed in fee to her codefendant Williams, without any reference in the deed whatever to any power conferred by the will. This is an action by the remainderman Bettie Meton or Melton, the feme plaintiff, against Green for waste, damages, etc., for wrongfully cutting all the timber from the land for purposes of sale only.

[1] It is said in the former opinion of the court in this case that "the primary purpose of the courts, when a will is presented for construction, is to ascertain the intention of the testator from the language used by him." And in determining this question the courts hold, as pointed out by Justice Manning, that the rules of construction require that all the words used by the testator shall be given effect, "unless they are in themselves meaningless, or so vaguely expressed a purpose that no definite intention can be inferred, or are plainly inconsistent with an otherwise clearly expressed intention, or are repugnant to some established rule of law." It is in our application of this latter principle to the will presented for construction that we now think we fell into error in the decision of this appeal. We gave to the words "or as much thereof as may be in her possession at the time of her death" an effect, which, after further consideration and investigation of the authorities, we do not think can fairly be sustained. The will of the testator, William R. Williams, contained the following language: "I give, devise and bequeath unto my beloved wife, Carrie Williams, all my property, real and personal and mixed, of what nature or kind so ever, and wherever the same shall be at the time of my death to have and to hold during her natural life, and at the death of my wife, the said Carrie Williams, the said property or as much thereof as may be in her possession at the time of her death is to go to Bettie Meton, her heirs and assigns forever."

In construing this will, we held that the use of the words "or so much thereof as may be in her possession at the time of her

death" conferred upon Mrs. Williams a power of disposition and thereby enlarged her life estate into an estate in fee in the event she should exercise such power. Guided now by that cardinal rule for the construction of wills—the intention of the testator—we are of opinion that it was the intention of Mr. Williams to give his wife merely a life estate with remainder to Bettie Metou in fee.

In order to give expression to every word used by the testator, we are not required to hold that the language quoted above refers to real property, but can restrict it to the personality of the testator, and such restriction is sustained by both reason and authority because it avoids inconsistency in the provisions of the will and maintains its integrity. Adopting this construction, we hold that the interest of Mrs. Williams, the wife of the testator, in the real estate is fixed by the specific language of the will "to have and to hold during her natural life."

It is said in *American & English Ency. of Law*, vol. 30, pp. 737, 738, that: "Where the quantity of the estate is devised definitely and specifically, the rule that a devise coupled with an unlimited power of disposition and control carries an absolute interest in the property has no application, and only a life estate coupled with a power of disposal passes. This power it has been adjudged is only coextensive with the estate which the devisee takes under the will." And the same text contains this statement: "It is clear, however, that by appropriate expressions of intent the power will not refer merely to the life interest of the first taker, but will give him a life estate coupled with a power to dispose of the entire estate absolutely." This latter statement is sustained by *Troy v. Troy*, 60 N. C. 624, in which property was devised to the wife for life with remainder to testator's son, and the wife was by express terms given power to sell all or any part of the property in the exercise of her judgment, and other expressions in the will indicated a clear intention on the part of the testator to confer upon his wife a general power of disposition and to enlarge the life estate created by the will. Referring to this power Chief Justice Pearson says that it is "a power appurtenant to the life estate, and the estate which may be created by its exercise will take effect out of the life estate as well as out of the remainder." This case is not authority for the contention that the language in the will before us should be so construed as to give Mrs. Williams a general power of disposition and thereby empower her to convey the real property in fee. The intention to confer the power was clearly expressed in *Troy v. Troy*, and the question of the establishment of such power by implication was not presented. The decisions in other courts are to the effect that the intention to create the power of disposition must

clearly appear from the language of the will, and will not be implied from language entirely consistent with the special reference to the life estate, and in that view we concur.

In considering a case in which the testator used the words "the remainder that is left," the Supreme Court of Missouri says: "It is needless to say that an intention clearly expressed in a will should not be defeated, except by some inflexible rule of law or public policy, unless a wholly inconsistent intention is manifest upon reading the entire instrument. This is particularly true when the inconsistency is raised by implication only. The implication to have such effect should be very conclusive." In *Wardner v. Baptist Memorial Board*, 232 Ill. 613, 83 N. E. 1080, 122 Am. St. Rep. 138, it is held that the use of the words "all that remains of the property" did not manifest an intention to create a power in the life tenant to dispose of the whole estate, the court saying: "It is a general rule in all cases where by the terms of the will there has been an express limitation of an estate to the first taker for life and a limitation over, with general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, that the power of disposal is only coextensive with the estate which the devisees take under the will, and means such a disposal as the tenant for life could make, unless there are other words clearly showing that a larger power was intended." And in *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, the testator's property, real and personal, was left to his wife with the provision that "if she should marry again, then it is my will that all the estates herein bequeathed, or *whatever may remain*, shall go to my surviving children, share and share alike." It was contended that there are words in this clause of the will which imply an absolute power of disposition, and give to the children only what may remain undisposed of in the wife's hand at the termination of her estate. "The contention," says Mr. Justice Wood, "rests upon the words 'or whatever may remain,' and is that they imply that a part or all of the estate might be absolutely disposed of by the wife during her widowhood. If the purpose of the testator in the disposition of his property is what the other parts of his will clearly indicate, then these words cannot be construed to change that purpose. They can have operation without giving them that effect. He was seised of real estate and possessed of personal property. Both were included on the devise to the wife, and she was to have the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personality, and the entire clause to give to his children a

remainder in the real estate and whatever of the personalty was not consumed, by the widow during widowhood." *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, and *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619, are to the same effect.

The case of *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102, strongly supports the views expressed in the foregoing cases. The following language was used by the testator in that case: "I give and bequeath to my beloved wife . . . the farm on which we now reside, . . . also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter." It was held that the wife took a mere life estate in the entire gift. The court says: "The misapprehension of the legal effect of the devise doubtless grows out of the use of the expression 'whatever remains' by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to override the clearly expressed intention that the widow should take a life estate only. . . . It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has." See, also, *Thompson v. Adams*, 205 Ill. 552, 69 N. E. 1, a more recent decision by the same court.

In *Russell v. Wernitz*, 88 Md. 210, 44 Atl. 219, the testator gave the residue of his property to his wife "to hold and dispose of as she may see fit, while she remains single, and at her death or marriage, the remaining property is to be equally divided between my two daughters." The court held that the widow took only a life estate in the real property, with remainder to the daughters, and that she had no power to dispose of the same in fee. "But it is contended," says the court, "that the words 'the remaining property' should be regarded as indicating that the testator intended that the appellant should have the right to diminish the corpus of the estate. But we do not accept this view. The will, evidently, was not drawn by one accustomed to the preparation of such instruments. The words employed were not chosen with regard to their technical meaning. The property that passed under the second item comprehended both realty and personalty. All of it was liable to waste or decay. Some portions of it doubtless would deteriorate by its use, and other articles were of such nature that their use was their consumption. In view of the general and particular intents of the will, it is not straining the construction of these words to regard them as indicating the intention of the testator that his widow should not be accountable for such loss or waste as might result from her personal enjoyment of the property." In *Cox v. Sims*, 125 Pa. 522, 17

Atl. 465, the testator gave to his wife the residue of his estate for life, and after his death all of said property or "so much as may remain unexpended" to his children. The court in disposing of the appeal said: "We are satisfied that her estate in the lands of the testator is for life, and that she has no power, express or implied, to dispose of any interest therein." A similar ruling was made in *Taylor v. Bell*, 158 Pa. 651, 28 Atl. 208, 38 Am. St. Rep. 857.

The English cases, which are reviewed by the New Jersey Court of Chancery in *Tooker v. Tooker*, 71 N. J. Eq. 513, 64 Atl. 806, will be found to sustain our conclusion that the words used in the will before us are not sufficient to create power to dispose of the real property of the testator in fee. *Constable v. Bull*, 18 L. J. Eq. 302; *Bibbens v. Potter*, 10 Ch. Div. 733; *In re Adams Trust*, 11 Jur. N. S. 961.

The view that the language of this will, which it is contended creates a general power of disposition, refers to the personal property that may be in Mrs. Williams' possession at the time of her death, finds direct support in *Williams v. Parker*, 84 N. C. 90, in which the devise was in the following language: "I give and bequeath to my wife, Polly Williams, and my grand-daughter, Sarah Jane Williams, all my land whereon I now live, and all my personal property of every order, during my wife Polly's lifetime, and at my wife Polly's decease, if there should be any property or money left, then I devise and bequeath," etc. It was held by this court that the property referred to as being left was personal property and did not include the real estate. This case is cited and approved in *Brawley v. Collins*, 88 N. C. 605, in which the following clause appeared in the will under consideration: "It is my will that all property, money and effects willed by me to my wife, Mary, that may be left at her decease, shall be equally divided between my daughter Betsy, and grandsons, Stephen Brawley and Peter W. Brawley." The plaintiffs, the grandsons referred to in this clause, asserted title to the land in dispute as a limitation in remainder to them and their aunt in equal parts, after the death of the testator's wife, contending that the use of the word "property" included real and personal estate. This court in an opinion by Chief Justice Smith rejected this contention, and held that it was the intention of the testator to limit the scope of the expression "all property, money and effects that may be left at her decease" to personal property. Chief Justice Smith says: "Manifestly as land is not subject to a contingency, since it *must*, not *may*, be left when life estate expires, he intended such goods as might be destroyed or consumed by the preceding owner, but in fact are not, but remain for the bequest in remainder to operate on." The court was guided in that case by the intention of the testator, and at the

same time all the language of the will was given effect, and we accomplish a similar result in the case before us by holding that the words "or as much thereof as may be in her possession" refer only to personal property, thereby preventing the repugnancy that arises from a construction by which the will is held to create a life estate with remainder over and in the same sentence grants a power by which the life estate may be enlarged into a fee and the remainderman disappointed. As the court says in *Brawley v. Collins*, supra, our duty is not to inquire what the words may comprehend, but what do they signify, and in what sense are they used by the testator, and, "when this is satisfactorily ascertained from an inspection and comparison of the several provisions of the instrument, the construction must be adopted which carries out the intent."

We have not deemed it necessary to review the authorities cited in our former opinion. Many of them will be found to fall within one of two classes, both of which are readily distinguishable from our case: First, cases in which there is a devise for life with language which expressly gives the devisee a general power to dispose of both real and personal property; and, second, cases in which the devise is not limited to a life estate, but the property is devised absolutely with a provision that what remains at the death of the devisee shall go to certain designated persons. The cases of *Troy v. Troy*, supra, and *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649, fall within the first class. There is a point made by the plaintiff, which we overlooked, which seems to us to be conclusive of her right to recover damages as against defendant Green.

[2] If we should concede that the language of the will should be so construed as to confer upon Mrs. Williams the power to dispose of the real property, such construction would not defeat the plaintiff's right to recover in this action against her grantee Green. The deed to the defendant Green by Mrs. Williams does not purport to have been made in the exercise of the power of disposition; it contains no reference whatever to such power, and, upon a well-settled principle of law in this court, the deed could not convey an estate in fee. The will, by language that is unequivocal, gives Mrs. Williams a life estate in her husband's property, real, personal, and mixed, and her deed, in the absence of any reference to the power of disposition, which she claims is conferred by the will, is held to convey only her life estate. "When the donee of a power to sell has an estate of her own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction established by the decisions is that she intends to convey only what she might rightfully convey without the power." *Towles v. Fisher*, 77 N. C. 440; *Exum v. Baker*, 118 N. C. 545, 24 S. E. 351. And

"the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation; and if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power." *Carraway v. Moseley*, 152 N. C. 353, 67 S. E. 765. We are of opinion, therefore, that it was properly held in the court below that the deed from Mrs. Williams to the defendant Green conveyed only her life estate.

In view of the fact that this opinion affirms the judgment of the superior court in favor of the plaintiff, we have examined the other exceptions in the record and find that they are without merit. It was not necessary to consider them when the case was originally before the court because the main question was decided in favor of the defendant who brought the appeal to this court. Petition allowed.

ALLEN, J. (concurring). Petitions to rehear, except as to the time of filing, are regulated by rules adopted by this court, and not by statute, because a statute cannot be suspended, and a rule may be, if the justice of the cause requires it. They are for convenience and to aid in the attainment of justice, and not to perpetuate a wrong. If, therefore, I come to the conclusion that a decision of this court is erroneous, and that it unjustly deprives a citizen of his property, I shall favor a reversal of the decision, although no fact has been overlooked, and no new authority can be found. Entertaining this view, I feel that it is proper for me to consider the questions presented by the petition, and in the outset it is well to state the facts.

In August, 1902, W. R. Williams died, seized in fee of the land in controversy and of a town lot, leaving a will, in which he disposed of his property as follows: "I give, devise and bequeath unto my beloved wife, Carrie Williams, all my property, real and personal and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death, to have and to hold during her natural life, and at the death of my wife, the said Carrie Williams, the said property or as much thereof as may be in her possession at the time of her death, is to go to Bettie Meton, her heirs and assigns forever. And I do nominate, constitute and appoint my said wife the sole executrix of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore made by me, and do declare this my last Will and Testament." Shortly thereafter the devisee, Carrie Williams, executed a deed to the defendant Green, her brother-in-law, purporting to convey the town lot in consideration of \$700, which the defendant alleges in his answer he paid to her, and on February 23, 1903, she purported to convey to said defendant in fee the tract of land in controversy in

exchange for a town lot conveyed to her in fee. The deed to the defendant does not refer to any power conferred by the will, and the only consideration to support it is the execution of the deed to her in exchange therefor.

W. R. Williams and wife had no children, and Bettie Melton, now Bettie Herring, is their foster child, reared by them since she was ten weeks old. It is true that the intention of the testator should be gathered from the will and the attendant circumstances, but it should be clear and unmistakable before it is held that one who takes a life estate under the will can, within six months after the death of the testator, sell one of the two pieces of land devised, and hold and use the money, and can exchange the other for other land and own that in fee simple, and thereby defeat the interest of the remainderman.

I concur in the construction placed upon the will in the opinion of Mr. Justice BROWN, but if, by any interpretation, a power of disposition is conferred on the life tenant as to the land, it could only be exercised when necessary for support and maintenance, which does not appear here. The testator gave to his wife a life estate in the land and personal property, and to his foster child an estate in remainder, and he must have intended both to take effect. He appointed his wife executrix, and knew his personal property would be in her possession, and he also knew that it might be consumed or destroyed, and that in all probability some of it might not be in her possession at her death, and it seems to me that a reasonable construction of the language "or as much thereof as may be in her possession at the time of her death," is that it refers to the personalty. When there are found two species of property, the one technically and precisely answering the description in the devise, and the other not so exactly answering that description, the latter will be excluded. *Bolick v. Bolick*, 23 N. C. 248. I will not undertake to review the authorities supporting this view, as they are stated with clearness and accuracy in the opinion of the court. I also think it was necessary for the deed to refer to the power.

It is said in *Kent*, vol. 4, p. 335: "The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power"—and this is cited with approval in *Exum v. Baker*, 118 N. C. 545, 24 S. E. 351. The case of *Towles v. Fisher*, 77 N. C. 438, is, I think, a direct authority on this point. In the case under consideration all the property, real, personal, and mixed, is devised to Carrie Williams for life, and at her death the said property, or so much thereof as may be in her pos-

session at the time of her death, is given to Bettie Melton. Carrie Williams attempted to convey to the defendant in fee.

In the *Towles* Case, William Shaw devised his land to his wife for life, and he devised to James Callum and Mary Callum "on the death of his wife," all the property, real and personal, belonging to his estate, which may be in possession at the time of her death. There was a codicil providing that sales should be made with the consent of the executors. The wife attempted to convey in fee without the consent of the executors, and without reference to the power. After holding that the deed was not valid because the executors did not consent thereto, the court says: "In addition to this, when the donee of a power to sell has an estate of her own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction established by the decisions is that she intends to convey only what she might rightfully convey without the power. These doctrines are so generally accepted that we think no reference to the authorities is necessary. They may be found cited in the brief of the counsel for the plaintiff. The deed to Primrose conveyed only the life estate of Priscilla Shaw." The rule seems to be well established, and it seems to me to be meaningless if it be said, that when one, who owns an interest with a power of disposition, conveys more than he owns, without reference to the power, that the conveyance will be referred to the power.

If, however, these views are not sound, and by correct construction the wife took a life estate under the will, with the power to sell the land, I still think the deed to the defendant is not good, because I do not think an exchange of lands was contemplated, or that it would be a valid execution of the power for the life tenant to convey the land devised to her for life to her brother-in-law in fee, and receive in exchange therefor a deed in fee for another tract of land.

WALKER, J. (dissenting). This court has repeatedly held, and with decided emphasis, that the weightiest considerations demand that the court should adhere to its former decision in a case, where it was made with unanimity and after full argument and consideration (*Lewis v. Rountree*, 81 N. C. 20; *Ashe v. Gray*, 90 N. C. 137); and it will not on petition, however earnestly and zealously pressed by counsel, re-examine the same authorities and reconsider the same course of reasoning in order to reverse its previous ruling (*Dupree v. Insurance Co.*, 93 N. C. 237; *Hannon v. Grizzard*, 99 N. C. 161, 6 S. E. 93). No case ought to be reheard upon petition unless it was decided hastily and some material point was overlooked, or some direct and controlling authority was not called to the attention of the court and was overlooked by it. *Watson v. Dodd*, 72 N. C.

240; Hicks v. Skinner, 72 N. C. 1; Devereux v. Devereux, 81 N. C. 12; Haywood v. Daves, 81 N. C. 8. In Weisel v. Cobb, 122 N. C. 67, 30 S. E. 312, it was said that "rehearings of our decisions are granted only in exceptional cases, as the highest principles of public policy favor a finality of litigation, and even when granted, every presumption is in favor of the judgment of the court already rendered," and, further, that where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered at the first hearing, the judgment will not be disturbed. The present Chief Justice, in Elmore v. Railroad, 131 N. C. 576, 42 S. E. 989, strongly and earnestly inveighed against the prevalent and increasing tendency to ask for rehearings, and stated what he thought should be the invariable rule, and the one established by more than a hundred decisions of this court, that the purpose of a rehearing is not to consider the same facts, briefs, and authorities used on the former hearing. With all possible deference, I assert that we are doing that very thing now, as the sequel will show. Nothing was brought forward on the rehearing but what we heard and knew before, viz., that there is some conflict in the authorities, but I do not think that I take much risk in stating that the great weight of authority in this country, if not in England, favors the judgment formerly rendered by this court. The case was thoroughly and carefully considered by us, and it is manifest, from the opinion delivered by Justice Manning—one of the ablest and most learned, one of the most diligent and painstaking and exhaustive in investigation, of the judges who have ever sat in this court—that no authority of importance was overlooked or disregarded. It is only a question now, as will be seen, whether we should follow our own decisions and the majority of the courts, or the minority of them. It may be remarked generally, and in limine, that the cases cited in the opinion now filed, as supporting the decision, have no application to the special facts of this case, but were rendered upon a state of facts substantially different. Consider the case of Giles v. Little, 104 U. S. 291, 26 L. Ed. 745, the principal one relied on in the opinion of the court, and we find that there was personal property of a kind which would be consumed by its use and where the expression "whatever may remain" is used in a limitation over, it was held as restricted to the consumable personal property, such as crops and provisions, and this testator had none of this sort. But even this view is rejected by some of the other courts, as not only changing the words, but as defeating the clearly expressed intention of the testator. In those cases where it is held that the *jus disponendi* is confined to the life estate given by the will, it appeared that there was no limitation over, and the language and nature of the devise required such a construc-

tion. A very few courts, confounding cases like ours with cases of that kind, have been misled into holding that where the general right to dispose of the property is given to the life tenant, with a limitation over of what remains, it is restricted to the life estate and does not extend to the fee. The fallacy of this reasoning is apparent when we consider that the life tenant has, by law, the right to dispose of the life estate, and did not require any authority or power from the testator to do so, and such a ruling makes the words as to the disposal useless and inoperative, contrary to the rule that we must sustain the will as a whole, giving effect to every part of it. The testator having devised the life estate, could not unreasonably restrict the right to dispose of it, which is a legal incident of it, and why should we say that he intended to give that right which she already had, rather than that which would be of some use and benefit to her? Why should we practically strike out words, rather than give them the only meaning they could reasonably have? The first and great rule in the exposition of wills, to which all other rules must yield, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322. And in seeking for the intention of the testator as to the construction or interpretation that should be placed upon ambiguous terms or clauses in a will, the relation of the parties, the nature and situation of the subject-matter, the purpose of the instrument and the motives which might reasonably be supposed to influence him in the disposition of his property, may properly be considered. *Smith v. Bell*, supra; 17 Am. & Eng. Enc. of Law (2d Ed.) p. 21; 17 Cyc. 673, and cases cited in each. In this case it appears that the testator owned the land, which was sold to the defendant, John H. Green, and a mule and wagon, and, perhaps, a cart, things not consumed in their use. He gives, devises, and bequeaths all his property, real, personal, and mixed, of every kind, to his wife during her life, and at her death, *the property*, or as much *thereof* as may then be *in her possession*, to Bettie Melton. It is evident from the words used that the testator intended to give his widow the same use and benefit of all his property. There is nothing in this will or in the character and condition of his estate, or the state of his family, which authorizes the construction that he intended to restrict the words of limitation over to the personalty or the consumable part thereof, any more than to the real property, for his words are, "the said property (that is, real, personal, and mixed) or as much thereof (that is, the same property just described, it being the only meaning of this adverb), as may be *in her possession* at the time of her death, is to go to Bettie Melton." Is that not the only natural and reasonable construction of his language? He

had the undoubted right to give her a life estate with the general power of disposal, and how more clearly could he have expressed such a purpose? When he says "*the said property*," or as much *thereof* as may be in her possession," how can we say that he did not mean all of the property, though he said so, but only a part? Suppose, as here, he had no consumable property, by which she could support herself, such as crops or provisions, and she had no funds with which to make the other property available for her support and maintenance, must she starve for the want of power under the will to convert what he did give her into productive or consumable property? Was it intended by the testator to give his widow, who was entirely dependent upon his bounty, a stone when she needed bread? He must be supposed to have understood the situation and to have provided for her with reference to it. The plaintiff's own witness, F. G. Ward, testified, that the property was "in such shape" that she could not make a living upon it, or it seemed to him that way. Any construction that prevents her from disposing of all the property would lead to the conclusion that her husband intended to give her something which, instead of being a benefit, would be a burden to her.

It was held in *Hemingway v. Hemingway*, 22 Conn. 462, that the word "possessed" denotes ownership and not merely personal or corporeal occupation. When the testator limited over the property—real, personal, and mixed—"in her possession at the time of her death," he clearly meant such as she had not disposed of by sale or otherwise, for property which was in her actual possession, and under her control, would go to the remainderman anyhow. It is better and safer to give effect to the words of the testator, and all of them, according to their natural sense and their accepted meaning, than to surmise that while he expressed himself broadly and comprehensively in favor of his dependent wife, so that his gift to her could take effect beneficially, he did not mean it, but something else that favors a remainderman, who was not his child, or even a blood relation, so far as appears. The first object of his care and bounty, it would seem, must be less considered than the second, so that the latter may enjoy the substantial benefit of the gift. The language of the court in *Clark v. Middlesworth*, 82 Ind. 240, in construing a testamentary clause substantially like this one, is very significant in this connection: "We think it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her, by the clearest implication, a power to dispose of the same. The words 'and at her death, should anything remain,' are senseless and without meaning unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The

words show that he must have contemplated this at the time, and therefore have intended it." And so are the words of Justice Connor in *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649: "To restrict the power of disposal of her life estate would be to nullify its effect. She had such power incident to her life estate. To confine the power of disposal to such life estate would do violence to the rule of construction that every word used by the testator should be given force." That was held to be law by this court, contrary to some of the authorities cited in support of the impending ruling, and, too, where there was no ulterior limitation. How much more does the construction now placed upon this will neutralize their meaning, if it does not literally excise the words used by the testator to express his desire in respect to his wife, who needed his help far more than the feme plaintiff. It has the effect of reading out of the will something that we would expect him instinctively to put into it, and reading into it something that it would be unnatural for him to have willed, considering the admitted facts and circumstances. The difference between a gift for life with a power of disposal, express or implied, and without an ulterior limitation, and one with such a limitation, is stated in 30 Am. & Eng. Enc. pp. 737, 738, which is quoted by the court in its opinion. In the latter case, the estate is for life, and the remainder will take effect, as to all property not disposed of, and as to this, the fee passes to the purchaser, the same as if the property had been given in fee, instead of for life, to the devisee and legatee. In other words, as said by Judge Pearson in *Troy v. Troy*, 60 N. C. (Hinsdale Ed.) 624, "the power is appurtenant to the life estate; and the estate created by its exercise will take effect out of the life estate, as well as out of the remainder." But it is useless to continue the argument in favor of the correctness of our former decision, as it is so fully sustained by cases decided by courts of the highest authority, whose opinions are respected and followed everywhere, and by text-writers. "Although a devise be expressly for life of a devisee, yet if the devisee be, by other clauses of the will, permitted to use and dispose of the subject absolutely at his pleasure, or if so much as may remain undisposed of by him at his death (which implies a power of unqualified disposition) be given over at his decease, the devisee is construed, by a necessary implication of the testator's intention, to take a fee simple." 2 Minor's Insts. 969, 970. So in *Madden v. Madden*, 29 Va. 377, in an able and exhaustive review of the cases on the subject, it was ruled to be settled law that, "Whenever there is an interest given, coupled with an absolute power of disposition in respect to all property of every description, real and personal, the first taker would have the absolute property, and that there was no dis-

inction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely, with a superadded power to dispose of by deed or will." In *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, the estate was to Agnes Redd for life, with this provision: "Should she die without leaving a child, in that case the property or what remains of the same, to go to Nancy Massie"—and it was held that she could dispose of it absolutely in fee, the court saying: "This language cannot be reasonably construed otherwise than that the devisee under it has not only the power to use this property, but to consume it, if she will. The gift over at her death of what 'may remain of the same' shows that the testator intended, notwithstanding the direction that the property was to be held by the trustees named, during her natural life, that she should have the power to dispose of, consume, or spend it in her lifetime, which she could only do by being invested with the fee simple. What might remain of the same was all that was to go over. The language forcibly implies an unlimited and unqualified power of disposition. The devisee could acquire no greater estate, nor exercise greater power over it. To put any restriction upon her absolute dominion over it, would be to say that the whole, or some part of it, should go over to second taker, when the will expressly says that only 'what may remain of the same' shall pass to the second taker." To the same effect is *Clark v. Middlesworth*, 82 Ind. 240, in which the testator gave all his real and personal estate to his wife for life, and at her death, if anything remained, the same to be divided among his heirs at law. The same court followed this decision in *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904, where the clause of the will was substantially like that we are construing in this case. It was held that the wife, to whom the real and personal property were given for her life, had power to convey the fee in the land, and might do so without referring to the will. It seems to me that the reasoning in *Paine v. Barnes*, 100 Mass. 470, is directly applicable to this case. The property willed was real and personal, and the court said that, upon the authorities, the meaning of the phrase, "if anything should remain in connection with the devise of a remainder of real property after an estate for life," would imply a power to convey, as otherwise there could be no reason for the doubt whether the estate would remain. There are many other cases of the same purport, but as a number of them are reviewed in the former opinion of the court, it is not necessary to comment upon them. It seems to me also that this case may be distinguished from those cited in the opinion of the court by the fact that the testator uses the word "possessed" or "in her possession," thereby necessarily implying, not as the word "remain" or "remaining" may, perhaps, be construed,

that she might dispose of some, if not all of the property, real and personal, and it might not, at her death, be "in her possession"; that is, owned and held by her. I do not find that word used in any will construed in the cases on this subject.

If I were at liberty to discuss the evidence to be found in the record, the intention of the testator, as it was adjudged to be at the former hearing, would be made manifest. *Williams v. Parker*, 84 N. C. 90, and *Brawley v. Collins*, 88 N. C. 605, have no bearing at all upon the question in this case. They only decide that "personal property" was intended, where the word "property" was used, because of the association of the latter with other words which clearly indicated such a purpose, and in *Brawley v. Collins*, Chief Justice Smith said that the word "property" would embrace all kinds—real and personal and mixed—unless its meaning is restricted by the context; citing *Foster v. Craig*, 22 N. C. 209. The words in this will are more indicative of a purpose to include all kinds of property, real, personal, and mixed, for those very words are used, and they are followed by these: "The said property or as much thereof as may be in her possession at the time of her death." The word "property," as thus used, manifestly refers to the kind just above enumerated, and this interpretation is directly warranted by what is said in the cases just cited. So that they are authorities, in my judgment, against the present conclusion of the court. Each case must be determined by its own facts. Where, therefore, it appears from the context of the will under construction that the testator, in using the word "property," referred to both kinds—real and personal—the word, as this court said, *must* have that meaning. That is our case exactly. If the words of the will, when considered with the context, or with the circumstances surrounding the testator, at the time it was written, show that he must have intended to include real estate in the term "property," it must have that meaning, and this should be so even though there are consumable things. I may be permitted to add to the authorities above cited the recent case of *Underwood v. Cave*, 176 Mo. 1, 75 S. W. 451, decided by one of the ablest courts of the Union, and in which I find the following: "It is my will that the property, real and personal, hereby bequeathed to my wife, shall be hers absolutely during her natural life, to use and enjoy as she may see proper, and at her death, if there should be anything left, my will is that it be vested and applied to the use of the Lone Jack Baptist Church, used as may be thought most conducive to the advancement of the Christian religion." It was held that the wife took a life estate, with superadded power to dispose of the fee, and that the exercise of the power by her cut out the remainderman. So in *Burford v. Aldridge*,

165 Mo. 419, 63 S. W. 109, 65 S. W. 720, we find a still stronger authority and a case more like ours. The clause of the will was as follows: "I will, devise, and bequeath to my beloved wife, Sarah, all of my property, personal, real and mixed, that may be left after paying the above bequests, to use and manage as she may deem best as long as she may live; and at her death, I desire and so will, that what may be left of my estate after her death shall be divided equally between my two brothers, Emsley Wharton and John G. Wharton, and my sister Eliza Plummer, and my brother-in-law D. W. Burford." In commenting on this language in the will, Judge Valliant says: "But under this will the widow was entitled to consume as much of the estate as she desired, the body as well as the product. And on the other hand, if she lived within the rents and interest and left a surplus of that, there is at least room for contention that such surplus would not have gone to her administrator on her death, but to the remainderman under the will. Therefore, whilst she was in a sense a trustee of the property for the use of the remaindermen, yet she had a very substantial interest in it, and the remaindermen could not call her to account or restrict her in amount in what she chose to expend for her own gratification, even though it consumed the whole estate, as long as good faith was preserved." "If we seek admittance into the family circle and learn the relations and feelings of the testator towards each of the beneficiaries of his bounty," and follow the controlling rule in the construction of wills, to which all technical rules should give way, and give effect to the true intention of the testator, as the same may be gathered from the whole instrument, if not violative of some established rule of law, and in arriving at that intention, if we take into account the relation of the testator, not only, as we have said, his relations to the beneficiaries, but also the conditions and circumstances surrounding him at the time of the execution of his will, reading it, as near as may be, from his standpoint, and giving full effect, if possible, to every clause and portion of it, we cannot conclude otherwise than that he intended his wife to be the first object of his bounty and to provide for her a comfortable and sufficient support, without hampering her in the use and enjoyment of the property, but allowing her to deal with it, in her own way, as her necessities might require, and leaving only what might be left of it to the remainderman.

It is said, though, that there was error in the former decision, because we overlooked the fact that the deed to Green did not refer to the will or the power. This is a misapprehension as to the nature of this power of disposal. "It has repeatedly been held that where a person having power to convey the fee-simple estate, and also hav-

ing a life estate or other interest, executed a conveyance of the fee, the deed will be referred to the execution of the power (or *jus disponendi*), because otherwise it cannot take full effect according to its terms." 31 Cyc. 1125. The case referred to in the opinion of the court is presented where there is an estate which is coupled with a power disconnected therewith, in which the donee has no beneficial interest. In such a case it will be presumed that the deed is intended to pass the interest and not to execute the power, unless the latter is in some way referred to in it. Besides, in this case, we are dealing with the *jus disponendi*, and not with a technical power, or a naked power of appointment. The case of *Grace v. Perry*, 197 Mo. 550, 95 S. W. 875, is directly in point and holds that no reference to the will was necessary to constitute a good and valid exercise of the power. See, also, *Underwood v. Cave*, supra.

It is suggested that *Towles v. Fisher*, 77 N. C. 437, is an authority for the position that the deed of the testator's widow conveys only a life estate, because it does not refer to the power contained in the will. That case is in perfect accord with the law, as I have before stated it to be. In *Towles v. Fisher*, the testator conferred upon his wife, Priscilla, the power of appointment to "charitable or religious" uses, and, by a codicil, the power to sell and dispose of any part of the land by and with the consent and advice of his executors, and the court very correctly held that it was necessary to have the consent of the executors and to refer to the power in her deed, for otherwise it would only pass the life estate. But it cannot be successfully argued from the construction of the provision of *that* will that a reference to the will in her deed was required in order to a valid exercise of Mrs. Williams' right of alienation or *jus disponendi*, for that is what it is and all that it is. If we hold otherwise, it seems to me, with all due deference, that we will be out of line with the controlling authorities upon the subject, both text-writers and cases. But it is very evident from the language of the court in *Towles v. Fisher* that the words "all the property, real and personal, belonging to my estate, which may be in her possession at the time of her decease (shall go over) and be equally divided between James and Mary Callum," would have conferred upon his wife, Priscilla, the absolute right of alienation in fee, but for the other provisions which are inconsistent with the existence of such a right and which are not in the will of W. B. Williams, the testator in this case. It would not have been necessary, in order to meet the contention of the plaintiffs in that case, to have referred to the express and inconsistent power given by the will to be exercised only with the consent of the executors, if the court had thought that she did not have the right of

disposal under the words of the will which we have quoted. The clear inference from the course of Justice Rodman's reasoning is that such words would confer the right to sell and convey in fee; otherwise he would have sufficiently answered the argument of the plaintiffs by simply stating that it did not, irrespective of any other clauses of the will.

We have not adverted to the fact, which was mentioned in our former opinion, that this is an action of waste, alleged to have been committed on the land devised, and is not one for the recovery of the tract of land which was received by the widow in exchange, or as the consideration for the land she conveyed. Surely the testator did not intend to subject her to an action for waste.

My conclusion is that the former decision, being right, should be approved, and that the petition should be dismissed.

HOKE, J., concurs in the dissenting opinion of WALKER, J.

(157 N. C. 484)

ROGERS v. WHITING MFG. CO.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—SAFE PLACE OF WORK.

An employer is required to exercise reasonable care to provide a reasonably safe place of work for his employes, especially where they work about machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 105*)—MASTER'S DUTY—SAFE APPLIANCES—CUSTOM.

An employer is bound to exercise reasonable care to furnish such reasonably safe machinery and appliances suitable for the work as are approved and in general use in similar plants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 105.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES—ADMISSION OF EVIDENCE—USAGE IN OTHER PLANTS.

In a woodworking employe's action for injuries while operating a lathe, claimed to have been caused by failure to furnish a guard over the saws to prevent them from throwing back splinters, evidence that guards were in general use on similar machines was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 921; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

In an action for injuries while operating a lathe caused by failure to furnish a guard over the saws, evidence held to make it a jury question whether defendant was negligent in not so guarding the saws.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1028; Dec. Dig. § 286.*]

5. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a mill employe's action for personal injuries by failure to furnish a guard or shield

over saws to prevent their throwing splinters, a requested charge that, even if the jury find that a mill in each of two states named and one in each of two other places named had machines to which saw shields were attached, that was not sufficient to show a general custom, was properly refused, where a witness testified that he had seen nine different mills in which such guards were used.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. MASTER AND SERVANT (§ 121*)—INJURIES—PROXIMATE CAUSE.

If the flying of a splinter from a saw injuring an employe was caused by the absence of a shield over the saw, and failure to provide a shield was a want of reasonable care by the employer, he would be liable for the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

7. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Appellant abandons assignments of error not discussed in his briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Superior Court, Graham County; Cline, Judge.

Action by A. C. Rogers against the Whiting Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Davis & Davis, for appellant. Morphew & Phillips, for appellee.

CLARK, C. J. This is an action for damages for an injury sustained while operating a lathe machine for the defendant. The plaintiff contended that the proximate cause of his injury was the failure of the defendant to furnish a guard or shield to go over the saws to prevent their throwing splinters and pieces of wood back, by reason of which defect the plaintiff was injured.

[1, 2] It is settled law in this state "that an employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially where driven by mechanical power, is required to provide for the employes in the exercise of proper care a reasonably safe place to work and supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged and such as are approved and in general use in plants and places of like kind and character." Hicks v. Mfg. Co., 138 N. C. 325, 50 S. E. 703, citing Witsell v. Railroad, 120 N. C. 557, 27 S. E. 125, and Marks v. Cotton Mills, 135 N. C. 287, 47 S. E. 432, and which is itself cited and approved in Helms v. Waste Co., 151 N. C. 372, 66 S. E. 312.

[3] The first nine of the defendant's exceptions are to the introduction of evidence tending to show that guards or shields were in general use in machines of like character

or kinds. But such evidence is competent, and in this case it was shown that the witnesses had seen nine different mills in which such guards were in use.

[4] This was sufficient to justify the court in leaving it to the jury to find whether the defendant had been guilty of negligence in not having a protection of this kind, and it was not error to refuse a prayer: "Even if the jury shall find a mill in Georgia, one in Tennessee, one in Andrews, and one in Swain county has machines upon which were shields or hoods, this is not sufficient to show a general custom."

[5] The prayer was properly refused, for the evidence was there were at least nine mills as to which the evidence showed use of these shields over saws, though it is true that as to some of them the lathe machines were not in use in a sawmill, as was the case here; but that was immaterial.

[6] Nor was it error to refuse the defendant's prayer to charge that "unless the plaintiff has shown by the greater weight of evidence that these hoods or shields were in general use, the jury could not consider as proximate cause any injury caused by a chip flying out and striking the plaintiff." If the flying out of the chip was caused by the absence of the shield or hood, and the jury should further find that this would have been prevented by the use of the shield or hood, and the failure to provide such was want of reasonable care on the part of the defendant, it would be liable. *Mason v. Railroad*, 111 N. C. 482, 16 S. E. 898, 18 L. R. A. 845, 32 Am. St. Rep. 814.

[7] The defendant in his brief restricts himself to the first 10 assignments of error, thus under the rule abandoning the others, which hence need not be discussed. This case, in its general features, resembles *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19, which has been often cited. See notes in *Anno. Ed.* No error.

(158 N. C. 104)

LUDWICK et al. v. PENNY et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. JUDGMENT (§ 739*)—ESTOPPEL—DEFENSES.

Revisal 1905, § 570, provides that, in an action to recover the possession of personal property, a judgment for plaintiff may be for possession or for the value thereof if delivery cannot be had, and for damages for detention, and, if defendant claims a return of the property, judgment for defendant may be for a return or for its value, with damages for the taking and withholding. Plaintiffs, in a former suit against them by defendant to recover personally in which the property was taken under claim and delivery, only counterclaimed for the conversion of their property. *Held*, that plaintiffs were not estopped by the judgment in their favor from suing for damages for wrongfully suing out the claim and delivery proceedings and levying process upon the property, since, under the statute, plaintiffs, even if they had

claimed them, could not have recovered such damages in the other action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1267; Dec. Dig. § 739.*]

2. JUDGMENT (§ 540*)—"RES JUDICATA."

The rule of *res judicata* is based upon the idea that there should be an end of litigation, as well as upon the maxim that one should not be twice vexed for the same cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 540.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6126-6130; vol. 8, pp. 7786, 7787.]

3. JUDGMENT (§ 713*)—RES JUDICATA.

While a judgment is conclusive upon matters raised by the pleadings or which might have been properly adjudicated thereunder, it is not conclusive as to causes of action which plaintiff might have joined, but which were not, in fact, joined or included in the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

4. PROCESS (§ 168*)—"ABUSE OF PROCESS"—"MALICIOUS PROSECUTION."

There is a clear distinction between the malicious prosecution of an action so as to interfere with another's property or business, and the malicious abuse of process, which is the willful and wrongful use of the process itself, and does not require a termination of the suit in which the process issued to be available as a cause of action.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 257; Dec. Dig. § 168.*]

For other definitions, see Words and Phrases, vol. 1, p. 50; vol. 5, pp. 4309-4310.]

5. MALICIOUS PROSECUTION (§ 34*)—RIGHT OF ACTION.

Since the malicious prosecution must have terminated before an action for damages therefor will lie, a cause of action for maliciously instituting an action to recover property, supported by claim and delivery proceedings for the purpose of destroying defendant's business, could not be set up as a counterclaim or otherwise by defendant in such action itself.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 70; Dec. Dig. § 34.*]

6. MALICIOUS PROSECUTION (§ 47*)—ALLEGATIONS OF COMPLAINT.

The complaint alleged that plaintiffs were engaged in the restaurant business and paid a sum to defendant which was due him from the person from whom they purchased the business, defendant agreeing at the time that the property was free from liens, but that he afterwards was "guilty of abuse of process, in that he wrongfully, unlawfully, and maliciously instituted * * * a civil action and seized the property * * * by claim and delivery proceedings, and thereby took advantage of plaintiff's inability to give a bond, deprived them of the opportunity of carrying on their business"; that, by reason of the wrongful conduct of defendant "in prosecuting the said action," he caused valuable goods to become worthless; that, when defendant began "the civil action" against plaintiffs, he caused their property to be seized under claim, and delivery proceedings, knowing that it was free from incumbrance, and that he instituted "said civil action" and seized plaintiffs' property willfully to coerce plaintiffs to pay him money, and that, by reason of "the abuse of the process sued out against plaintiff" and the wrongful and malicious conduct aforesaid, plaintiffs were damaged, etc. *Held*, that the complaint alleged a cause of action for the malicious prosecution of a civil action, and an interference with the property by claim and de-

livery proceedings, and not merely for the malicious abuse of process.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 91, 92; Dec. Dig. § 47.*]

7. PLEADING (§ 84*)—CONSTRUCTION—LIBERAL CONSTRUCTION.

Pleadings are liberally construed, and plaintiff will be permitted to recover according to his allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 84.*]

8. APPEAL AND ERROR (§ 232*)—PRESENTATION BELOW.

A party cannot rely on appeal on a different ground of objection to evidence than that stated below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

Brown, J., dissenting.

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by O. J. Ludwick and another against George T. Penny and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

See, also, 152 N. C. 375, 67 S. E. 919.

The complaint was as follows:

"The plaintiffs, complaining of the defendant, allege:

"(1) That the plaintiffs were engaged in business in the city of High Point, Guilford county, N. C., up to August 13, 1907, under the partnership name of the Acme Café, and were the owners of property of the value of about \$3,800 which they owned and used in connection with their said business, and without which they could not carry on their business.

"(2) That the plaintiffs engaged in business as the Acme Café, and had a large patronage, and were making of their business a financial success.

"(3) That these plaintiffs bought the Acme Café from F. E. Thomas on or about February 28, 1907, and at the time they purchased it they paid to the defendant George T. Penny, on account of certain indebtedness which F. E. Thomas owed him, the sum of \$1,500, and the defendant George T. Penny at the time of the payment of the said money, and in consideration thereof, represented to the plaintiffs that the property connected with the Acme Café was free from all liens and incumbrances, and the said George T. Penny agreed in consideration of the payment of said \$1,500 to cancel a certain mortgage which had theretofore been executed to him on said property by F. E. Thomas.

"(4) That the defendant was guilty of abuse of process, in that he wrongfully, unlawfully, and maliciously instituted about August 13, 1907, a civil action and seized the property of these plaintiffs by claim and delivery proceedings, and thereby taking advantage of the plaintiffs' inability to give a re-

plevy bond, deprived them of the opportunity of carrying on their business, and completely destroyed the same.

"(5) That by reason of the wrongful, unlawful, and malicious conduct of the defendant in prosecuting the said action against these plaintiffs, and in taking their property from them, thereby depriving them of the opportunity of carrying on their business, the defendant caused valuable perishable property which these plaintiffs had and owned in connection with their said business to spoil and become worthless, to their great damage.

"(6) That at the time the defendant in this action began the civil action against these plaintiffs, to wit, on or about August 13, 1907, and at the time he caused the property of these plaintiffs to be seized under claim and delivery proceedings, he knew that the plaintiffs did not owe him any amount whatsoever, and that the property of these plaintiffs was free from any and all incumbrances to him, and was not subject to be rightfully taken under claim and delivery proceedings.

"(7) That, as these plaintiffs are informed and believe, the defendant George T. Penny instituted said civil action against them and caused their property to be seized as aforesaid, wantonly, recklessly, and willfully, for the purpose of unlawfully coercing the plaintiffs to pay him money which they did not owe.

"(8) That by reason of the abuse of the process sued out against plaintiffs by defendant, and the wrongful, unlawful, and malicious conduct of the defendant as aforesaid, these plaintiffs sustained and are entitled to recover of the defendant the sum of \$4,000 actual damages.

"(9) That by reason of the wrongful, reckless, wanton, and malicious abuse of process by the defendant issued against the plaintiff, and the wrongful conversion thereby of the property of the plaintiff to the use of the defendant as above alleged, these plaintiffs are entitled to recover of the defendant the sum of \$4,000 as punitive damages."

T. J. Gold and King & Kimball, for appellants. Justice & Broadhurst, for appellees.

WALKER, J. Plaintiffs brought this action to recover damages for unlawfully and maliciously suing out process and levying upon plaintiffs' property, thereby breaking up and destroying their business. Defendant had previously sued the plaintiffs for the recovery of the property, and under claim and delivery proceedings had seized the same. That suit was decided in favor of the defendants for the reason hereinafter stated. The defendant held a note and a mortgage on the property to secure the same, which was executed by one Thomas to Pen-

ny. The property was afterwards sold by Thomas to the plaintiffs Ludwick & Bame, who undertook to pay the note secured by the mortgage. They alleged that, by an agreement between all interested parties, and the payment of \$1,500, the debt and mortgage had been satisfied, when Penny brought his suit against them. The jury so found in that action, and further found, in answer to issues submitted to them, that the value of the property sold and unsold by Penny was \$2,500. The court thereupon adjudged that the defendants in that suit, Ludwick & Bame, recover of the plaintiff Geo. T. Penny the sum of \$750, the value of the property which had been sold, and the costs of the action, and also the sum of \$1,800, the value of the unsold property, as found by the jury, but as to the latter sum (\$1,800) a stay of execution was ordered, so that the plaintiff Penny might have the opportunity to redeliver the unsold property. The defendants in that action, Ludwick & Bame, set up a counterclaim for the unlawful and wrongful conversion of their property by Penny, and for nothing more.

[1] The defendant in this action Geo. T. Penny pleads that the plaintiffs are estopped by the judgment in the action of Penny v. Ludwick & Bame to claim any damages for "breaking up and destroying their business by unlawfully and maliciously suing out process of claim and delivery and seizing their property, as that question was directly involved in the former suit." We do not adopt this view of the matter. The jury found in this case that "the defendant Geo. T. Penny had unlawfully, willfully, wrongfully, wantonly, recklessly, and maliciously sued out the process of the court in the case of Penny v. Ludwick & Bame, as alleged in the complaint," which was equivalent to saying that Penny, knowing that he had no cause of action against the defendants in that suit, Ludwick & Bame, had wrongfully, maliciously, and wantonly brought the suit and levied upon their property which was used in their business, which, it is alleged, subsequently destroyed it. This matter was not involved in the former suit. Revisal 1905, § 570, provides that in an action to recover the possession of personal property, if the property has been delivered to the plaintiff, and the defendant claims a return thereof, and becomes entitled to it by succeeding in the action, judgment for him shall be for a return of the property, or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same. It is true the defendants in that case set up a counterclaim, but they did not allege any facts which would entitle them to any greater relief than is given to them by Revisal, § 570, and the counterclaim was superfluous pleading. The cause of action alleged in this case was not, therefore, involved in that suit, nor was it at all considered, nor did the defendants there-

in recover any damages on that account. One valid reason for not estopping the plaintiffs in this action by the judgment in the former suit is that the statute we have cited limits the recovery in the latter to the property or the value thereof, unless, perhaps, the defendants in that suit had set up a counterclaim for more; that is, not only for such damages, but for maliciously breaking up and destroying their business.

The defendant Penny relies upon the following principles, which he says are established by *Porter v. Mack*, 50 W. Va. 581, 592, 40 S. E. 459, 463, and numerous other authorities cited in the brief of his counsel: "When a person has a cause of action which he may assert by an action *ex contractu* for the direct damages, or *ex delicto* for both the direct and indirect damages, if he selects the former, he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong, of which he can have but a single satisfaction, though it in no wise compensates him for the damages sustained." 21 Am. & Eng. Enc. p. 237, note 1; *Webb's Pollock on Torts*, 658; *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506; *Norton v. Doherty*, 3 Gray (Mass.) 372, 63 Am. Dec. 758; *Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565; *Newby v. Caldwell*, 54 Iowa, 102, 6 N. W. 154; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Thompson v. Myrick*, 24 Minn. 12; *Whitney's Adm'r v. Town of Clarendon*, 18 Vt. 258, 48 Am. Dec. 150; *Smith v. Way*, 9 Allen (Mass.) 473. And again: "In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." And, further, it is urged by him that "a cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance, or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts, because he may not at first be able to prove all the items of the demand, or because all the damages have not been suffered. If he attempts to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to a second action." The principle here asserted in defendant's behalf, as defeating the plaintiffs' right of recovery in this action, finds support in the decisions of this court. *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225; *Mast v. Sapp*, 140 N. C. 538, 53 S. E. 350, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864.

The defendant also contends that the court has adopted in such cases as this the following rule: "Where two or more successive actions are identical as to the parties, the alleged cause of action, the defenses relied up-

on and the relief demanded, a judgment upon the merits in the first action will estop any and all parties from maintaining the subsequent ones. Except in special cases, the plea of *res adjudicata* applies, not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward. Under our present system of pleading and practice, a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all the equitable defenses of which he might have availed himself to defeat the legal title." *Tuttle v. Harrill*, 85 N. C. 456; *Anderson v. Rainey*, 100 N. C. 321, 5 S. E. 182; *Buchanan v. Harrington*, 152 N. C. 335, 67 S. E. 747, 136 Am. St. Rep. 828; *Harper v. Lenoir*, 152 N. C. 723, 68 S. E. 228; *Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144.

We have no desire to contravene what is thus stated by the authorities, for we believe that, when they are properly considered and understood, it will be found that the principle is correctly formulated by them, and is in itself just and right.

[2] There should be an end of litigation, and this is the fundamental idea upon which the rule of *res judicata* is founded, and to this may be added, as another reason for the rule, the maxim of the law that no one should be twice vexed for the same cause.

[3] But does this well-settled rule apply to this case? We think not, and the case of *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, which explains and defines the doctrine on this question, is decisively against the defendant's contention. It is said in that case that: "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings. Although the present cause of action might have been set up as a second cause of action in the former suit, as it was not, and was not actually litigated, and was not 'such matter as was necessarily involved therein,' the plea of *res judicata* will not avail." We have seen that our statute confines the recovery in an action for personal property with the ancillary remedy of claim and delivery to the property itself or the value thereof, which, of course, excludes the recovery of any damages for maliciously suing out process and destroying the plaintiff's business, which is a distinct cause of action with a different rule as to the measure of damages. In his treatise on Torts (Vol. 1 [3d Ed.] p. 348), Judge Cooley tells us when an action will lie for the malicious prosecution of a civil suit; and in that

connection he says: "So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver, the granting of an injunction, or by writ of *replevin*." *Brownstein v. Sahlein*, 65 Hun, 365, 20 N. Y. Supp. 213; *McPherson v. Runyon*, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727. He also says that the same rules apply to actions for malicious civil suits as for criminal prosecutions, and thus states this branch of the rule: "It is laid down or assumed in all the cases that an action for the malicious prosecution of a civil suit is governed by the same principles as one for the malicious prosecution of a criminal action. There must be malice and the want of probable cause and the same rules apply in the proof or disproof of these elements. So the advice of counsel will have the same effect as in case of criminal prosecution, under the same conditions. And the malicious suit must be terminated in favor of the plaintiff in that action." *Id.* p. 352. Speaking of the malicious abuse of process, he distinguishes it from a malicious civil suit, where there is an interference with property or business, as follows: "If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The following are illustrations: Entering a judgment and suing out an attachment for an amount greatly in excess of the debt; causing an arrest for more than is due; levying an execution for an excessive amount; causing an arrest when the party cannot procure bail, and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which the other is not entitled. In these cases proof of actual malice is not important, except as it may tend to aggravate damages. It is enough that the process was willfully abused to accomplish some unlawful purpose. Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.' In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit." *Id.* p. 354 et seq.

[4] The distinction is clear. One consists in commencing and prosecuting a suit maliciously and interfering with property or business, and the other consists in the willful, unlawful, and wrongful use of the process itself.

[5] As the suit must have been terminated before an action will lie for prosecuting it maliciously, this cause of action could not be set up in the action itself as a counterclaim or otherwise. *Fulton Grocery Co. v.*

Maddox, 111 Ga. 260, 36 S. E. 647; Bonney v. King, 103 Ill. App. 601; Luby v. Bennett, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897. But the conclusive answer to the contention that the former judgment is *res judicata* is that the defendant asked for no more than the statute allowed him to recover in that action; that is, the damages for the conversion only and nothing more. This being the measure of his recovery, as fixed by the statute, he was not at liberty to ask for more damages than those authorized by the positive law in such cases, and therefore, having no opportunity to recover them in that action, he is not estopped to ask for them in this one. The very question involved in this case is decided against the defendant's contention in *McPherson v. Runyon*, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727.

[6] It is suggested that the complaint shows that the plaintiffs are suing for a malicious abuse of process only, but a cursory reading of the complaint will make it appear, we think, that the action is really one for the malicious prosecution of a civil action, and an interference with their property by claim and delivery proceedings. It is true plaintiffs allege that there was a malicious abuse of the process issued by the court, but they base this allegation solely upon the fact that they were unable to replevy the property by giving bond, which is manifestly insufficient to sustain such an action. They do allege, though, in substance, facts which are sufficient to constitute a good cause for malicious prosecution, for they say that defendant, knowing the plaintiffs were not indebted to him at all upon the debt and mortgage, unlawfully, wrongfully, willfully, wantonly, and recklessly commenced said action and prosecuted the same to their damage. They do not use the words "without probable cause," but no set form of words is required, if those of equivalent import are used, and the language of this complaint in that respect is much stronger than if the plaintiffs had employed the words, "and without probable cause." If what the plaintiff alleges is true, there was no probable cause but the action was wantonly instituted and with reckless indifference to plaintiffs' rights of property.

[7] Pleadings are now construed liberally, and plaintiff recovers according to his allegations. *Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442; *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31, 65 L. R. A. 736; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874. But, after all is said the fact remains that the plaintiff in the former action alleged no more than would enable him to recover what the statute allowed him to recover as damages, and that corresponded exactly with the allegation. The case is governed by *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044, where it is said: "While the allegation of

the complaint may be broad enough to constitute a demand for the possession, it is evident from a perusal of the entire pleadings that the demand was not intended to be for the possession, which the plaintiff undoubtedly had when the action was commenced, but was to recover damages caused by reason of the wrongful seizure and detention of the property. As heretofore stated, it does not definitely appear how plaintiff reacquired possession of the property; but assuming—and there are statements from some of the witnesses tending to show this—that the possession was restored by means of a former action of claim and delivery, while plaintiff could have had his damages assessed in the former action (*Revisal*, § 570), the authorities seem to be to the effect that he was not required to take this course, but, after obtaining possession, could, in another action, recover damages for the injury done by the wrongful seizure and detention of his property. *Woody v. Jordan*, 69 N. C. 189; *Asher v. Reizenstein*, 105 N. C. 213 [10 S. E. 889]." Our conclusion is that the plaintiffs are not estopped by the former judgment.

The testimony of the plaintiff O. J. Ludwick was objected to upon the ground that the former judgment was *res judicata*, and the assignment of error based upon this exception cannot be broader than the exception itself.

[8] Where a party states the ground of his objection to evidence below, he cannot rely upon a different ground in this court. This is well settled. *Kidder v. McIlhenny*, 81 N. C. 123; *Jones v. Cal*, 93 N. C. 179. We do not mean to imply that there was any error in the court's ruling upon the evidence, or in its charge to the jury upon the damages. Those questions are not presented to us by the exceptions and assignments of error.

The court properly refused to sign the judgment tendered by the defendant upon a verdict in favor of the plaintiff.

No error.

BROWN, J. (dissenting). The facts, as I understand them, are that Penny brought an action against Ludwick to recover possession of certain personal property, consisting of a soda fountain, cash register, cigar case, stove, electric meter, refrigerator, electric fan, and a motor fan, used in a restaurant in High Point, and took out the ancillary remedy of claim and delivery. Ludwick failed to replevy, and the property was delivered to Penny. At the trial Penny failed to establish his right to recover the property, and judgment was given for Ludwick. The case is reported. 152 N. C. 376, 67 S. E. 919. In that action, as appears in this record, Ludwick not only denied Penny's title to the property and right to recover, but set up (something he was not compelled to do) a counterclaim, in which he averred that Pen-

ny had unlawfully and wrongfully seized the property, and converted it to his own use, to his great damage. Ludwick asked as relief that the property be restored, and that he recover as damages \$4,000. Ludwick recovered judgment for \$700 on third issue, and \$1,800 on fourth issue. 152 N. C. 377, 67 S. E. 919.

Ludwick now brings this suit, alleging that Penny had maliciously sued out the claim and delivery, and had destroyed his business by the wrongful seizure of his property. I am of opinion that the plaintiff Ludwick, having seen fit to plead a counterclaim in the other action, and to claim damages for the wrong done him, should have set up all his items and claims for damage in that counterclaim, and have them all determined on one trial. He should not be permitted to divide up his damages as they all grew out of one and the same transaction and one and the same tort. For a long time I thought such a counterclaim could not be pleaded in an action on nature of claim and delivery, and that the defendant must wait until that action was ended in his favor and then sue for damages. But that question was settled by this court in *Smith v. French*, 141 N. C. 10, 58 S. E. 438, wherein it is held that the defendant may plead his counterclaim for damages for the tort in the claim and delivery action. In that case Mr. Justice Hoke says: "Even if the present opinion should be found to conflict with some former decision, it is only a question of procedure not involving a rule of property, and we think it better that our present construction of the statute should now be declared the true one as more in accord with the spirit and letter of our Code, which, as heretofore stated, designs and contemplates that all matters growing out of or connected with the same controversy should be adjusted in one and the same action. A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should necessarily or entirely mature before action commenced nor even before answer filed, if the provisions of the Code permit, and right and justice require that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation."

Thus we see that this plaintiff had the right to plead a counterclaim for damages for the wrongful seizure of his property in the other action, and also that he did plead it. Having chosen to plead it, he should have set up all his items of damage in that counterclaim, and should not be heard again concerning same transaction. It is immaterial that plaintiff now avers that the taking of his property by legal process was maliciously done. It was all connected with

and grew out of the one act, and could and should have been embraced in his counterclaim in the former suit. It is a well-settled principle that the commission of a single tortious act creates a single cause of action only, and all damages resulting therefrom must be recovered in one suit. 24 Am. & Eng. Ency. p. 788. The counterclaim set up by plaintiff in the former action is to be treated as if he had chosen to commence an independent action for damages. He should have set up all his damages in the one action, and have them determined on the one trial. This is the true spirit and value of code pleading. In the case of *Porter v. Mack*, 50 W. Va. 581, 592, 40 S. E. 459, 463, it is said: "The law seems to be well settled that when a person has a cause of action which he may assert by an action *ex contractu* for the direct damages, or *ex delicto* for both the direct and indirect damages, if he selects the former, he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong, of which he can have but a single satisfaction, though it in no wise compensates him for the damages sustained." In that case a recovery was sought to be had for an alleged conspiracy to break up the business of the plaintiff, and this was a second action, and the plaintiff was held bound by the adjudication of the previous action.

In his counterclaim this plaintiff averred that the taking of the property was wrongful. He could just as easily have averred that it was malicious. He could have claimed damages to his business as the result of the taking as well as the injury and sacrifice of his property. In 21 Am. and Eng. Ency. (1st Ed.) p. 237, it is said: "In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." See, also, *Norton v. Doherty*, 3 Gray (Mass.) 372, 63 Am. Dec. 758; *Ware v. Percival*, 61 Me. 891, 14 Am. Rep. 565; *Newby v. Caldwell*, 54 Iowa, 102, 6 N. W. 154; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766. In *Norton v. Doherty*, supra, Chief Justice Shaw says: "On consideration the court are of the opinion that the former judgment was a good bar, because the first action was brought to recover damages for the same wrong or injury, and because it could be supported by the same evidence." Mr. Sutherland says: "Causes of action not divisible.—A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance, or cause of action of which he complains. He cannot split a cause of action

and bring successive suits for parts. He may not be able at first to prove all the items of the demand, or because all the demands have not been suffered. If he attempt to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to a second action." In support of this statement the author cites a large number of cases, amongst others, *Porter v. Mack*, supra. These well-settled principles are clearly stated in the well-considered opinion of Mr. Justice Clark in *Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144, in which it is held that: "The judgment or decree of a court of competent jurisdiction is conclusive, not only as to the subject-matter actually determined thereby, but also as to every other matter which properly belonged to the subject in litigation, and which the parties by the exercise of reasonable diligence might have brought forward at the time and had determined respecting it." The only evidence of damage which plaintiff offers on this trial is injury to his business by reason of the wrongful taking of his restaurant fixtures. He could and should have alleged and proven the same item of damage on the trial of his counterclaim. This is not an action for malicious prosecution which could not be commenced until after the termination of the former action. The complaint does not allege a want of probable cause, or any other of the usual and necessary allegations in a suit for malicious prosecution. On the contrary, in section 4 of the complaint this action is characterized as one for "abuse of process." Such an action need not await the termination of the former proceeding. "An action for damages for the abuse of legal process may be maintained before the action in which such process was issued is terminated." 19 Cyc. 632. It seems to me plain that every element of damage set up in this action could and should have been set up in the counterclaim in the former under the principles laid down in *Smith v. French*, supra.

I am of opinion that the former judgment for damages rendered in plaintiff's favor on his counterclaim is a bar to the recovery of further damages for same wrong.

(156 N. C. 553)

PEELE v. POWELL.

(Supreme Court of North Carolina. Nov. 9, 1911.)

1. FRAUDS, STATUTE OF (§ 17*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—"SPECIAL PROMISE."

A "special promise" to answer for the debt, default, or miscarriage of another means an express promise, and not one implied by law.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6590.]

2. FRAUDS, STATUTE OF (§ 33*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

Whether a promise to answer for the debt of another is made orally or in writing, it must have a consideration to support it.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.*]

3. FRAUDS, STATUTE OF (§ 158*)—PAROL EVIDENCE—CONSIDERATION OF WRITTEN PROMISE TO ANSWER FOR DEBT OF ANOTHER.

Where a promise to answer for the debt of another is in writing, the consideration need not appear in the writing, but may be shown by parol.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 373-376; Dec. Dig. § 158.*]

4. FRAUDS, STATUTE OF (§ 33*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—ORIGINAL PROMISE.

An original promise to answer for the debt of another, based on a consideration, is valid, though not in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 50-53; Dec. Dig. § 33.*]

5. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—"ORIGINAL PROMISE."

An obligation to answer for the debt, default, or miscarriage of another is original and valid, though in parol, if made at the time or before a debt is created, where credit is given solely to the promisor; or where credit is given on the promises of both, as principals and jointly liable, and not on the promise of one, as surety for the other; or a promise, made after the debt is created, when, by reason of the promise, the original debtor is released; or if it is a promise to pay out of funds placed in the hands of the promisor by the debtor; or if it be a promise based on a new consideration of benefit or harm passing between the promisor and the creditor.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5063-5064.]

6. FRAUDS, STATUTE OF (§ 34*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—PAYMENT OUT OF PARTICULAR FUND.

A promise to answer for the debt of another out of a particular fund, which is not received by the promisor, is not binding.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 54; Dec. Dig. § 34.*]

7. FRAUDS, STATUTE OF (§ 34*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

A promise to answer for the debt of another, which is all or part of the consideration for property conveyed to the promisor, is valid, though not in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 54; Dec. Dig. § 34.*]

8. FRAUDS, STATUTE OF (§ 28*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

A promise to make good notes of another, transferred by the promisor in payment for property, is valid, though not in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 45; Dec. Dig. § 28.*]

9. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—COLLATERAL PROMISE.

Where there is no benefit to one promising to answer for the debt of another, and the promise does not create an original obligation, but is a collateral promise, merely superadded to the promise of another to pay the debt, the original promisor remaining liable, the collateral promisor is not liable, unless there is a writing, whether the promise is made when the debt is created or not.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

10. FRAUDS, STATUTE OF (§ 158*)—ADMISSION OF EVIDENCE—ACCOUNT.

Where there is evidence of a valid promise to pay for goods furnished to another, the creditor's itemized and verified statement of account of goods sold to such other person for the amount alleged to be due by him in his complaint is competent to prove indebtedness of such other person.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. § 158.*]

11. FRAUDS, STATUTE OF (§ 158*)—EVIDENCE—SUFFICIENCY.

Evidence, in an action to enforce an alleged promise by defendant's intestate to answer for the debt of another, held not to show the promise.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. § 158.*]

12. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—DECLARATIONS IN OWN INTEREST.

In an action against defendant's intestate on his alleged promise to answer for the debt of another, plaintiff's ledger and daybook, showing goods furnished to such other person, were not competent, as they were merely declarations of plaintiff in his own interest.

[Ed. Note.—For other cases, see *Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.**]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Bertie County; Carter, Judge.

Action by C. T. Peele against Isa G. Powell, administratrix of Edgar Powell, deceased. From a judgment of nonsuit, plaintiff appeals. No error.

This is an action brought by C. T. Peele against Isa G. Powell, administratrix of Edgar Powell, to recover \$286.65 and interest thereon from March 27, 1907, the value of goods sold and delivered to J. T. Cook, for which it is alleged the defendant's intestate is liable.

The plaintiff offered the following evidence: An itemized and verified statement of account of goods sold and delivered to J. T. Cook for the amount alleged to be due by him in his complaint. Objection by defendant sustained, and plaintiff excepted. The account was against Tom Cook; Edgar Powell, security.

Luther Bryant testified: That he was clerk in plaintiff's store from January 1, 1906, till the end of the year 1908; that for

all goods sold to J. T. Cook from February 22, 1906, to March 27, 1907, the credit therefor was extended to Edgar Powell; that about the time of the last-mentioned date Mr. Peele told him (the witness) not to let Mr. Cook have any more goods without a written order from Mr. Powell. Cook had no credit at that time, and was a tenant of Mr. Powell. That in July, 1906, he heard Powell tell plaintiff to let Cook have goods, and he would see that they were paid for.

F. L. Bishop testified as follows: "On or about the 25th day of March, 1908, I met Mr. Powell in the road, and in the conversation between us Mr. Powell stated that Mr. Peele had him charged with a great big account that Mr. Cook had made at his store; and that he did not think that he ought to pay it, because Mr. Peele ought not to have let Mr. Cook have so many goods on such a crop as Mr. Cook was then working, but that he [Mr. Powell] had told Mr. Peele to let Mr. Cook have some goods, and that he reckoned he would have to pay it. I then told Mr. Powell what Mr. Peele had told me to tell him; that he presented Mr. Cook's account to him [Powell], and, unless he made some arrangements about that account, that he [Peele] was going to take some steps to collect it; that Mr. Peele said that he hated to take such measures against him, and that he wanted to avoid it if possible, but that he could not afford to lose the account."

L. J. Brewer testified: That in March, 1906, he was at Powell's house, and saw some one going out the gate, and that he asked Mr. Powell who it was, and he replied that it was Charlie Peele, who had been to see him about Cook's account, and that he told him that it was all right. He testified also that on another occasion, at the sheep shelter, in 1908, that Mr. Powell told him that Mr. Peele had a large account against him for Tom Cook, and that it amounted to about \$290.

The plaintiff offered to prove by himself that he sold the goods to Cook, and the amount of the sales, which was excluded, and the plaintiff excepted. He also offered in evidence his ledger and daybook, for the purpose of proving the account against Cook, and excepted to its exclusion.

The principal controversy between the plaintiff and the defendant is as to the effect of the evidence; the defendant contending that it is not sufficient, under the statute of frauds, to bind the estate of his intestate. His honor was of this opinion, and, upon the conclusion of the evidence, entered judgment of nonsuit, and the plaintiff excepted and appealed.

L. L. Smith, for appellant. Winston & Matthews, for appellee.

ALLEN, J. (after stating the facts as above). The liability of a promisor to answer, "upon special promise, for the debt, default, or miscarriage of another person," has been considered in numerous decisions of this court, and there is frequently much difficulty in determining whether a particular promise is within the statute.

[1] The term "special promise" means an express promise, and not one implied by law. *Browne, Stat. Frauds, § 166.*

[2, 3] Whether oral or in writing, it must have a consideration to support it (*Draughan v. Bunting, 31 N. C. 10; Stanly v. Hendricks, 35 N. C. 87; Combs v. Harshaw, 63 N. C. 198; Haun v. Burrell, 119 N. C. 547, 26 S. E. 111*); but, if in writing, the consideration need not appear in the writing, and may be shown by parol (*Nichols v. Bell, 46 N. C. 32; Haun v. Burrell, 119 N. C. 547, 26 S. E. 111*).

[4] If the promise is based on a consideration, and is an original obligation, it is valid, although not in writing. *Hospital Ass'n v. Hobbs, 153 N. C. 188, 69 S. E. 79.*

[5] The obligation is original, if made at the time or before the debt is created, and the credit is given solely to the promisor, as in *Morrison v. Baker, 81 N. C. 80*, and *Sheppard v. Newton, 139 N. C. 536, 52 S. E. 143*, or if credit is given on the promises of both, as principals and as jointly liable, and not on the promise of one, as the surety for the other (*Browne, Stat. Frauds, § 197; Horne v. Bank, 108 N. C. 119, 12 S. E. 840*). So is a promise, made after the debt is created, when, by reason of the promise, the original debtor is released (*Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143; Jenkins v. Holley, 140 N. C. 379, 53 S. E. 237, 111 Am. St. Rep. 846*); and also if it is a promise to pay out of funds placed in the hands of the promisor by the debtor (*Stanly v. Hendricks, 35 N. C. 86; Threadgill v. McLendon, 76 N. C. 24; Mason v. Willson, 84 N. C. 53, 37 Am. Rep. 612; Voorhees v. Porter, 134 N. C. 604, 47 S. E. 81, 65 L. R. A. 736*); or if a promise based on a new consideration of benefit or harm passing between the promisor and the creditor (*Whitehurst v. Hyman, 90 N. C. 489*).

[6] If, however, there is a promise to pay out of a particular fund, and the fund is not received by the promisor, it is not binding. *Bagley v. Sasser, 55 N. C. 350*. If one, under the former practice, was arrested in a civil action, and was released on the oral promise of another to pay the debt, the promise was binding because the release from arrest satisfied the original debt (*Cooper v. Chambers, 15 N. C. 261, 25 Am. Dec. 710; Draughan v. Bunting, 31 N. C. 10*); but it was otherwise of an oral promise to pay upon condition that the creditor would not arrest the debtor, because the debtor remained liable (*Britton v. Thrailkill, 50 N. C. 331; Rogers v. Rogers, 51 N. C. 300; Combs v. Harshaw, 63 N. C. 198*).

[7, 8] Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, as in *Neal v. Bellamy, 73 N. C. 384*, and in *Dale v. Lumber Co., 152 N. C. 653, 68 S. E. 134, 28 L. R. A. (N. S.) 407*, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, as in *Hockaday v. Parker, 53 N. C. 17, Little v. McCarter, 89 N. C. 233, Deaver v. Deaver, 137 N. C. 242, 49 S. E. 113, Satterfield v. Kindley, 144 N. C. 455, 57 S. E. 145, 15 L. R. A. (N. S.) 399*, or is a promise to make good notes transferred in payment of property, as in *Adcock v. Fleming, 19 N. C. 225, Ashford v. Robinson, 30 N. C. 114*, and in *Rowland v. Rorke, 49 N. C. 337*, the promise is valid, although in parol.

[8] If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing, and this is true, whether made at the time the debt is created or not. *Smithwick v. Shepherd, 49 N. C. 197; Bagley v. Sasser, 55 N. C. 350; Scott v. Bryan, 73 N. C. 582; Rowland v. Barnes, 81 N. C. 239; Haun v. Burrell, 119 N. C. 547, 26 S. E. 111; Williams Co. v. Hamill, 131 N. C. 59, 42 S. E. 448; Sheppard v. Newton, 139 N. C. 535, 52 S. E. 143; and Supply Co. v. Finch, 147 N. C. 106, 60 S. E. 904*. In our opinion, this case falls within the last class.

[10] There is no evidence of benefit to the intestate, and, while the jury would have been justified in finding from the evidence that he promised to pay, it is not sufficient to sustain a finding that it was more than a promise to pay the debt of Cook, for which he (Cook) remained liable. The verified account and the evidence of the plaintiff were competent to prove the indebtedness of Cook, as neither involved a transaction or conversation with the deceased, and there would be error in their exclusion, which would entitle the plaintiff to a new trial, if there was evidence of a valid promise of the intestate to pay. It was because his honor thought there was no such evidence that he ruled as he did, and we concur in his opinion. The definition of a promise to answer for the debt of another, which is not enforceable, adopted in our court and applicable here, is: "An undertaking by a person, not before liable, for the purpose of securing or performing the same duty for which the party, for whom the undertaking is made, continues liable." *Sheppard v. Newton, supra*. Tested by this rule, we think the action cannot be maintained.

[11] The account began on the 22d day of February, 1906, and ended the 27th day of March, 1907. The witness for the plaintiff, Bryant, testified that about the time of the last date (March 27, 1907) the plaintiff told him not to let Cook have any more goods

without a written order from Powell, and that Cook had no credit at that time. The inference is that Cook had credit prior to the time, and no goods were afterwards sold to him. It is true that same witness also said that for all goods sold to Cook credit was extended to Powell, and this would be entitled to great weight, if he had stated something said or done by Powell, authorizing the extension of credit. A similar statement was made by a witness in *Williams Co. v. Hamill*, 131 N. C. 59, 42 S. E. 448, and was held insufficient to charge the promisor. Again he says, in July, 1906, he heard Powell tell the plaintiff to let Cook have goods, and he would see that they were paid for. He does not state whether or not any goods were sold to Cook at that time, and, so far as we can see, the promise related to a single transaction, and there is no evidence that it is embraced in the account sued on. We would not be justified in giving such a promise both a retrospective and prospective construction, to include the part of the account before the promise, and that part made after it.

The evidence of the witnesses Brewer and Bishop does not show liability on the part of the intestate. The most material statement made by either is by Brewer: "That in March, 1906, he was at Powell's house, and saw some one going out the gate, and that he asked Mr. Powell who it was, and he replied that it was Charlie Peele, who had been to see him about Cook's account, and that he told him that it was all right." We will assume that "him," as last used, applies to Peele, although it is not certain, but, if so, it was "Cook's account" that was all right, and there is no suggestion in the evidence that Cook was not liable therefor. Suppose he had said, "Cook owes Peele an account, and I have promised to pay it." No one would contend that this would create a legal liability, and the evidence is not as strong as this.

The action is against the estate of a deceased person. The intestate lived one year and eight months after the last item in the account, and no action was instituted against him during this period. The defendant administrator has no personal knowledge of the transactions, and death has destroyed any opportunity of replying to the evidence of the plaintiff. Under these circumstances, the evidence should be carefully examined, and if it does not conform to the requirements of the law, it should be so declared.

[12] The ledger and daybook of the plaintiff were properly excluded, as they were mere declarations of the plaintiff in his own interest. *Bank v. Clark*, 8 N. C. 36; *Bland v. Warren*, 65 N. C. 374; *Dyeing Co. v. Hosiery Co.*, 126 N. C. 294, 35 S. E. 586.

We find no error.

No error.

WALKER, J. (dissenting). It is suggested, in opening the opinion of the court, that

there is frequently much difficulty in determining whether a particular promise to answer for the debt, default, or miscarriage of another person falls within the provisions of the statute of frauds. It would not seem so difficult if we did not attempt to apply well-recognized principles, which are clearly stated in the opinion, to disputed facts, and the situation would be much simplified, and the difficulty otherwise encountered would be removed, if, when the facts are not settled, the case should be submitted to the jury, which is invariably done in other cases, to ascertain what the promise or contract was, or what was the intention, understanding, and agreement of the parties. Was it the intention of Peele and Powell that the latter should become the sole and responsible debtor, or, in other words, did he promise *for himself* to pay the debt, or did he promise as surety or guarantor for Cook? In the former case, the promise would be an original one, not within the statute, and in the latter it would be a superadded one; Cook still remaining liable for the debt.

I have the highest and best authority for saying that this case should have gone to the jury, so that they might find what was the promise. It was so held (Chief Justice Pearson delivering the opinion) in *Threadgill v. McLendon*, 76 N. C. 24, when there was much less dispute about the facts, or where the facts were much more significant of the true nature of the promise, than are those in this case. In *Threadgill's Case*, McLendon requested Threadgill to furnish goods and supplies to one Treadaway, who was a cropper of McLendon, such goods and supplies as he might want, and he (McLendon) would see that Threadgill was paid for them, and that upon this request and promise Treadaway obtained credit at Threadgill's store, and received the goods as he wanted them, amounting in value to \$156. That of this account \$56 was charged to McLendon and \$100 to Treadaway. This court, after stating that the trial judge had attached too much importance to the manner of making the entries upon the books, said: "Considering the fact that the defendant was bound to furnish the cropper with necessary supplies, and had a lien upon the crop, it ought to have been left to the jury to say whether the credit was not, in the first instance, given to the defendant, and the entries on the books made simply to discriminate what was for farm purposes, and what for the personal use of the cropper and his family." Ours is a much stronger case than that for a submission to the jury of the vital question, as to the nature of the promise, as understood by the parties. I find abundant evidence in the record which tends most strongly to show that Powell understood and agreed with Peele to become himself the payer, regardless of Cook, and that he was looked to as the sole responsible debtor.

And still weightier, if anything, as an authority, is the opinion of the present Chief Justice in *Jenkins v. Holley*, 140 N. C. 379, 53 S. E. 237, 111 Am. St. Rep. 848, where it is said: "The evidence offered by plaintiff should have been left to the jury, with any evidence the defendant might offer, upon the issue whether Holley became sole debtor, or was merely responsible, if Wilson did not pay." The facts of that case are substantially like those we find in this record. There was evidence in that case, and there is evidence here, that the plaintiff had "looked to" the defendant as his debtor, and that defendant said it was "all right," and upon this state of facts it was said, in *Jenkins v. Holley*: "The language was strong, if not, indeed, conclusive, evidence" of a promise, not within the statute, and then follows what is above quoted from the opinion, to the effect that the case should at least have gone to the jury to ascertain the intention of the parties. In *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143, the judge held, as did the lower court in this case, that the promise was within the statute, and ordered a nonsuit. This ruling was reversed by this court upon appeal, and a new trial awarded; Justice Hoke saying, in the course of the opinion: "A statement on the same subject, somewhat more extended and very satisfactory, will be found in *Clark on Contracts*, p. 67, as follows: 'There must either be a present or a prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily and not collaterally liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, 'if he does not pay you, I will,' this is a collateral undertaking, and must be in writing; but, if he says, 'Let him have the goods, and I will pay,' or, 'I will see you paid,' and credit is given to him alone, he is himself the buyer, and the undertaking is original. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original, but it is collateral if any credit was given to the other party.' To like effect are the decisions of our own court. *Whitehurst v. Hyman*, 90 N. C. 487; *White v. Tripp*, 125 N. C. 523 [34 S. E. 686]."

It will be observed that the case he puts, where the promisor is liable and cannot hide himself behind the statute, is the very one we have under consideration. "Let him have the goods, and I will pay," or, "I will see you are paid." We will see presently, when I review the evidence, that credit was given to Powell alone. It was not necessary that Powell should say, as intimated in the opinion, that credit should be given to him alone,

in order to bind him, or that he should have expressly assented to such a course; but if he requested that the goods be sold on his credit, as he most assuredly did, and Peele, acting upon his request and induced thereby, sold the goods on his credit, and looked to him alone, the promise was binding as an original one. It was, at least, as Chief Justice Clark said, and as Justice Hoke clearly suggests, a question for the jury as to what was meant, and as to "how the credit was given." *Sheppard v. Newton*, supra. Quoting from that case again its concluding words: "Applying these principles to the foregoing statement of the evidence, the court is of opinion that there was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to the jury, on the question whether the defendant is not answerable as the original or present debtor on the plaintiff's demand." This is striking language and worthy of much consideration. It would attract the attention of any one familiar with the evidence in this case, as showing a close similarity between the two.

Let me now notice two other cases decided by this court. In *White v. Tripp*, 125 N. C. 523, 34 S. E. 686, it appeared that the goods were charged to both the promisor and the person (defendant's son) who received the goods, or for whose benefit they were purchased. The court held that this fact was not controlling, and that the case was one for the jury. Plaintiff testified that he gave sole credit to the father, Joseph Tripp, without there being any evidence that the latter had assented to such an arrangement. It did not occur to the court that such assent was necessary. It was held that the case was one for the jury, as to the intention of the parties, upon the question as to whom was the credit given. The court, with reference to the state of the proof, said: "If the defendant authorized the selling to the son, the plaintiff could recover, although the goods were charged to J. B. Tripp in the manner stated in the case. He also charged the jury on the law of principal and agent, and that if the credit was given to J. B. Tripp, with Joseph Tripp as surety, then the defendant would not be liable. There is nothing in these instructions of which the defendant can justly complain. The promise, as the jury have found it to be under the charge, is not required to be in writing. *Neal v. Bellamy*, 73 N. C. 384. The liability of the defendant depends upon his agreement with, or promise to, the plaintiff, and not upon the manner in which the plaintiff stated the account on his books. The latter was evidence, properly before the jury, under the circumstances, and for the purpose already stated." As will be seen, the charge was approved and the judgment was affirmed; the court holding that the liability of Joseph Tripp, the promisor, depend-

ed upon his agreement with the plaintiff, and not upon the manner in which the goods were charged on the books; it being for the jury to say what was the intention.

Justice Hoke, in *Dale v. Lumber Co.*, 152 N. C. 651, 68 S. E. 134, 28 L. R. A. (N. S.) 407, states the law clearly, and in principle that case is not unlike this one. He says: "In *Emerson v. Slater*, 63 U. S. 28-43 [16 L. Ed. 360], a decision on this section of the statute of frauds, the court said: 'But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' This position has been sustained and applied in other cases by the same court, notably in *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, in which it was held: 'In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but, if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to that promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.'"

Powell had a business purpose, and, too, a pecuniary one, to subserve, as appears in this case, as Cook was his tenant, without credit, and unable to get supplies to make his crop without the credit of Powell at Peele's store. He made the promise to advance his own interests, and no doubt received the full benefit of it in the way of rent, and, perhaps, enough besides to pay for the goods and supplies Peele furnished to his tenant, Cook, at his request, as he had a lien under the statute for both rent and advancements. Therein consists the extreme hardship of the court's ruling, and the facts of the case so strongly appeal to my sense of justice and right, as did the facts in *Liverman v. Cahoon*, 72 S. E. 327, at this term, where the statute of limitations was pleaded, that I could not, and cannot in this case, refrain from giving my reasons at length for my earnest dissent from the conclusion, as well as the reasoning, of the court. I think that in both cases the defendants were seeking to take an unconscionable advantage of the plaintiffs, and one which the law, according to my understanding of it, did not countenance, much less justify.

The statute of limitations and the statute of frauds are to be considered as good legal defenses, when applicable to the facts; but they were designed, as Chief Justice Pearson said, in *Threadgill v. McLendon*, supra, "to prevent fraud," and not as a cloak for it.

There is no evidence in this case that the plaintiff ever trusted Cook for a moment, for it appears that he was utterly insolvent and without credit, and for that very reason the promise was made by Powell. Who can doubt, upon the evidence, that the credit of Powell alone entered into the transaction? He knew his tenant had no credit, and that his crop would be lost, unless he should become the debtor to Peele. There is at least evidence of all this, which should have been submitted to the jury. Our judicial duties at this time have been so onerous and exacting that I have little or no time to examine the authorities very closely, but a mere cursory reading of them warrants me in saying that they fully support my conclusion. "An oral promise to pay for goods furnished to a third person, at the request of the promisor and on his sole credit, is an original undertaking, and not within the statute of frauds. The same rule applies in respect of other considerations moving from the promisee and beneficial to a third person, at the request and upon the sole credit of the promisor, such as the advancing of money, the rendering of services, renting premises, bailing goods, or supplying board." 29 Am. & Eng. Enc. of Law, 923-930, where the law is fully stated, and authority will be found covering every point in this case, and especially does it sustain the view that the case is at least one for the jury. In *Morrison v. Baker*, 81 N. C. 76, it was held that, "where goods are furnished to A. upon the unconditional promise of B. to pay for them, it is not an undertaking to pay the debt of another, but the personal debt of B." It is clear to my mind, upon the conceded facts, that the promise of Powell to Peele was, in law, not a collateral, but an original, one; but, if not so, as matter of law, the question as to the nature of the promise should have been submitted to the jury.

Now as to the evidence. Luther Bryant testified: "I was a clerk in plaintiff's store from January 1, 1906, till the end of the year 1908; for all goods sold to J. T. Cook from February 22, 1906, to March 27, 1907, the credit therefor was extended to Edgar Powell; that about the time of the last-mentioned date, Mr. Peele told me not to let Mr. Cook have any more goods without a written order from Mr. Powell. Cook had no credit at that time, and was a tenant of Mr. Powell." It is true he afterwards said that Powell told plaintiff "to let Cook have the goods, and he would see that they were paid for." But how does this affect Powell's liability? It does not exclude the idea

that he would be solely responsible to Peele. Identical words were not allowed any such effect in *Threadgill v. McLendon*, supra. They rather strengthen the other evidence. The court says it does not appear that he let Cook have any goods at that time. Why, Luther Bryant had already said that there was a running account at the store from February 22, 1906, to March 27, 1907; goods having been furnished between those dates by Peele to Cook solely upon Powell's credit.

It is also stated by the court, in the opinion, that Peele told his clerk, Bryant, about March 27, 1907, not to let Cook have any more goods without a written order from Powell, and that Cook had no credit, and it is argued from this that Cook had credit prior to that time, and no goods were afterwards sold to him; but no such inference, I respectfully submit, is at all warranted. Bryant expressly stated that Cook *never* had any credit between February 22, 1906, and March 27, 1907. It makes no difference whether he got any goods afterwards or not. Besides, the court excluded all evidence as to the account between Peele and Cook, and thus prevented the plaintiff from proving and developing his case. His ruling was wrong, of course, as the transaction between Peele and Cook was no transaction with the deceased party, Powell. The reason why Bryant was instructed not to let Cook have any more goods without an order from Powell was that he was increasing his account to such an extent, and so rapidly, that he thought it right to notify Powell and get his order. Powell himself referred to this afterwards, according to the witness F. L. Bishop.

It also appears from Bishop's and Brewer's testimony that Powell admitted his liability to Peele, and stated that it was "all right." This kind of admission is held to be some evidence of an independent and original promise, in the beginning of the transaction, to pay for the goods himself, as will appear by reference to the Am. & Eng. Enc. of Law, above cited. It is not necessary to give the promise "a retrospective and prospective construction to include the part of the account before the promise, and that part made after it," as said in the court's opinion; for there is ample evidence to show a promise, both at the time of the first conversation, before any goods were furnished, and afterwards. And, again, when Powell said, "it was all right," it is plain to my mind, from the context, what he meant, and there is but one interpretation to be placed upon his words. He referred to his liability for the account, for that was what Peele had gone to his home to see him about, and nothing else. In one sense, he was referring to "Cook's account," and that is that Cook had got the goods which Powell had promised to pay for, and he went to see him about it for

the purpose of getting his money. But he *never* intimated, by word or act, that he looked to Cook for the money. Why should he look to an insolvent? "You can't get blood out of a turnip" (ex nihilo nihil fit), to speak figuratively, and Peele knew that Cook would never have any money for him, and for that reason he depended upon Powell alone. The fact that Powell is dead is utterly irrelevant to the question. The statute of frauds does not protect a man because he is dead, any more than it does a living person. They both stand with reference to it on an equality; one has no greater right under it, and is entitled to no greater consideration, than the other.

The case of *Garrett-Williams Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448, so much relied on by the court, with other cases of a like kind, and which was strenuously urged upon our attention by defendant's counsel as directly in point, does not fit this case by any means. The promise there was by T. A. Hamill to pay, if F. A. Hamill did not. "We went to Whitakers, and T. L. Hamill bought goods, and said ship goods in future to F. A. Hamill whenever he needed them, until he notified us not to ship, and he would see us paid, and to collect from F. A. Hamill when I came around, and if F. A. Hamill failed to pay, he would." That was distinctly a collateral promise—a promise of T. A. Hamill *superadded* to that of the principal debtor, F. A. Hamill.

It seems to me that the necessity which the court found for explanatory argument upon the facts, in order to show that the statute does not apply, is a cogent reason for sending the case to a jury.

My conclusion is (1) that the plaintiff was deprived of the right to develop his case by erroneous rulings of the court upon the testimony, and (2) that the evidence is such as to require the intervention of a jury, and for either or both reasons the nonsuit should be set aside, and a new trial ordered.

HOKE, J., concurs in the dissenting opinion of WALKER, J.

(157 N. C. 424)

WHITEHURST v. PADGETT et al.

(Supreme Court of North Carolina. Dec. 13, 1911.)

1. FRAUDS, STATUTE OF (§ 23*)—DEBT OF ANOTHER—"ORIGINAL PROMISE"—"COLLATERAL PROMISE."

A promise made at the time or before a debt is created, and where credit is given solely to the promisor or to both promisors as principals, or a promise based on a new consideration passing between the promisor and the creditor, or a promise for the benefit of the promisor where he has a personal and pecuniary interest in the transaction in which a third party is the original obligor, is an "original promise," which is not within the statute of frauds, but a promise not creating an original

obligation and merely superadded to the promise of another who remains liable, to pay such debt, is a collateral promise required by the statute to be in writing and signed, whether made at the time the debt was created or afterwards.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1252; vol. 6, pp. 5063, 5064.]

2. FRAUDS, STATUTE OF (§ 159*)—QUESTION FOR JURY.

Where a landlord interested to have his tenant furnished with supplies to make his crop is sought to be charged on his promise for goods furnished the tenant, and the evidence whether the credit was in the first instance given to him as a joint principal, is conflicting, the question is for the jury.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 378; Dec. Dig. § 159.*]

3. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence in an action against a landlord and his tenant, seeking to recover for goods furnished the tenant, that plaintiff had charged the goods on his books to both the landlord and the tenant is irrelevant, and hence harmless as to the tenant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. APPEAL AND ERROR (§ 499*)—SUFFICIENCY OF OBJECTION—RULE OF COURT.

An objection made by one of two defendants without showing which one made it, and which is untenable as to one defendant, must fail in view of Supreme Court rule 27 (140 N. C. 662, 68 S. E. viii) providing that it shall not be ground for exception that evidence, competent for some purposes, but not for all, is admitted, unless appellant asks at the time of admission that its purpose be restricted.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 499.*]

5. EVIDENCE (§ 171*)—BEST OR SECONDARY EVIDENCE—COLLATERAL WRITINGS.

In an action against a landlord and his tenant to recover for goods furnished the tenant on an alleged oral promise of the landlord to pay for them, where the plaintiff's book of entry and its contents were only collaterally involved in the issue, parol evidence on the part of plaintiff as to whom he had charged the goods on his books was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by S. C. Whitehurst against E. P. Padgett and M. A. James. Judgment for plaintiff, and defendants appeal. No error.

Julius Brown, for appellants. F. G. James & Son, for appellee.

WALKER, J. Plaintiff had a store at Grindool, and defendant, Alexander Padgett, lived on the Barnhill land, which he had leased from his codefendant, M. A. James. There was evidence tending to show that Whitehurst, at the request of Padgett and James, furnished Padgett with fertilizers to the amount of \$284.31, for use on the Barnhill place, as tenant of James. The material facts, according to the plaintiff's testimony,

were these: Padgett applied to Whitehurst for the fertilizer and told him that James would pay for it. Whitehurst saw James afterwards, who said to him, "All right, go ahead and furnish Padgett, and I will see that you get your money." He was afterwards told by Whitehurst that the debt for the fertilizer was due, when he said, "I will see that you get your money, if I do not get a cent." There was evidence for the defendants that no such promise had been made by James, but, on the contrary, that Whitehurst had refused to accept the promise of James to pay for the fertilizer. Defendants also relied upon the statute of frauds. The court charged the jury that Padgett could not bind James by any declaration that the latter had told him to buy the fertilizer on his credit and responsibility, unless they found that James had authorized the purchase by Padgett from Whitehurst, and agreed to become liable for the same; that they would consider all the evidence and find therefrom whether such authority had been given, and that if they should find that the authority was given, their verdict would be for the plaintiff, otherwise for defendants. The jury returned a verdict against defendants, and they appealed.

[1] We see no objection to the charge of the court. At this term, in *Peele v. Powell*, 73 S. E. 234, we held that a promise is not within the statute of frauds, if it is based upon a consideration and is an original one, and that it is original if made at the time or before the debt is created, and the credit is given solely to the promisor or to both promisors, as principals, or if the promise is based upon a new consideration of benefit or harm passing between the promisor and the creditor, or if the promise is for the benefit of the promisor and he has a personal, immediate, and pecuniary interest in the transaction, in which a third party is the original obligor, but if the promise does not create an original obligation, and is collateral and merely superadded to the promise of another to pay the debt, who remains liable therefor, the statute applies, and the second promisor is not liable upon his promise, unless it was reduced to writing and signed, as required by the statute, and this is true whether his promise was made at the time the debt was created or afterwards. Numerous authorities were cited to support these principles, and, among others, the following: *Neal v. Bellamy*, 73 N. C. 384; *Dale v. Lumber Co.*, 152 N. C. 653, 68 S. E. 134, 28 L. R. A. (N. S.) 407; *Hospital Ass'n v. Hobbs*, 153 N. C. 188, 69 S. E. 79; *Morrison v. Baker*, 81 N. C. 80; *Shepard v. Newton*, 139 N. C. 536, 52 S. E. 143; *Haun v. Burrell*, 119 N. C. 547, 26 S. E. 111; *Horne v. Bank*, 108 N. C. 119, 12 S. E. 840; *Browne on Statute of Frauds*, § 197, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the authorities sustain the rules laid down by the court.

[2] Whether the defendant James intended to become a joint principal with Padgett, his tenant, was fairly and correctly submitted to the jury by the court upon all the evidence, and there was more than we have considered it necessary to recite. James had a direct personal and pecuniary interest in the transaction, and made the promise, as the jury finds, at the time the goods were furnished or the debt was contracted, and it is evident, the jury having found the fact as to the promise in favor of plaintiff, that he relied upon it at the time and furnished the fertilizer upon the faith of it. In the case of *Threadgill v. McLendon*, 76 N. C. 24, were words almost identical, and, at least, substantially the same as those used by James, according to plaintiff's testimony, the court held that it was properly left to the jury to say whether the credit was not in the first instance given to the promisor, who was a landlord, and who, as the court says, was interested to have his tenant or cropper furnished with necessary supplies to make his crop and had a lien upon it. That was the first reason for the decision, and it is applicable to this case. It would not be fair for the defendants to rely upon the statute, under such circumstances, it having been passed to prevent frauds and not to encourage them, as was said by Judge Pearson, for the court, in *Threadgill v. McLendon*, *supra*.

[3] The plaintiff was asked by his counsel to whom he had charged the goods on his books, and replied that they were charged to Padgett and James. Defendants objected to the question, but it was irrelevant as to Padgett, and, of course, harmless, and therefore, was not objectionable as to him. It does not appear that James individually objected to it.

[4] If we treat the objection as having been made by one of the defendants, and not by both, it does not appear which one made it, and the objection, being untenable as to Padgett, must fail. Rule 27 (140 N. C. 662, 66 S. E. viii).

[5] But we think the "best or primary rule" does not apply. The book entry and its contents are not directly involved in the issue. The plaintiff was not suing upon the entries, but upon the contract, which was not required to be in writing. McKelvey on Evidence (2d Ed.) pp. 425-428, after stating the old rule, thus refers to the modern rule: "Where the writing is not in issue, but merely collateral to it, it is held that the rule has no application, and parol evidence may be given, even though it covers the contents of the writing. An interesting question arises where the allegations that a book or documents do not contain certain

matter. It has been held here that oral testimony of any one who has examined the writing may be given in support of the allegation. In a certain sense the writing itself may certainly be regarded as the best evidence of what it does not contain, as well as what it does contain, yet there may not be the same difficulty in establishing that a certain matter is not contained in a writing as in determining with exactness its actual contents, and there may, therefore, be less reason for the enforcement of the best-evidence rule." He cites the case of *Conrod v. Madden*, 126 Ind. 197, 25 N. E. 1102, and our case of *Ledford v. Emerson*, 138 N. C. 502, 51 S. E. 42, which seems to be as extreme an application of the rule of the best evidence as can be supposed. It was there held that "the rule excluding parol evidence as to the contents of a written instrument, applies only in actions between parties to the writing, and when its enforcement is the substantial cause of action, and not where the writing is collateral to the issue."

We have carefully considered the other rulings of the court, to which exceptions were taken, and find no reversible error therein.

No error.

(157 N. C. 460)

GAINESVILLE & ALACHUA COUNTY
HOSPITAL ASS'N v. ATLANTIC
COAST LINE R. CO. et al.

(Supreme Court of North Carolina. Dec. 20, 1911.)

1. CORPORATIONS (§ 514*)—ACTION—PLEADING—ISSUES AND PROOF.

In an action by a hospital association begun in a justice's court, defendant was summoned to answer the plaintiff corporation for the nonpayment of a sum due by contract, and the answer set up nonliability, the statute of frauds and want of jurisdiction. *Held*, that the pleadings did not sufficiently raise the issue of plaintiff's corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. § 514.*]

2. CORPORATIONS (§ 34*)—CORPORATE EXISTENCE—ESTOPPEL TO DENY CORPORATE EXISTENCE.

Where defendant has dealt with the plaintiff as if plaintiff had been duly incorporated and had the capacity to enter into the contract, whether express or implied, it is estopped from denying plaintiff's corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.*]

3. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF CASE.

The decision on a former appeal is the law of the case in a subsequent appeal where the same questions are raised upon evidence not substantially different from that in the former appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

4. APPEAL AND ERROR (§ 1097*)—REHEARING --GROUNDS—ERROR ON REVIEW.

Matters decided on a former appeal must be questioned by a petition to rehear the case or for a reversal of the decision, if erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

5. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—ORIGINAL PROMISE.

An original promise to answer for the debt of another is not within the statute of frauds, and hence is not required to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18-19; Dec. Dig. § 23.*]

Appeal from Superior Court, Sampson County; Cline, Judge.

Action by the Gainesville & Alachua County Hospital Association against the Atlantic Coast Line Railroad Company and another. Judgment for plaintiff, and the Atlantic Coast Line Railroad Company appeals. No error.

Defendant in this action was summoned to appear in a justice's court "to answer the complaint of the plaintiff corporation for the nonpayment of the sum of \$127.75 with interest on the same from the 21st day of July, 1908, due by contract or quasi contract, and demanded by said plaintiff," and made answer to this complaint as follows:

"(1) That it does not owe the plaintiff anything.

"(2) That if the defendant Georgia Hobbs is indebted to the plaintiff, this defendant is not liable therefor; that this defendant cannot be made liable for the debt of Miss Georgia Hobbs, except upon a promise in writing, signed by it or some one legally authorized to make and sign such promise; and this defendant avers that no such promise was ever made, and this defendant pleads specially the statute of frauds.

"(3) That it is informed and believes that the basis of the plaintiff's claim is some matter and things which occurred in the state of Florida, and this court has no jurisdiction.

"(4) That no contract or quasi contract exists or ever has existed pursuant to which this defendant is liable to the plaintiff in any amount."

Junius Davis, for appellant. Faison & Wright, for appellee.

WALKER, J. An examination of the record in this case discloses the fact that every question now raised was presented in the former appeal and then decided by this court. If it was material at the former hearing for the plaintiff to have established its incorporation, the nonsuit should have been sustained, and there is no less evidence of that fact now than there was then.

[1, 2] But we concur with the judge, who

presided at the trial, that the question of incorporation is not sufficiently raised by the pleadings, and, besides, if our former decision was correct, the appellant (Railway Company) dealt with the plaintiff as if it had been duly incorporated and had the capacity to enter into the contract, whether express or implied. Banking & Trust Co. v. Duffy, 72 S. E. 96, at this term.

[3, 4] The question as to the statute of frauds, and the remaining one as to the authority of H. O. McArthur to act for the company in the particular matter, were both passed upon when the case was here before. The evidence is not substantially different from what it was in the former appeal. We then held that it was sufficient for submission to the jury, and we must so decide now, as the same question cannot be raised by a second appeal, but it must be done by a petition to rehear the case, and for a reversal of our decision if we were in error. Jones v. Railroad, 131 N. C. 133, 42 S. E. 559; Wright v. Railroad, 128 N. C. 77, 38 S. E. 283; Kramer v. Railway Co., 128 N. C. 269, 38 S. E. 872; Holley v. Smith, 132 N. C. 36, 43 S. E. 501. The motion to nonsuit is governed by the same rule. We do not mean to imply that our former rulings were erroneous, but simply that they cannot be reviewed in this way. There is no practical difference between this case and the one we formerly heard. [5] Assuming that McArthur had sufficient authority to represent defendant, which we formerly decided to exist, the ruling that the promise to pay the plaintiff its charges for medical and other services to Miss Hobbs, as an original one, is not affected by the statute of frauds, and, therefore, is not required to be in writing, finds some support in two cases decided at this term. Peele v. Powell, 73 S. E. 224, and Whitehurst v. Padgett, 73 S. E. 240.

No error.

(70 W. Va. 97)

ADKINS et al. v. GUYANDOTTE TIMBER CO.

(Supreme Court of Appeals of West Virginia. Dec. 12, 1911.)

(Syllabus by the Court.)

NAVIGABLE WATERS (§ 26*)—ACTION FOR OB- STRUCTION—PLEADING.

A declaration in an action for damages from the temporary obstruction of a river by a boom company whereby a raft was detained from its destination and lost in a flood, must aver that the owner of the raft requested the boom company to permit the raft to pass.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 26.*]

Error to Circuit Court, Cabell County.

Action by E. E. Adkins and another against the Guyandotte Timber Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Campbell, Brown & Davis, for plaintiff in error. George J. McComas and Daniel Dawson, for defendants in error.

ROBINSON, J. The action is one for the recovery of damages from the loss of a raft of logs. Plaintiffs claim that the loss was caused by defendant, a boom company, in negligently and unlawfully blocking the channel of the river, so that the raft was detained therein until a flood came and swept it away.

The case is similar to that considered in *Ironton Lumber Co. v. Guyandotte Timber Co.*, 68 W. Va. 358, 69 S. E. 815. The decision in that case controls the determination of a material point in the case at hand. There is no averment in the declaration that plaintiffs requested defendant to open the boom and allow their raft to pass through. Demurrer to the declaration was overruled. It should have been sustained.

On the authority of the case cited, we must reverse the judgment, set aside the verdict, sustain the demurrer, and remand the case with leave to amend the declaration.

(70 W. Va. 113)

ELKINS NAT. BANK v. REGER et al.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 279*)—VENDOR'S LIEN—ENFORCEMENT.

In a suit to enforce a vendor's lien, a subsequent trust lien creditor, holding a prior vendor's lien note as collateral security for his trust lien debt, is a necessary party.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 778-782; Dec. Dig. § 279.*]

2. VENDOR AND PURCHASER (§ 279*)—VENDOR'S LIEN—ENFORCEMENT.

Under such circumstances, it does not suffice to make the trustee in the deed of trust a party as representing his cestui que trust, since he has neither authority to collect the debt nor title to the collateral note.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 778-782; Dec. Dig. § 279.*]

Appeal from Circuit Court, Randolph County.

Bill by the Elkins National Bank against Ella D. B. Reger and others. Decree for complainant, and defendants appeal. Reversed and remanded.

C. H. Scott and H. G. Kump, for appellants. E. A. Bowers, for appellee.

POFFENBARGER, J. Having become possessed, in the manner hereinafter stated, of a promissory note for the sum of \$1,310, executed by Mrs. Ella D. B. Reger and secured upon her property by a vendor's lien, the Elkins National Bank brought this suit to enforce the lien. The note was for part of the

purchase money of the property proceeded against and made payable to the vendor, Mrs. Elizabeth B. Tibbetts. The deed for the property was acknowledged August 31, 1904. On the same day Mrs. Tibbetts assigned the note to Shelton L. Reger, the husband of Mrs. Reger. About the same time the husband and wife made and delivered their promissory note to the Elkins National Bank for \$1,200, and the former assigned to said bank, as collateral security for said \$1,200 note, the note executed by his wife to Mrs. Tibbetts and by her assigned to him. The proceeds of this note were placed to his credit and he checked out the money, but to whom and for what purpose it does not very clearly appear. The \$1,200 note reads in part "I promise to pay," but is signed by both parties. At the time of the assignment of the \$1,310 note as collateral, Mrs. Reger assigned to the bank, as further security, three promissory notes of \$300 each, executed to her by Dora Watson and Creede Watson, and secured by a vendor's lien on property other than that involved here. The \$1,200 note was renewed once or twice, and, default having been made in the payment of the last renewal note, the bank sold the collateral notes at public auction, and bought them in through its attorney at the price of \$1,590. It then brought this suit to enforce the lien of the \$1,310 note on the property of Mrs. Reger. There was a prior vendor's lien on it in favor of Mrs. Grace Davis Lee for purchase money due her from Mrs. Tibbetts, payment of which Mrs. Reger had assumed. At the time of the purchase by Mrs. Reger, this lien amounted to \$2,500, evidenced by three promissory notes, one for \$834, and two for \$833 each. Some time after the purchase by Mrs. Reger, her husband went to the Elkins National Bank, where these last-mentioned notes were held for collection, and paid off the first one, calling for \$834. Claiming an assignment of that note, by reason of his having paid it or taken it up with money claimed to have been his own, he assigned it to J. W. Knopsnyder as collateral security for a \$500 loan made by said Knopsnyder to Mrs. Reger, and further secured by a deed of trust upon the property here preceeded against in which E. D. Talbott was made trustee. Mrs. Grace Davis Lee, holding her two vendor's lien notes, Ella D. B. Reger, Shelton L. Reger, E. D. Talbott, trustee, and Elizabeth B. Tibbetts, payee in the \$1,310 note and promisor in the \$834 note and the two \$833 notes, were made parties defendant. Knopsnyder is shown by the answers filed, but not by the bill, to have been dead at the time of the institution of this suit, and his executor, the Davis Trust Company, was not made a party. Without referring the cause to a commissioner, the court decreed the debt of Mrs. Lee, then amounting to \$2,030, to be the first lien up-

on the property, that of the bank, amounting to \$1,641.43, the second, and that of Knopsnyder the third lien, and ordered the property sold to satisfy these liens in default of payment by Mrs. Tibbetts of the debt due Mrs. Lee, and by Mrs. Reger of the debt due the bank, and appointed a commissioner for the purpose of executing the decree. A sale was made to N. I. Hall for the sum of \$4,900, which was paid in cash, and then Shelton L. Reger and others put in an upset bid of \$5,200. This bid was accompanied by a petition of Mrs. Reger, praying the court to set aside the sale and resell the property. From this decree, the Regers have appealed.

[1] Of the many assignments of error, the most important one is founded upon the failure to make Knopsnyder's executor a party, after discovery of its possession of the \$834 note and the manner and purpose of its acquisition. As the bill did not disclose these facts, the demurrer was no doubt properly overruled; but, if the executor was a necessary party, the disclosure of its interest at any stage of the proceeding, no matter in what way, made it necessary for the plaintiff to amend by making the executor a party. As the bill accords to Mrs. Lee the first lien on the property and claims the place of second lienor for the bank, one of its purposes was, after the disclosure of the alleged assignment of the \$834 note to Knopsnyder through S. L. Reger, to assert priority of the bank's lien over Knopsnyder's right, if any, as holder of that note, and such was the effect of the decree. Indeed, the decree allowed nothing to anybody on account of the \$834 note. It treated that note as having been paid, although it was shown to be in the hands of the executor of Knopsnyder. But for this claim of priority, Knopsnyder's executor might have been omitted, under the authority of *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561, and *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. 21, holding it unnecessary, in a suit of this character, to make a lienor under a deed of trust subsequent to the vendor's lien a party, and sufficient to make the trustee a party, so as to bring the legal title before the court. *Turk v. Skiles*, however, says it is necessary to make the cestui que trust a party, if there is a controversy as to priority between the vendor's lien and the trust lien, on the theory of a waiver or estoppel on the part of the holder of the former in favor of the holder of the latter. Here the question of priority stands upon a ground higher than that of waiver or estoppel. Mrs. Lee admittedly had the first lien for the \$834 note. If she assigned it to Reger, and Reger to Knopsnyder, it is clearly entitled to preference over the lien asserted by the bank. There may not be much merit in this claim of assignment; but it is a claim, and an adjudication against it, in

the absence of Knopsnyder's executor, cannot bind it. Hence, the failure to make it a party was an obvious error, which will reverse the decree, unless it can be excused upon some ground.

[2] The presence of the trustee in the deed of trust as a party is relied upon as a sufficient excuse, on the theory of his representation of the Knopsnyder debt, secured by the deed of trust, as well as by the \$834 note. The deed of trust was such in form and effect as is ordinarily taken to secure a debt and conferred no authority upon the trustee to collect, wherefore he did not represent it. *Bryan v. McCann*, 55 W. Va. 372, 47 S. E. 143; *George, Trustee, v. Zinn*, 57 W. Va. 15, 49 S. E. 904, 110 Am. St. Rep. 721. Hence the trust deed debt was not represented, nor was the holder of the \$834 note before the court. Though Talbott seems to have filed it with a deposition, he had no title to it, nor right to collect it otherwise than as attorney or agent. Nor did S. L. Reger represent it, although he claimed an equitable right respecting it. For the purposes of adjudication, it was not before the court at all.

Nor do we think Mrs. Reger released or waived the error by asking the court to set aside the sale and resell the property. In every substantial view, this act was one in resistance of the sale, and not an acceptance of the benefit of the decree complained of.

Though the Knopsnyder estate may not be interested in some of the controversies raised by the assignments of error, it is difficult to say how far that interest extends, and, as the decree must be reversed for lack of a necessary party, we refrain from further consideration of the assignments, in conformity with the general rule.

For the error aforesaid, the decree complained of will be reversed, and the cause remanded, with leave to the plaintiff to make Knopsnyder's executor a party and amend its bill.

(70 W. Va. 22)

WILEY et al. v. HATCHER.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 3*)—DESCRIPTION—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS.

In locating the boundaries of land, ordinarily the course of a line must yield to a call for a natural monument.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—DESCRIPTION—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS.

A call in an ancient deed for "two white oaks on Cooper's Point" must control over a course given for the line which will not take it to Cooper's Point, when the location of that

place is definitely established, though the trees are not found there.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 3.*]

3. EJECTMENT (§ 10*)—TITLE OF PLAINTIFF—ADVERSE POSSESSION.

When a plaintiff in ejectment proves that he and those under whom he holds have had adverse possession of the land for a period exceeding ten years, he need not trace his title to the commonwealth.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 30-41; Dec. Dig. § 10.*]

Error to Circuit Court, Summers County.

Action by C. D. Wiley and others against James E. Hatcher and another. Judgment for plaintiffs, and defendant James E. Hatcher brings error. Affirmed.

M. F. Matheny and E. C. Eagle, for plaintiff in error. T. N. Read and Farley, Sutphin & Ward, for defendants in error.

ROBINSON, J. Trial of this action in ejectment was had by jury and resulted in a verdict for plaintiffs. Judgment thereupon followed. Defendant assigns error and seeks a reversal.

The whole controversy turns on the location of the true line between a tract of land long in the possession of plaintiffs and an adjoining tract long in the possession of defendant. The parties seem agreed that the line runs from a particular corner. But each side claims a different corner for the other end of the line. So a triangular parcel belongs to one tract or the other, according to the establishment of the corner in dispute. As we shall see, the location of this disputed corner was a matter for the jury to determine, mostly from parol testimony. Their finding is by no means unsupported by the evidence. Certain it is, the finding is not against a clear preponderance of the evidence. The jury were properly instructed. We cannot disturb their verdict.

Plaintiffs' deed calls for the line of defendant's land. Defendant says that plaintiffs are bound by this call of their deed and can claim only to the line of his land. But the question still remains, where is the proper location of the line in relation to defendant's tract? Defendant has not had an enclosure of the disputed territory, nor has he had possession of it to the exclusion of plaintiffs. The greater portion has lain in the common. Indeed plaintiffs long had possession of a part of the disputed territory until defendant entered shortly prior to the beginning of this suit. Plaintiffs are bound by the true location of the line of defendant's tract, since their deed calls for the line of his land, but they are not bound by any location of the line that defendant sees fit to make. If the line is where plaintiffs claim, the disputed parcel is a part of the tract which has long been in their possession under claim and color of their deed.

Their possession of the tract has extended over this parcel also. If the line is where defendant claims, this disputed parcel has been in his possession as a part of his tract, except as to the portion which plaintiffs have actually occupied. Though plaintiffs' deed calls for defendant's line, plaintiffs are entitled to claim their tract to the true location of that line.

[2] Defendant testifies that "the Syms line" is the true line of his land. Deeds in his chain of title, as well as deeds in plaintiffs' chain of title, plainly show that an old line called "the Syms line" is the division line between these two tracts of land. According to defendant's title papers "the Syms line" extends from the corner well established as one end of the line, and as to which there is practically no dispute, to a corner described as "two white oaks on Cooper's Point," a distance of 360 poles. This call for the line is first found in the deed from Beckley to Syms, made in 1842, conveying the land now owned by defendant, where the direction of the line is given as N. 78 E. The later title papers of defendant call for this same line. It appears that "the Syms line" was once called "McDaniel's line," before Syms owned the land. In plaintiffs' title papers there is a deed from Beckley to Cooper, made in 1835, which calls for this line as "Mr. McDaniel's line on Cooper's Point." Then the deed from Cooper to Meador, conveying the land which plaintiffs now own, calls for the line as "John Simses line on Cooper's Point." Clearly, "the Syms line" is the division line between the land of plaintiffs and the land of defendant. There can be no question as to the location of the corner for one end of the line. The testimony of the county surveyor as to the location of that corner sufficiently establishes it. Indeed defendant accepts the location of that corner, but insists that the line shall run from it to a corner other than the one claimed by plaintiffs. The controversy narrows to a dispute over the location of the end of the line at the corner called for "on Cooper's Point." The testimony establishes a sharp point of the mountain to be Cooper's Point. Old citizens of the vicinity testify that this particular spot has been known by the name for many years. Cooper's Point is found and by the evidence unquestionably established. But the "two white oaks" are not found on it. Nor does the course of the line when run to it fit the direction call in the old Syms deed. It is N. 65—¾ E., whereas with proper variation from the old call it should be N. 82 E. The distance of 360 poles, however, fits exactly. When the line is run N. 82 E. 360 poles, it goes far off from Cooper's Point, but reaches a small marked white oak on a ridge. Defendant contends that this is the proper corner and that the place is Cooper's Point. The parol evidence is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clearly against his contention in this particular. Besides, when the line is run to that place it must improperly go far across another division line of plaintiffs' land and must eliminate one of the lines of plaintiffs' survey as well as a clearly marked and well established corner of the same. If the line is run to the place established by the old people as Cooper's Point, it fits with adjoining surveys. When the survey of plaintiffs' tract was made in 1835, Cooper's Point was recognized therein as being far to the left of the place where defendant now contends it should be found. It was then recognized as being to the left of the clearly marked and well established corner which defendant would now eliminate or disregard. All the witnesses well qualified to testify in the particular, old men speaking from the notoriety of early days, locate Cooper's Point where this early survey of plaintiffs' land located it.

Defendant relies on the fact that he has shown a small marked white oak at the end of the line when run on the course for which the old deed calls, while the two white oaks that are called for "on Cooper's Point" are not there. The evidence as to the marks on the small white oak and as to its age is of doubtful consequence. At any rate, that tree is not "on Cooper's Point." It can have no standing as a corner since it is not at the place it should be. The line calls not simply for white oaks. Those white oaks to be recognized as corner trees for the line must be "on Cooper's Point." That place is a natural monument that cannot be disregarded. True, the white oaks are not found "on Cooper's Point," but there is no evidence in the case that they were never there. There has been ample time for them to disappear since 1842. Defendant does not even undertake to prove that the white oaks as called for were never since the date of the deed at the place which the witnesses establish as Cooper's Point. Trees naturally fall, decay and disappear, but the point of a mountain is eternal in its existence.

[1] In locating the boundaries of land, ordinarily course and distance must yield to a call for a natural monument. Chief Justice Marshall said: "All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformable to the calls of the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects." *McIver v. Walker*, 9 Cranch, 173, 3 L. Ed. 694. In the case before us, it is only the course that must yield. The distance fits the call for the natural monument—the sharp point of the mountain. The course can be changed or disregarded, but

the fixed location of the point of a mountain cannot be moved to another place. The evidence abundantly establishes the location of each of the corners pertaining to "the Syms line." That line must be drawn between them. The jury most properly so found. The words of Judge Tucker are appropriate here: "If a patent or deed refer to any notorious landmarks, or natural boundaries, which cannot be mistaken, and are not liable to change or decay, as the corners or angles of a plat, such notorious landmarks are to be regarded as termini, from whence straight lines are to be run from one to the other, without regard to the correspondence of either course or distance, which may in such cases be mistaken in the deed." *Dogan v. Seekright*, 4 Hen. & M. (Va.) 130.

[3] It was not incumbent on plaintiffs to trace their title to the commonwealth. The testimony sufficiently shows that they, and those under whom they hold, have been in the continuous exclusive possession of the tract to which the disputed parcel belongs for a period much longer than the statutory bar. That possession extended to the bounds of their deed. It extended to "the Syms line." They were in possession of the tract claiming to that line. They may recover in ejectment under such circumstances without establishing a chain of paper title running to the commonwealth. *Rifle v. Skinner*, 67 W. Va. 75, 67 S. E. 1075.

An order will be entered affirming the judgment.

(70 W. Va. 96)

ISLAND CREEK R. CO. v. LOGAN & S. RY. CO.

LOGAN & S. RY. CO. v. ISLAND CREEK R. CO.

(Supreme Court of Appeals of West Virginia. Dec. 12, 1911.)

(Syllabus by the Court.)

1. INJUNCTION (§ 28*)—SUBJECTS OF RELIEF—CONDEMNATION PROCEEDINGS.

The fact that a railroad company desiring to cross at grade or otherwise the right of way or track of another railroad company has not as a prerequisite condition, and before instituting suit to condemn the same, obtained a decree in equity, fixing the points and manner, and the terms and conditions on which such crossing may be made, gives a court of equity no jurisdiction at the suit of the condemnee company to restrain the prosecution of such suit to condemn; the defense at law being ample and complete.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 62-65; Dec. Dig. § 28.*]

2. EMINENT DOMAIN (§ 274*)—RESTRAINING PROCEEDINGS—IRREPARABLE INJURY.

Nor is there jurisdiction in equity to restrain such condemnation suit on the broader equitable ground of irreparable injury to the property and plant of the condemnee; all such matters being properly addressed to the consideration and judgment of the court in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suit of the condemnor against the condemnee to obtain a decree fixing the points, the manner, and the terms and conditions on which such crossing may properly be made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 753, 765-768; Dec. Dig. § 274.*]

3. RAILROADS (§ 91*)—CROSSINGS—PROCEEDINGS TO TAKE PROPERTY—CONDITIONS PRECEDENT.

Such decree of a court of equity, obtained pursuant to section 11, c. 52, Code 1906, is a prerequisite condition to the exercise of the right of one railroad company to cross, at grade or otherwise, the right of way or tracks of another railroad company given by paragraph 7 of section 50, c. 54, Code 1906, or to institute a suit to condemn such crossing pursuant to section 48 of said chapter. *Approving Railroad Co. v. Traction Co.*, 56 W. Va. 18, 48 S. E. 746, and interpreting the points of the syllabus in *Railroad Co. v. Railroad Co.*, 56 W. Va. 458, 49 S. E. 532.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.*]

Appeal from and Error to Circuit Court, Logan County.

Bill in equity by the Island Creek Railroad Company against the Logan & Southern Railway Company. From a decree for defendant, plaintiff appeals. Affirmed.

Condemnation proceedings by the Logan & Southern Railway Company against the Island Creek Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed, and petition dismissed, without prejudice.

Vinson & Thompson, for appellant and plaintiff in error. Campbell, Brown & Davis and Brown, Jackson & Knight, for appellee and defendant in error.

MILLER, J. The bill of the Island Creek Railroad Company, which on demurrer was dismissed, for want of equity, sought: First, to enjoin the Logan & Southern Railway Company, from prosecuting its proceeding at law to condemn a crossing at grade over plaintiff's railroad, at two points proposed in its petition: Second, to require the Logan & Southern Company, to construct and maintain an overhead crossing, over its track, in place of the proposed grade crossings: Third, to have the court fix the place, plans and specifications, and the terms upon which such overhead crossing should be made, and thereby waiving right to compensation for the use of its lands taken therefor, and damages to the residue occasioned thereby: And, fourth, general relief.

The Logan & Southern Company, by its petition, professing to be proceeding pursuant to the seventh paragraph of section 50, c. 54, Code 1906, and section 48, of that chapter, as provided by the former, alleging its inability to agree with defendant upon the amount of compensation, or upon the points or manner of crossing, sought to have the court in that proceeding ascertain and determine that petitioner was entitled

to cross or intersect the right of way and track of defendant at grade, at the two points, and substantially in the manner shown by exhibits filed with its petition; and to have commissioners appointed, as provided by law, to ascertain a just compensation to defendant for said crossings or intersections, to be made by petitioner, and that upon payment thereof, the title and right to such crossings or intersections, and each of them might be vested in petitioner, and for such further relief as the court might deem proper in the premises.

The points and manner of the proposed crossings, as the petition shows, were those which petitioner, without agreement or consultation with the condemnee, had arbitrarily chosen, and the petition contains no allegation, nor was it claimed or proven on the trial, that before the filing thereof, the points and manner of making the proposed crossings or intersections had been decreed to petitioner by suit in equity, as provided by section 11, c. 52, Code 1906. On the contrary it was conceded that no such decree had been procured.

Among the numerous defenses pleaded by defendant, one is that although petitioner had been requested by it to institute a suit in equity, pursuant to said section 11, of chapter 52, for the purpose of procuring a decree, adjudging, ascertaining and specifying the place, method and manner of making said crossings, in order that justice might be done to both parties, petitioner had failed and refused to do so, and it pleads the want of such decree in bar of said action at law.

On the hearing, upon pleadings and proofs, the court below on July 29, 1910, pronounced the judgment complained of, that the petitioner had lawful right to cross or intersect at grade the right of way and track of the defendant at the two points proposed in its petition, and shown upon the plats or maps exhibited therewith; that said crossings and each of them were necessary for its purposes, and will be used therefor, and that said crossings respectively should be located, constructed, maintained and operated as described in said petition, and shown upon said maps or plats, respectively. By the same judgment commissioners were also appointed to ascertain a just compensation to defendant therefor.

By stipulation of counsel both cases have been conjointly argued and submitted for decision, and both will be disposed of in this opinion.

[1] First we will dispose of the appeal from the decree dismissing the bill of the Island Creek Company. Appellant seeks to support that bill upon two principal grounds, viz.: First, on its alleged right, as a condition precedent, to have the points and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

manner of the proposed crossings or connections decreed by a court of equity, pursuant to said section 11, of chapter 52; second, on the broad general ground of equity jurisdiction to prevent by injunction, irreparable injury to its plant and property, by the proposed crossings, which it is alleged can not be adequately and justly compensated in damages, and as an overhead crossing is practicable, the proposed grade crossings are wholly unnecessary, unreasonably burdensome, and practically destructive of its property and franchises.

It is contended also, and we are disposed to so hold, in giving proper construction to our particular statutes, that it is a condition precedent to the right of one railroad company desiring to cross at grade or otherwise the right of way and tracks of another railroad company, and before a suit in condemnation will lie, that it should first obtain a decree in equity, fixing the points and manner and the terms and conditions of making such crossing or connection. It follows, therefore, as a necessary corollary, that the absence of such decree and of allegation and proof thereof, constitutes a complete and adequate defense at law, and there being such defense at law there is no jurisdiction in equity to grant the relief prayed for in the bill. This proposition is elementary, and it has been distinctly applied by this court in a case similar to this. *Railroad Co. v. Railroad Co.*, 56 W. Va. 453, 49 S. E. 532. The basis of this holding will be further considered in disposing of the writ of error to the judgment in the condemnation suit.

[2] But has equity jurisdiction, as claimed by counsel, on broader equitable grounds? We have considered all the numerous specifications of fact alleged as constituting irreparable injury, and as a reason for requiring defendant to make an overhead crossing, and to require the crossing to be made differently from those proposed in the petition in condemnation, and so far as we can see all of them entitled to consideration, can be available as a defense, or as advice to the court on bill filed, to determine the character and manner of the crossings that should be made by the condemnor. This being so, and we do not perceive any reason why it should be otherwise, the proper and only place to present all these matters is to the court having jurisdiction to decree the points and manner, and the terms and conditions of making such crossings, for we hold that one railroad company can not condemn a crossing at grade or otherwise, over the right of way or tracks of another company, until it has obtained a decree as the basis of its suit to condemn, and that until such decree has been obtained the defense to any action by it seeking to cross in any manner the tracks of the other company is ample and com-

plete. Our opinion, therefore, is that the bill in this case was properly dismissed and that the decree below should be affirmed.

[3] We have next to dispose of the writ of error to the judgment of condemnation. We have already indicated our opinion that that judgment must be reversed. If as we hold the decree of a court of equity defining the points and manner of crossings and connections, and the terms and conditions on which they may be made, is a prerequisite condition to a suit to condemn the same, authorized by said paragraph 7 of section 50, c. 54 of the Code, the want of such decree, pleaded by defendant, constitutes a complete defense to the petitioner's action, and we need not, and should not further consider the many other grounds of defense alleged; they are substantially the same as those alleged in the bill of the condemnnee company, and as we said of those so we may say of these, they are all the proper subjects of consideration by the court on bill filed pursuant to said section 11, c. 52 of the Code, and should not be prejudged on this writ of error.

Counsel for the Logan and Southern Company, however, earnestly controvert the proposition that a decree in equity was a prerequisite condition to its suit to condemn. It is conceded that such course was open to it, but that it had right of election of remedies, and that having chosen the more speedy and expedient proceeding by petition in condemnation, given by said section 50, c. 54 of the Code, it can not be denied relief in the legal forum, because the equitable remedy was also open to it. His argument in support of his theory of plenary and concurrent remedy at law, is based on the claim that paragraph seven of said section 50 of chapter 54, is a particular provision, applicable alone to securing a crossing by one railroad company over the right of way and tracks of another railroad company, an absolute right, as it is claimed, and of which it can not be denied, given by said section; while the provisions of said section 11 of chapter 52, are general, and applicable to other classes of public service corporations, and that for this reason, and because the former statute is also the later statute, if there is conflict or inconsistency the earlier and more general statute must yield to the later and special law, on the theory of implied repeal or modification by the later statute. The well recognized canons of construction, laid down by Sutherland on Statutory Construction (2d Ed.) §§ 274-276; Winn, *Adm'r*, etc., v. Jones, 6 Leigh (Va.) 74; *Justice v. Commonwealth*, 81 Va. 211; *For's Adm'r v. Commonwealth*, 16 Grat. (Va.) 1; *Hogan v. Guilgon*, 29 Grat. (Va.) 710; *Conley v. Supervisors*, 2 W. Va. 416; *Shields & Preston v. Bennett*, 8 W. Va. 74; and *Hawkins v. Bare & Carter*, 63 W. Va. 431, 436, 437,

60 S. E. 391—are invoked by counsel in support of his contentions. In our opinion, however, a proper construction of said paragraph seven of said section 50, does not require application of these rules of construction. Section 11 of chapter 52, does not furnish a concurrent remedy. It is simply a provision of the statute for establishing by decree the place and manner of crossings and connections. Resort must then be had to a suit at law to condemn the right to cross or connect as decreed. Said section 11, of chapter 52, constitutes a curb on the arbitrary power of one railroad company to cross at will property already devoted to public use. Equity and justice require such judicial ascertainment. *Lake Shore & M. S. Ry. Co. v. C. W. & M. Ry. Co.*, 116 Ind. 578, 582, 19 N. E. 440.

We can not construe said paragraph 7 as it is construed by counsel for the petitioner, and we think the rules invoked, for the most part, inapplicable. Said paragraph 7 is contained in the chapter relating to "Joint Stock Companies," and for what purposes they may be incorporated, etc. The first section of that chapter is pertinent; it provides: "Joint Stock Companies, incorporated under this chapter, shall be subject to the provisions of the fifty-second and fifty-third chapters of the Code, so far as the same are applicable." The particular provision of that paragraph relied on by counsel, as giving plenary and concurrent remedy is: "If the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossing and connections, the same shall be ascertained and determined in the manner prescribed by section forty-eight of this chapter." When we turn to section 48, however, we do not find there any specific provision for determining the points and manner of making such crossing or connections. The only pertinent provision of that section is: "If any railroad corporation shall be unable to agree with the owner of any real estate for the purchase thereof for its corporate purposes, it may have such real estate condemned for such purposes under the provisions of chapter forty-two of the Code." Chapter 42 is the general statute relating to the taking of land without the owner's consent for public use, but there is no provision of this chapter specifically covering this subject. The provisions of this chapter are general, applying to all cases where land of a private person may be taken for public use. It is not distinctly claimed, however, that under said paragraph 7 the Logan & Southern Company, though in terms given the right thereby "to cross at grade or to cross over or under" the right of way and track of the Island Creek Company, that this right is wholly an arbitrary right; but it is insisted that in so far as it can be

controlled as to the points and manner of such crossings and connections, the court on its law side, is empowered, by virtue of said paragraph 7 of section 50 to determine the points and manner of such crossings and connections, and that its rights and those of defendant can be as fully protected in that forum as by a prior decree in equity. Is this a correct interpretation of our statutes? If it is we can see no practical purpose of section 11 of chapter 52; for if a decree in equity pursuant to that section is not a prerequisite condition to the right to condemn a crossing or connection over the right of way of another railroad, the condemnor even after obtaining such decree would not be bound to adopt it, perhaps. Nothing but *res judicata*, if applicable, could prevent it from disregarding the decree. If said section 48 did in fact make specific provision for determining the points and manner of crossings and connections, there would be force in the position of counsel; but there being no such specific provision, it seems to us necessary in order to give true interpretation to said paragraph 7, and as we are plainly told to do by the first section of the same chapter, to declare it subject to section 11 of chapter 52, for it is clearly applicable, and if we read the provisions of that section into section 48, as it seems to us we must do, the way in which the points and manner of securing such crossings and connections, is clearly indicated, there is harmony and no conflict in these statutes. The proceedings provided by chapter 42, on the law side of the court, limited as the applicant and defendant are by the pleadings in such proceedings, are not sufficiently elastic to vary the points and manner of the crossings and connections sought to be condemned, to conform to the equitable rights of the parties; hence the necessity for the prior decree of a court of equity, enforceable against the parties, and limiting them, in proceedings to condemn, to the provisions and requirements thereof. *Railroad Co. v. Traction Co.*, 56 W. Va. 18, 48 S. E. 746, was a suit in equity filed pursuant to said section 11 of chapter 52, to obtain a decree fixing the point and manner of crossing at grade the railway track of the defendant company, but framed on the theory also that the court had jurisdiction, which was denied, to condemn the property, decreed to be taken. In that case the history of said section 11 is gone into, and it is distinctly decided, with reference to that history, that in case of disagreement, though the right to cross must be obtained by condemnation under the general law, yet that it is a prerequisite condition to the enforcement of that right, that a decree in equity be obtained designating the place at which and the manner in which the crossing desired shall be made. This construction of

these statutes was followed approvingly by Dayton, Judge, in *Elkins Electric Ry. Co. v. Western Maryland R. Co.* (C. C.) 163 Fed. 724. But it is said our later case of *Railroad Co. v. Railroad Co.*, 56 W. Va. 458, 49 S. E. 532, is in conflict with this rule. The first point of the syllabus in that case may be susceptible of that interpretation, but the point was not necessarily involved in that case, and the point ought not be so interpreted. That was a suit, as was the equity suit disposed of in this opinion, by one railroad company against another to enjoin condemnation proceedings at law, and was disposed of in the same way, denying equity jurisdiction by injunction to stay the proceeding at law, on the ground, according to the body of that opinion, of complete remedy at law. Limited as herein, the two points of the syllabus in that case, are correct legal propositions; but we can not approve the interpretation put upon them by counsel for the Logan & Southern Company. The construction given in *Railway Company v. Traction Co.*, supra, and followed in this opinion we regard the true construction of our statutes, and the only one consonant with reason, and the purposes and objects which the Legislature intended in enacting them. In those Code states, with statutes similar to our own, but where law and equity are administered under one form of proceeding, and where commissioners are authorized to go upon the ground, and to determine the points and manner of making crossings and connections, the rule may be different. See *Railroad Co. v. Railroad Co.*, 72 Mich. 206, 40 N. W. 436; *In re St. Paul & Northern Pacific Ry. Co.*, 37 Minn. 164, 33 N. W. 701; *In re Minneapolis & St. Louis Ry. Co.*, 36 Minn. 481, 32 N. W. 556; *St. Louis Transfer Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 100 Mo. 419, 13 S. W. 710; *In re Lockport & Buffalo R. R. Co.*, 77 N. Y. 557; and *Union Pac. Ry. Co. v. Leavenworth N. & S. Ry. Co.* (C. C.) 29 Fed. 728.

Our conclusion is, therefore, to reverse the judgment below, and to dismiss the petition, but to be without prejudice, however, to any new and proper proceedings brought to vindicate the rights of defendant in error.

(70 W. Va. 117)

POLING et al. v. PICKENS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 80*)—PLEADING—DECLARATION.

A declaration for slander in charging the plaintiff with swearing a lie, not stating that the plaintiff made the false statement in a legal proceeding, and not stating that she was under oath when making the statement, is not good as a declaration for common-law slander;

but as it avers that the slanderous words according to their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace, it is good as a declaration for insulting words under Code of 1906, c. 103, § 2, and is not subject to demurrer.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.*]

2. ACTION (§ 38*)—SINGLE CAUSE OF ACTION.

A declaration in an action for slander in the usual form of a declaration for common-law slander, reciting the good character and reputation of the plaintiff, and malicious intent of the defendant to injure the good name and reputation of the plaintiff, and alleging damage to it from the act of the defendant, thus importing to be an action for common-law slander, yet averring that the words spoken, according to their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, thus showing that the action is for statutory slander under Code of 1906, c. 103, § 2, is a declaration for statutory slander, and not open to the charge that it unites in the same count the two kinds of slander. The recital of good character and injury to it is treated as inducement and surplusage.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 38.*]

3. HUSBAND AND WIFE (§ 102*)—TORTS OF WIFE—LIABILITY OF HUSBAND.

A husband is liable for slander by his wife, whether present or not, notwithstanding the married woman's separate estate act.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 878-380; Dec. Dig. § 102.*]

Error to Circuit Court, Upshur County.

Action by Matilda J. Poling and another against Emma V. Pickens and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

John Bassel and C. O. Higginbotham, for plaintiffs in error. Wm. S. O'Brien and J. M. N. Downes, for defendants in error.

BRANNON, J. Matilda J. Poling and Lewis W. Poling, her husband, sued Emma V. Pickens and Robert Pickens, her husband, in the circuit court of Upshur county for slander of Matilda Poling by Emma Pickens, and there was a verdict for the plaintiffs and judgment thereon. We have a writ of error from that judgment.

[1] The plaintiffs in error assign it as error that the demurrer to the declaration, consisting of one count, was overruled. The declaration avers that the plaintiff Matilda J. Poling was a true and honest citizen, and had always well behaved herself, and until the wrong imputed by the defendant was always reputed, esteemed, and accepted by her neighbors and other good citizens to whom she was known to be a person of good name, fame and credit, and had obtained the good opinion of her neighbors and other good citizens to whom she was known; and that Emma V. Pickens, well knowing the premises,

but contriving and maliciously intending to insult Matilda J. Poling and injure her good name, fame and credit, and to bring her into public scandal, infamy, and disgrace, and to cause it to be believed by her neighbors and other citizens that she had been guilty of telling falsehoods, and being otherwise a mean and unworthy citizen, did on the — June, 1907, in the county of Upshur, in the presence and hearing of Lewis W. Poling, her husband, and other good citizens, falsely and maliciously, and with the intention to insult said plaintiff, speak and publish of and concerning Matilda Poling the false, scandalous, malicious, defamatory, and insulting words, which the plaintiff avers to be in their usual construction and common acceptance construed as insults, and tend to violence and breach of the peace—that is to say, "You" (meaning the plaintiff Matilda J. Poling) "go down town and swear another lie on me" (meaning that the said plaintiff Matilda J. Poling had sworn a lie on her, the said Emma V. Pickens)—by means of which the plaintiff was injured, etc. It is said this declaration is not good. It is said it was error to join the husband of Matilda Poling as a plaintiff. This point is not argued. It is well established that at common law the husband may join his wife in an action in tort by her.

[2] The frame of this declaration reads as if the action were for common-law slander injurious to the name, fame and reputation of Matilda Poling, and has words in it treating the words used as actionable under section 2, c. 103, Code 1906, saying that "all words which from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." If I understand the point made against the declaration, it is that it joins common-law slander and statutory slander in the same count. I do not consider this mode of framing a declaration as very good pleading or artistic pleading. Statutory slander, if of a character to insult and produce anger and breach of the peace, gives action, though it may not impute legal crime, or injure fame or reputation, but merely insults, and therefore I would think that the declaration should merely state that the defendant spoke certain words of and concerning the plaintiff maliciously and unlawfully, with an averment that they were such words as from their usual construction and common acceptance are construed as insults and tend to violence and breach of peace. All allegations of the plaintiff's good character and of intent on the part of the defendant to defame it and allegation of injury there-to seem useless and out of place in actions for statutory slander; but eminent writers on pleadings, Minor, Barton, and Hogg give the forms used in this case. Their forms follow the precedents for common-law slander, with the addition of words suggested

above, indicating that the action is one for statutory slander. These precedents are based on decisions holding that words of common-law slander, sufficient to sustain action, may still be treated as ground for action under this statute. Under that statute, words of a character to insult and tending to violence and breach of the peace, though not actionable at common law, are so under the statute; but words actionable at common law may also be made the subject of action under that statute if the declaration contain words, as this declaration plainly does, showing that the action is for statutory slander. *Sweeney v. Baker*, 13 W. Va. 158, point 5, 31 Am. Rep. 757; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 808. There it is said that in an action for statutory slander so much of the declaration as follows the common-law form of declaration for slander is mere matter of inducement, and unobjectionable. I would say it is surplusage. It is claimed that from the frame of the declaration above given we must say that this declaration joins both common-law and statutory slander, which is forbidden by decisions. *Moseley v. Moss*, 6 Grat. (Va.) 534; *Hogan v. Wilmoth*, 16 Grat. (Va.) 80; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725. But this declaration is not open to an objection of blending common-law and purely statutory slander. That rule against blending means where you put into the same count common-law slanderous words and words not such, but only insulting words, not actionable at common law. We have just shown that a declaration going for insulting words under the statute may contain only words constituting common-law slander, and it cannot be in this case that there is a blending of the two kinds of slander. The most that can be said against this declaration is that it declares on the words as if actionable at common law. It contains only the slanderous words above given, no other words of different character of slander. How can it be said to unite two kinds of slander? In an action under the statute for common-law slander your declaration must show that the action is under the statute by averment to the effect that such words from their usual construction and common acceptance are construed as insults and tend to violence and breach of peace, or some averment of that import. *Hogan v. Wilmoth*, 16 Grat. (Va.) 80. This declaration does so, thus showing that the action is under the statute.

There is another reason against the demurrer. For this reason we need not have considered the demurrer. As stated above this declaration declares on its face that it goes for statutory slander. For that reason we must consider it such. But there is another reason requiring us to consider it so. It does not allege that Matilda Poling was sworn when she made the alleged false statement, or that it was made in a judicial pro-

ceeding, or that it was material. As stated in the opinion at its opening in *Brooks v. Calloway*, 12 Leigh (Va.) 470, it is therefore not a good declaration for common-law slander. *Hogan v. Wilmoth*, 16 Grat. (Va.) 80. The declaration therefore is to be viewed as one under the statute. This being so, the statute prohibits a demurrer from preventing a jury to pass on the words spoken. This declaration is really for insulting words hurting the feelings, causing anger and violence and breach of the peace. No demurrer lies to this declaration, as would be the case if it were for common-law slander only, without showing that it is filed under the statute, or if it united two kinds of slander in one count. Whether the words spoken are an insult under the statute is to be left to the jury.

[3] Another question. Judgment was rendered against Emma Pickens and her husband for words spoken by the wife. The rule of the common law is that the husband is liable for slander by the wife. It is contended that this is no longer in our time the law, owing to the acts providing for the separate estate of the wife and the rights to sue and be sued and to contract. The authorities conflict on this question, but preponderance of authorities is that the rule of the common law yet prevails. In obiter expressions in *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 28 L. R. A. 655, 45 Am. St. Rep. 923, and *Withrow v. Smithson*, 37 W. Va. 761, 17 S. E. 316, 19 L. R. A. 762. I condemn this rule, but held it yet prevailing in this state. These dicta were given force of law in *Kellar v. James*, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003, in which case Judge Poffenbarger carefully discussed the question. We are asked to reconsider the matter. We decline to rediscuss it. The authorities are given in those cases. I cite the case of *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160, holding the common-law rule still in force, notwithstanding the married women's act. An elaborate note to that case condemns the rule, but admits it to be law. I refer also to volume 9, p. 1225, of that late valuable work, *Am. & Eng. Ann. Cas.* where we find a full note of cases in many states holding that the old odious rule of the common law making the husband liable for the torts of the wife still prevails, and that action therefore must be brought against both, and judgment rendered against both. In 14 L. R. A. (N. S.) our case of *Kellar v. James* is elaborately annotated, giving diverse authorities. Our Legislature, in my own opinion, should abrogate the rule that the husband is liable for independent torts of the wife. I have no reference in what is said above to torts by a wife as to her separate property.

We affirm the judgment.

(70 W. Va. 106)

BROEMSEN et al. v. AGNIC.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 75*)—CONTRACT—VALIDITY—CERTAINTY.

A contract selling land is not void for uncertainty because no time is specified for executing or tendering the deed, or payment of the purchase money. Where no time is specified, a reasonable time is always implied. [Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 113-126; Dec. Dig. § 75.*]

2. VENDOR AND PURCHASER (§ 59*)—CONTRACT—CERTAINTY AS TO PARTIES.

A contract of sale and purchase of land, signed on behalf of the vendors, "H. Broemsen Helra, by L. A. Rolf, Agent," is not void and unenforceable because of uncertainty of parties.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 90; Dec. Dig. § 59.*]

3. SPECIFIC PERFORMANCE (§ 105*)—SALE OF LAND—ENFORCEMENT BY VENDOR—LACHES.

Delay of several months, by a vendor after promptly tendering a deed to the vendee, to institute a suit against the vendee to specifically execute a contract of sale, there being nothing in the facts or circumstances showing an intention on his part to abandon the contract will not defeat such suit on the ground of laches.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

4. SPECIFIC PERFORMANCE (§ 96*)—CONTRACT TO SELL LAND—TENDER OF PERFORMANCE BY VENDOR.

If at or before the time of the decree for specific execution of a contract, the vendor is able to do so, and tenders a good and sufficient deed, conveying the land as called for by the contract, specific execution thereof may be decreed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 278-285; Dec. Dig. § 96.*]

Appeal from Circuit Court, Ohio County.

Action by Edward Broemsen and others against Michael Agnic. Decree for plaintiffs, and defendant appeals. Affirmed.

J. B. Sommerville, for appellant. A. L. Sawtell and T. S. Riley, for appellees.

MILLER, J. Defendant has appealed from the decree below, pronounced December 17, 1909, specifically executing his contract of purchase and giving decree against him for \$2200.00, balance of purchase money, as follows: "Wheeling, W. Va. January 14, 1907. This is to certify that Mike Agnic has bargained to buy from H. Broemsen Helra, per L. A. Rolf, agent, their agent, the property known as 2648 Main Street, for the sum of \$2300.00 to be paid as follows: \$100.00 cash in hand, the receipt of which is hereby acknowledged, the balance \$—— to be paid or arranged for on tender of a good general

warranty and safe deed. [Signed] H. Broemsen Heirs [Seal], by L. A. Rolf, Agent. Michael Agnic, [Seal.]"

That defendant made the contract, and that appellees, through their agent or attorney, on or about February —, 1907, tendered to defendant or his authorized agent, a deed for the property purchased, and exhibited or tendered with the bill, dated January 15, 1907, and purporting to convey to him with covenants of general warranty "all their right, title, interest, claim or demand, whatsoever in and to" said lot, and that plaintiff's title is good, are facts alleged in the bill, not specifically denied in the answer, and are fully proven by the evidence. There is evidence that defendant's attorney, after the deed was tendered made some captious objections to the title, but the evidence shows they were without substantial merit.

[1] The decree below is first attacked on the ground of alleged uncertainty of the contract: First, in failing to fix a time for execution of the deed, the tender thereof, to whom to be tendered, and the payment of the purchase money; in other words that the contract was not binding on appellees, and upon the principles of *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, was void for want of mutuality, and not binding on appellant. There is nothing in this position, and the case cited is inapt. The rule is that where no time is specified, and unless time is of the essence of the contract, not made so by this contract, a reasonable time is always implied.

[2] Second, it is said the contract is uncertain as to parties, and therefore void, being signed "H. Broemsen Heirs, by L. A. Rolf, Agent," the names of the heirs not being given, and that as it appears H. Broemsen disposed of his property by will, his devisees and not his heirs could sell and convey the same. We see no merit in this point. It is true a contract must be reasonably certain as to parties, as well as to subject matter. *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; *Pomeroy on Contracts* (2d Ed.) §147. But reasonable certainty is all that is required. H. Broemsen's heirs made the contract reasonably certain as to the vendors; besides it was not necessary that the contract should be signed by the principals, it being signed by an agent authorized to make it on their behalf. *Armstrong v. Coal Co.*, 67 W. Va. 589, 598, 39 S. E. 195, and authorities cited. The fact that the contract was made on behalf of "H. Broemsen Heirs," when it appears the property had been devised by H. Broemsen to his wife, Georgine Broemsen, and that though heirs of both, the vendors had derived the property directly from their mother and not from the father will not relieve defendant from performance of his contract. *Blaisdell v. Morse*, 73 Me. 542; *David v. Williams-*

burgh City Fire Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418. The erroneous description by which parties undertake to sell, or convey land makes no difference, if as individuals they have the right and title to sell and convey. *Williams v. Hardie* (Tex. Civ. App.) 21 S. W. 267.

[3] Another point of attack is that appellees were guilty of laches, and therefore not entitled to specific performance of the contract. It is claimed they failed to show themselves ready, desirous, prompt and eager to perform the contract on their part. We see no merit in this contention. The bill and evidence shows reasonable promptness in making and tendering a deed. While the deed may have been technically objectionable, the vendors appear to have been ready, able and eager to make a good deed, if the one tendered was not satisfactory in form. The evidence satisfies us that appellant did not intend to execute the contract on his part, and that a deed in any form would not have been accepted. Plaintiffs brought the suit within a reasonable time after defendant's refusal to perform the contract on his part. There is nothing in the delay to sue or in the facts and circumstances pleaded or relied on in defense to show any intent to abandon the contract, or excuse the performance of the contract by defendant, so as to bring the case within the rule of *Harrison v. Harrison*, 36 W. Va. 558, 15 S. E. 87; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; or *Gish's Ex'r v. Jamison*, 96 Va. 312, 31 S. E. 521, relied on by defendant's counsel.

[4] Lastly it is objected to the decree that a good deed such as the contract called for, was not tendered before suit, or with the bill. Defendant had declined to perform the contract before suit on other grounds than the objectionable form of the deed, which we think were not well founded. The rule is, that if before decree a vendor is able to tender a good and sufficient deed this will suffice for a decree of specific performance. *Armstrong v. Coal Co.*, supra; *Tavener v. Barrett*, 21 W. Va. 656; *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 9. A writ of certiorari awarded here has brought up as a part of the record, a deed identified by the endorsement of the clerk of the circuit court as the deed tendered at the time of the final decree appealed from. This deed we think good in form and in strict compliance with the contract. No objection to it for want of form or substance is pointed out on the hearing here. Appellant was thereby given choice of the two deeds, the one tendered before suit, and with the bill, or the one tendered at the date of the decree.

We have found no substantial error therein, for which the decree appealed from should be reversed, and our conclusion is that it should be affirmed.

(137 Ga. 198)

ELLISON v. STATE.

{Supreme Court of Georgia. Dec. 13, 1911.}

(Syllabus by the Court.)

1. HOMICIDE (§ 107*)—JUSTIFICATION—REASONABLE FEAR.

The doctrine of reasonable fears as a defense does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing. *Jackson v. State*, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; *Williams v. State*, 120 Ga. 870, 873, 48 S. E. 368.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 137; Dec. Dig. § 107.*]

2. HOMICIDE (§ 146*)—PRESUMPTIONS AND BURDEN OF PROOF—MALICE.

The law relating to the presumption of malice arising from proof of a voluntary homicide, where the evidence adduced to establish the homicide does not negative the existence of malice, and relating to the burden of proof to show circumstances of alleviation or justification, unless they appear from the evidence adduced against the accused, is settled by the decision in *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, and cases following it. *Delk v. State*, 135 Ga. 312, 69 S. E. 541.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 265-271; Dec. Dig. § 146.*]

3. HOMICIDE (§ 185*)—INSTRUCTIONS—JUSTIFICATION.

Where one indicted for murder relied on the defense of acting under the fears of a reasonable man, under Pen. Code 1910, § 71, which declares that "a bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing, but the circumstances must be such as to excite the fears of a reasonable man," there was no error in giving in charge section 70, defining justifiable homicide in defense against one who manifestly intends or endeavors, by violence or surprise to commit a felony upon the person of the slayer, in order that the jury might understand the reference to "a bare fear of any of those offenses," in the section first cited.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 185.*]

4. HOMICIDE (§ 101*)—JUSTIFICATION—PROVOCATION.

While a husband may be justified in killing another man, if necessary to prevent the latter from committing rape on the wife of the former, he will not be justified at a later day in killing the other person in revenge for a previous attempt to commit rape upon his wife. *Hill v. State*, 64 Ga. 453; *Futch v. State*, 90 Ga. 472, 480, 16 S. E. 102; *O'Shields v. State*, 125 Ga. 310, 54 S. E. 120; *Mize v. State*, 135 Ga. 291, 297, 69 S. E. 173.

(a) The facts in *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630, and the points actually decided, were different from a case involving killing merely in revenge for a past offense. The language used in the discussion in that case has been considered, and held not to conflict with later rulings, so as to override them. *Wilkinson v. State*, 91 Ga. 729, 733, 17 S. E. 990, 44 Am. St. Rep. 63; *Gossett v. State*, 123 Ga. 431, 435, 51 S. E. 394.

(b) The charge of the court on this subject was quite as favorable as the plaintiff could have asked, if not more favorable to him than he was entitled to have given.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 101.*]

5. HOMICIDE (§ 45*)—MANSLAUGHTER—PROVOCATION.

In determining whether a homicide shall be reduced from murder to voluntary manslaughter, on the ground that the slayer acted without malice and under the excitement of passion justified by the circumstances, provocation by words, threats, menaces, or contemptuous gestures, will not be sufficient to reduce the homicide to manslaughter. Pen. Code 1910, § 65.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 69; Dec. Dig. § 45.*]

6. HOMICIDE (§ 309*)—INSTRUCTIONS—JUSTIFICATION.

Where the judge charged the law in reference to justification if the slayer acted under the fears of a reasonable man in accordance with Pen. Code 1910, § 71, and also charged the law touching voluntary manslaughter and the reduction of the homicide from murder to manslaughter in accordance with Pen. Code 1910, § 65, it furnishes no ground for reversal that he failed, in connection with the latter charge, to specifically instruct the jury as to what consideration might be given to threats and menaces in connection with the doctrine of reasonable fears. *Futch v. State* (Nov. 14, 1911) 137 Ga. —, 72 S. E. 911.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 309.*]

7. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS—REQUESTS.

A failure to charge in regard to the consideration to be given by the jury to evidence of good character of the defendant, in the absence of a request for such a charge, will not require a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

8. NO ERROR.

While some of the rulings of which complaint was made were to some degree subject to criticism in the light of the evidence and of the entire charge, none of them were such as to require a reversal.

Error from Superior Court, Worth County; Frank Park, Judge.

Willis Ellison was convicted of homicide, and brings error. Affirmed.

Tipton & Passmore, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(137 Ga. 178)

WILLIAMS v. MAYOR AND COUNCIL OF CITY OF BRUNSWICK.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. PURPOSE OF ACTION—RECOVERY OF DAMAGES.

This was an action for damages, in which the only recovery sought was for the loss of rents which plaintiff's property would have earned had the conduct of the municipality, of which complaint was made, not occurred, and for attorney's fees in prosecuting an injunction suit to prevent the conduct alleged to be unlawful.

2. TRESPASS (§ 16*)—NATURE OF ACTION.

The petition cannot be properly construed as one setting forth a cause of action for trespass. *Fulton Grocery Co. v. Maddox*, 111 Ga. 260 (2), 36 S. E. 647.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 16.*]

3. MALICIOUS PROSECUTION (§§ 49, 50*)—PROCESS (§ 168*)—ABUSE OF PROCESS—SUFFICIENCY OF PETITION.

The action was founded on either a malicious use of legal process, or the malicious abuse of such process, or both. Under either construction the petition was fatally defective, because: (a) As an action for the malicious use of process, there was no allegation that the process or legal proceedings on behalf of the municipality which caused the damage to the plaintiff was maliciously and without probable cause employed by the defendant. (b) As a suit for the malicious abuse of process, it was not alleged that the process or legal proceedings employed by the defendant, with the alleged damaging result to plaintiff, were employed for any specified unlawful object, and not for the purposes which they were designed by law to accomplish. For discussions relative to actions for malicious "use" and malicious "abuse" of legal process, see *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276 (1-2), 62 S. E. 222, and citations.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 94-97; Dec. Dig. §§ 49, 50;* *Process*, Cent. Dig. § 257; Dec. Dig. § 168.*]

4. DISMISSAL OF PETITION.

The judge did not err in dismissing the petition on general demurrer.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by William Williams against the Mayor and Council of the City of Brunswick. Judgment for defendant, and plaintiff brings error. Affirmed.

William Williams, instituted suit against the mayor and council of the city of Brunswick. The petition alleged that plaintiff was the owner of certain real estate in the city of Brunswick, and was engaged in constructing a building thereon. The municipality by its chief of police early in December entered upon the premises, and ordered petitioner and his employes to desist at the peril of prosecution and punishment in the police

court. To prevent such interference, petitioner on December 16th instituted proceedings for injunction, and obtained a restraining order against the city. Subsequently the city applied to the judge for an order to preserve the status, and on December 20th an order was passed enjoining the petitioner also. At the trial, on the 4th day of April, next ensuing, the judge granted an ad interim injunction against the city, but refused to enjoin petitioner. The city sued out a writ of error and gave a supersedeas bond, and subsequently the judgment of the lower court enjoining the city was affirmed by the Supreme Court, and the judgment of the latter court was by appropriate order made the judgment of the superior court, thus terminating the injunction case in favor of petitioner. The effect of the interference by the chief of police and the order of the judge preserving the status was to delay petitioner in the construction of his building. Except for such interference the building would have been completed and rented about December 20th, and continued to be rented at a stated monthly rental. In order to enforce his rights in the premises, it was necessary for petitioner to employ counsel, which he did at reasonable cost. The prayer was for the recovery of damages covering the value of rents which would have been earned from the date of the order of the judge in the injunction case preserving the status, and also for the amount paid out as attorney's fees.

F. H. Harris, for plaintiff in error. J. T. Colson, for defendant in error.

ATKINSON, J. The case presented by the record is controlled by the rulings announced in the headnotes. The questions of law decided are fully discussed in the authorities cited in the headnotes and in other decisions of this court cited in the authorities mentioned. Under these circumstances, elaboration would be unprofitable.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(112 Va. 307)

STONEGA COKE & COAL CO. v. ADDINGTON.

(Supreme Court of Appeals of Virginia. Nov. 18, 1911. Rehearing Denied Jan. 18, 1912.)

1. DAMAGES (§ 62*) — CONTRACTS — MEASURE OF DAMAGES.

Where an owner of coal mines, who employed a contractor to drive entries into the mines, to do all the temporary timbering, and to remove the slate and refuse in the entries, etc., failed to furnish, as required by the contract, pumps, pipes, and wrenches, which could be purchased for a very small sum, the contractor was required to purchase the same, and where he failed to do so he could not recover the value of any labor done by reason of the owner's failure to furnish the articles, since the rule that a party cannot recover for avoidable consequences is applicable to contracts, as well as torts.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 124-131; Dec. Dig. § 62.*]

2. MINES AND MINERALS (§ 109*)—CONTRACTS — BREACH—WAIVER.

An owner of a coal mine, employing a contractor to drive entries into the mine, failed to furnish the contractor pumps, pipes, and wrenches for pumping the water out of the mine, as required by the contract. The contractor continued to work for several months after such failure, and informed the owner that he would bail the water out. *Held*, that the contractor waived his rights under the contract, especially where he could have furnished the articles at a trifling cost.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 109.*]

3. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE.

The Supreme Court of Appeals, reversing a case for errors in instructions, will not consider the motion to set aside the verdict as contrary to the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Error to Circuit Court, Wise County.

Action by C. M. Addington against the Stonega Coke & Coal Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Bullitt & Chalkley, for plaintiff in error.
Bond & Bruce, for defendant in error.

KEITH, P. C. M. Addington brought an action of assumpsit in the circuit court of Wise county against the Stonega Coke & Coal Company, in which he states that, at the request of the defendant, he had agreed to drive two entries into its mines in the county of Wise for a distance of 1,700 feet, to mine out all the "break-throughs," and to do all the temporary timbering, and to remove and clean up all the slate, dirt, and refuse in said entries and "break-throughs," except when there was a fall of slate more than 12 inches in thickness; to drive the headings of the usual width, and take out all of

the coal therein to the roof, unless the entry could be driven 6 feet in height, and leave a roof or top of coal at least 12 inches thick, and in that event the entry was to be left 6 feet in height; and to load into mine cars all of the coal taken out of said entries and "break-throughs" in driving the same as aforesaid; and the defendant then and there undertook and agreed with the plaintiff to furnish and provide at the drift mouth of said entries all props, cross-beams, and other timbers necessary to support the roof of said mine, and all ties, spikes, partings, and switches and other material and appliances necessary to make the said track, and all pumps, pipes, and wrenches, and tools and appliances necessary to pump or siphon the water out of said mine, and to furnish all cars necessary to load the coal and other material taken from said entries, and to haul all ties, props, rails, and timber into said entries, and haul out all loaded cars as fast as the same were loaded, and to pay the plaintiff \$4 per lineal yard for each yard of entry and "break-throughs" driven by him as aforesaid, and to pay to him on its regular pay day in each month all amounts due to him for the work done under and in pursuance of said agreement for the preceding month. The plaintiff avers that he always, from the time of making the agreement, performed all things on his part to be performed; that he purchased and provided himself with tools, materials, and supplies necessary to do said work, and did mine and drive a considerable portion of said entries and "break-throughs," or the most difficult and expensive part thereof, and did bail and haul out of said mine large quantities of water; and that he has always been ready, able, willing, and anxious to perform and complete the whole of said work in pursuance of his agreement; that the defendant, not regarding its promise, but intending to injure the plaintiff, did not perform the agreement on its part, but failed and refused to furnish and provide the plaintiff with props, cross-beams, and other timbers necessary to support the roof of said mine, and ties, rails, spikes, partings, switches, and other material and appliances necessary to make the said track, and pumps, pipes, wrenches, tools, and appliances necessary to pump or siphon the water out of said entries and "break-throughs," and to furnish cars necessary to load said coal and other material taken from said mine, and to haul the timbers, props, rails, and ties into the said mine, and to haul out the loaded cars; and that in November, 1908, the defendant would not permit or suffer the plaintiff to complete his work, and then and there hindered and prevented him from doing so, and discharged the plaintiff from any further performance or completion of his said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

agreement, to the damage of the plaintiff \$2,000.

The plaintiff's bill of particulars is for damage by reason of the failure of the defendant to furnish pipes, wrenches, and pumps (\$200), and for profit on contract (\$1,800). The defendant filed a bill of particulars, which is nothing more than an amplification of the plea of nonassumpsit.

The case was submitted to a jury, which found a verdict in favor of the plaintiff for \$800, upon which the court entered judgment, and the case is before us upon a writ of error awarded the defendant.

The first error assigned is that the court erred in giving to the jury a certain instruction asked for by the plaintiff, which is as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff and defendant made the agreement as alleged in the declaration, and that the plaintiff has complied with all the requirements of the contract on his part to be performed, and that there was a material breach of the contract by the defendant, then they must find for the plaintiff.

"The court further tells the jury that if they find for the plaintiff they shall assess such damages as in their opinion he has sustained, and in assessing the damages they shall take into consideration the value of any labor which the plaintiff has done by reason of the failure of the defendant to furnish pipes, wrenches, and pumps, if they believe that defendant was to furnish same, and they shall allow him, also, any profit which, in their opinion, the plaintiff would have made, if he had been permitted to complete the contract."

The defendant, in lieu of this instruction, asked the court to tell the jury that, "although they believe from the evidence that the defendant agreed to furnish the plaintiff with pumps, pipes, and wrenches for the purpose of syphoning the water out of the mine, and did not furnish the same, or did not furnish pumps and pipes which would properly do the work, yet, if the plaintiff continued to work for several months after the defendant had failed to furnish the said appliances, and stated to the company that he would bail the water out, he cannot now claim that the said failure to furnish the said pumps, pipes, and wrenches was a violation of the contract on defendant's part, and cannot recover damages on account thereof."

The court refused to give this instruction as asked, and modified the same by inserting therein, after the words "bail the water out," the following words, viz., "and waived his right to have said appliances furnished him, then," and gave said instruction as so modified. To all of which the defendant excepted.

[1] The giving of the first instruction,

considered in connection with the facts in this case, presents an interesting question of law. It is shown by the plaintiff's own evidence that, conceding that the defendant was bound to furnish pumps, pipes, and wrenches, and that it failed to comply with its agreement in this respect, they could have been purchased for a very small sum; and the contention of the defendant is that the cost to the plaintiff of such appliances is the true measure of the damages to which he is entitled by reason of the failure of the defendant to furnish them in accordance with its contract, and not the "value of any labor which the plaintiff has done by reason of the failure of the defendant to furnish pipes, wrenches, and pumps." In other words, the defendant invokes the familiar doctrine, that the plaintiff cannot recover for avoidable consequences.

This subject is treated at large in Sedgwick on Damages (8th Ed.) §§ 201, 202, and 205, and numerous cases are cited which illustrate the doctrine.

In *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341, it is said that: "The delinquent party is held to make good the loss occasioned by its delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. * * * If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks, of an equal quality and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built."

"So in trespass in Massachusetts, it appearing that the defendant had broken down the plaintiff's fence in November, but that the plaintiff did not repair the breach till May, in consequence of which cattle got in and destroyed the crop of the next year, and the claim being for the loss of the subsequent year's crop, as well as the expense of repairing the fence, the Supreme Court said:

"In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently,

and willfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But, if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote."

And in section 205 (Sedgwick, *supra*), it is said that "the rule applies both in contract and tort, and illustrations may be drawn from every branch of the law."

See, also, 13 Cyc. p. 71: "Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase, and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent upon him, however, to use reasonable exertion and reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case." See *Factors' & Traders' Ins. Co. v. Werlein*, 42 La. Ann. 1046, 8 South. 435, 11 L. R. A. 361; 1 *Sutherland on Damages*, 152.

In *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117, the rule is thus stated: "Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

Authorities upon this subject might have been multiplied to an almost unlimited extent, but those we have cited are deemed sufficient.

The testimony shows that the pump worked well at first; that it afterwards got stopped up with coal, by reason of not having a nozzle attached to it. One of the witnesses for the plaintiff was asked:

"Q. How much did a nozzle cost? A. Don't know how much it would have cost. Man could have took a tin can and made one.

"Q. You just preferred to work it along and let it get stopped up with coal? A. We was working by the day, and had to work according to Mr. Addington's orders."

And then, with reference to the wrench, the witness was asked:

"Q. How much would it have cost to have gotten a wrench? A. Not a great deal.

"Q. How much would a pipe wrench have

cost? A. A large one maybe \$1.50 or \$1.75; something like that."

Another complaint was that the cylinder of the pump was not properly packed. The question was asked the witness:

"Q. That you could have taken out and packed very easily? A. Yes, sir; a mechanic could have taken it out and packed it.

"Q. How long would it have taken to have done that? A. Oh, a couple of hours."

We think these facts clearly bring the case within the operation of the principle we have discussed, and that it was error to give the instruction asked for by the plaintiff.

[2] The instruction asked for by the plaintiff in error, defendant in the court below, which was refused as asked for and given with an amendment, is predicated upon the theory that the defendant agreed to furnish the plaintiff with pumps, pipes, and wrenches for the purpose of syphoning the water out of the mine; that it did not furnish the same, and did not furnish appliances which would properly do the work; but that plaintiff continued to work for several months after such failure upon the part of the defendant, and stated to the company that he would bail the water out. Then the instruction, as originally prepared, told the jury that the plaintiff could not afterwards claim damages for a violation of the contract on the part of the defendant to furnish pumps, pipes, and wrenches.

Plaintiff could have furnished pumps, pipes, and wrenches at a trifling cost, or, if that could not be done, he might have insisted upon a compliance by the defendant with its contract to furnish them; but having done neither of these things, and having informed the company that he would bail the water out, if the jury believed that such was the fact, he must be taken to have waived his right under the contract; for non constat plaintiff in error, without this statement on the part of defendant in error, would itself have furnished the needed appliances. If the facts stated in this instruction constitute a waiver, then plainly it was error, after the words "he would bail the water out," to add the words "and waived his right to have said appliances furnished him, then," for that was equivalent to telling the jury that the facts stated did not constitute a waiver.

[3] As the case has to be reversed for error in instructions, we shall not consider the motion to set aside the verdict as contrary to the evidence.

The judgment is reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

(70 W. Va. 110)

COOPER v. BENNETT et al.(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)*(Syllabus by the Court.)***1. EQUITY (§ 355*)—DEPOSITIONS—TIME OF TAKING.**

Except by consent of parties, depositions for use as the basis of a final decree cannot be taken before the execution of process or appearance or filing of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 120-124; Dec. Dig. § 355.*]

2. PROCESS (§ 4*)—SUIT IN EQUITY—NOTICE.

The summons and proceedings at rules cannot be dispensed with by notice of intention to apply to a court of equity for a final decree.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 4.*]

3. EQUITY (§ 355*)—DISMISSAL—IRREGULARITY IN TAKING DEPOSITIONS.

If depositions improperly taken are excepted to, the court should expressly pass upon the exceptions, sustain them, and then allow the depositions to be retaken, if they disclose the existence of evidence likely to sustain the bill, when put in proper form. In such case, dismissal of the bill as upon the merits is erroneous.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 739-742; Dec. Dig. § 355.*]

Appeal from Circuit Court, Randolph County.

Bill by James Cooper against A. J. Bennett and others. Decree for defendants, and complainant appeals. Reversed and remanded.

J. W. Harman, for appellant. W. E. Baker and W. B. Maxwell, for appellees.

POFFENBARGER, J. Desiring an injunction to vindicate his alleged right to a private way over the lands of A. J. Bennett, Robert Bazzle and Marcus Bazzle, James Cooper, on the 7th day of February, 1910, gave said parties a written notice, accompanied by a copy of his bill in equity, of his intention to present the bill to the circuit court of Randolph county, on the 17th day of February, 1910, and then and there ask for an injunction upon the same, in accordance with the prayer thereof, compelling them to remove certain obstructions to the road and enjoining them from further obstructing the same, and also of his intention to take depositions to sustain the allegations of his bill on the 10th day of February, 1910. Pursuant to this notice, he took the depositions of his witnesses on said 10th day of February, and, on the 28th day of that month, filed his bill in court, accompanied by the depositions so taken. The defendants appeared and excepted to the depositions, because taken before the cause had reached a stage authorizing such action. On the filing of the bill and depositions, the defendants appeared and entered their demurrer and filed their joint and

separate answers, and the court gave time to mature the cause for hearing. No summons was issued in the cause until March 29, 1910. At April rules, what is called a general and special replication to the answer was filed, and on the 17th day of August, 1910, the court entered a decree dismissing the bill, from which the plaintiff has appealed.

The decree appealed from says the cause came on that day to be finally heard upon the bill, exhibits, affidavits filed therewith, exceptions to said affidavits, answer of the defendants, and replication thereto. The depositions taken and filed were thus described and evidently treated as affidavits, and, instead of expressly passing upon the exceptions thereto, the court dismissed the bill as upon the merits. It is said this, in effect, overruled the demurrer and the exceptions, and treated the depositions, though described as affidavits, as having been properly taken, and, as the decree was favorable to the defendants, they make no complaint of the overruling of the demurrer and exceptions, if such is the legal result. Insisting upon the sufficiency of the depositions in form and substance and the propriety of overruling the exceptions, the plaintiff seeks reversal of the decree of the court below and a decree here giving him the relief sought.

[1, 2] The exceptions should have been sustained. Technically, there was no suit pending when the depositions were taken. No summons was issued, no bill had been filed, and there had been no appearance. For the purposes of a preliminary injunction, affidavits may be filed in support of the allegations of the bill, and depositions taken as these were might be treated as affidavits. But, offered here as the basis of a final decree, they are insufficient. *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13. For the purposes of a preliminary injunction, a notice and presentation of the bill to the judge or court are sufficient, but they cannot be substituted for the summons or appearance and the filing of a bill, in the acquisition of an ordinary decree. For such a decree, or final relief, a bill must be matured and proceeded with regularly, even though the relief desired is only an injunction by way of final decree or the perpetuation of a provisional injunction. We know of no statutory or other authority for the taking of depositions before the formal commencement of a suit. "The cause must have been set for hearing before the depositions are taken, and the person to be affected by them must be then a party to the suit." *Barton's Ch. Pr.* p. 785. The rule thus stated may be too strict, and it may be, and probably is, permissible to take depositions after the filing of the bill; but there must necessarily

be a pending suit within the meaning of the law relating to regular proceedings. A preliminary injunction is an extraordinary proceeding in which the statute dispenses with some things indispensable in regular proceedings. Section 3 of chapter 133 of the Code, relied upon here to sustain the depositions, applies to provisional injunctions only.

As the depositions taken indicate the existence of evidence strongly tending to sustain the allegations of the bill, and the cause was submitted, without having had the exceptions first passed upon by an express ruling, we think the case falls within the principle of *Hager v. Melton*, cited, calling for a reversal of the decree and a remand of the cause, with leave to the plaintiff to take the proof he appears to have. For other applications of the principle, see *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. 44; *Holt v. Taylor*, 43 W. Va. 153, 27 S. E. 320; *Hylton v. Hylton*, 1 Gr. (Va.) 161; *Cropper v. Burton*, 5 Leigh (Va.) 428; *Duff v. Duff*, 3 Leigh (Va.) 523; *Miller v. Argyle's Ex'rs*, 5 Leigh (Va.) 460; and *Sitlington v. Brown*, 7 Leigh (Va.) 271.

[3] Dismissal under the circumstances here shown operated as a surprise upon the plaintiff and subordinated substance to shadow. The action of the court compelled him to hazard his whole case on his judgment as to the sufficiency of his proof in point of form only. Besides the decree is equivocal. The exceptions may be appealed to in support of it or in condemnation thereof, according to the interest of the party. From one point of view it is a decree upon the merits, and, from another, it is not. Hence the losing party is unable to say with certainty upon what ground he lost his case.

For these reasons, the decree will be reversed, the exceptions to the depositions sustained, and the cause remanded, with leave to the plaintiff to take evidence to sustain his bill.

(70 W. Va. 126)

COAL & COKE RY. CO. v. MARPLE et al.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

TAXATION (§ 677*)—SALE FOR TAXES—COMBINATION BETWEEN BIDDERS.

An agreement between two or more persons, not general partners, who are competitive bidders at delinquent tax sales, that they will become partners in all lands that may be thereafter purchased by either of them, contravenes public policy, and will render void a tax deed acquired pursuant to such agreement.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1357; Dec. Dig. § 677.*]

Brannon and Poffenbarger, JJ., dissenting.

Appeal from Circuit Court, Braxton County.

Action by the Coal & Coke Railway Company against John M. Marple and others. Decree for plaintiff, and defendants Marple and John I. Bender appeal. Affirmed.

Morrison & Rider, for appellants. Haymond & Fox, for appellee.

WILLIAMS, P. Plaintiff brought its suit in equity against John M. Marple and John I. Bender and others to cancel a tax deed for 66½ acres of land, made by the clerk of the county court of Braxton county to said Marple and Bender, and obtained a decree in its favor, on the 12th day of December, 1907. From that decree Marple and Bender have appealed.

The land was owned by M. A. Stump, and on the 28th of December, 1900, he and his wife conveyed it to Henry G. Davis. In September, 1901, said Davis and wife conveyed it to the Washington Coal & Coke Company, and it, in turn, conveyed it to plaintiff in February, 1904. The deed from Stump and wife to Henry G. Davis was not recorded until April 15, 1901, and hence too late to be transferred on the land book and charged with taxes in the name of said grantee. It was therefore properly returned delinquent in the name of said Stump for nonpayment of taxes for the year 1901.

The learned circuit judge who heard the cause prepared a very elaborate and able written opinion which, on motion of plaintiff, was made a part of the record. That opinion has been of much service to us in our effort to reach a just conclusion. Many facts were averred in the bill as constituting sufficient grounds for avoiding the tax deed. But it is necessary for us to consider only one of them, because all the others relate to matters which this court has heretofore held, in similar cases, to be either unimportant, or to be such defects in the proceedings as are expressly cured by statute.

The ground on which the court set aside the tax deed is that an agreement had been entered into between said Marple and Bender, in 1902 or 1903, to become partners in all lands that might thereafter be sold for taxes and purchased by either of them at tax sales. This, we think, was sufficient ground to avoid the deed. Marple and Bender filed their joint answer, in which they aver: "That said tract of land was purchased at said tax sale by them at a risk; that they, nor neither of them, knew whether or not there was any land there; that said land was simply purchased by them because it was cheap; that they did not know of said tract of land when they attended said tax sale, nor did they know said tract of land belonged to plaintiff." They deny, however, that there was any arrangement or agreement between them before said sale, or at

the sale, or at any other time, "as to this tract of land." Defendants do not deny that there was a partnership agreement, previously made, which related to and embraced all lands that either of them might thereafter purchase at a tax sale. Their qualified denial is a virtual admission that such partnership existed, which embraced any and all lands that either of them might thereafter purchase. Moreover, Marple testified as follows: "In 1902 and 1903, we made arrangements. Bender and I were both buying land at sheriff's tax sales, and I suggested to him that we go in partners, and we agreed to do so." The land in question was sold in January, 1904, after the partnership arrangement was made, and the whole tract was purchased by Marple at the price of \$5.54. The testimony above quoted proves that the agreement to become partners was made to prevent competitive bidding, at tax sales, between Marple and Bender. They had been competing bidders, and, in order to prevent competition between themselves, they agreed to become partners. The partnership embraced a matter concerning which the two parties had theretofore been competitors—nothing else. The real purpose was to prevent competition. Such a partnership would not be created between noncompetitors, and, when entered into by competing bidders, it is equivalent, in law, to an agreement not to compete with each other, which is against public policy.

The collection of taxes by the sale of land, simply upon notice posted and published in a newspaper, without judicial process, is purely a statutory proceeding, and is a very drastic remedy. The constitutionality of such proceeding was, for a long time, seriously doubted by many men learned in the law, and, while the question may now be regarded as fairly well settled in favor of the state's right to collect its revenue by that method, still it has always been the uniform policy of the law to protect the rights of the delinquent landowner with every reasonable safeguard, consistent with the right of the state to collect its revenues without unreasonable delay. One of these safeguards is the statutory provision that no more of the delinquent owner's land shall be sold for the taxes due thereon than is necessary. Another is that the sale shall be at public auction, at a certain place, and on certain days, and after due publication in a manner particularly set out in the statute. Still another safeguard is the one embedded in the general policy of the law, which is that the bidding shall not be stifled, or competition discouraged. It cannot be said that a delinquent taxpayer deserves no consideration at the hands of the state because he has failed to perform one of the most important duties which she has enjoined upon him. The statute is not penal, but remedial. The state seeks only to get her revenue by this means, not to pun-

ish the delinquent taxpayer. The right of property is involved which, in the eyes of the law, has been a sacred right from time immemorial. The right of the state to its revenue, only, is superior to that of the owner. The remedy was not designed for the benefit of land speculators. The rights of the delinquent landowner stand next to those of the state. He has a right to demand that competition at the sale shall be unfettered by any arrangement, or agreement, between prospective bidders, which has for its object the acquisition of the greatest amount of his land for the taxes due on it. Such an agreement between competitive bidders, or prospective bidders, is a fraud upon the law. The agreement between Marple and Bender, who were not general partners, to become partners in all lands thereafter sold for tax, and purchased by either of them, is purely a speculative contract. It is, in effect, an agreement not to bid against each other, and is therefore against public policy. That the agreement does not relate to any particular piece, or tract, of land, but comprehends all lands that may be thereafter sold for taxes, regardless of quantity, locality, or ownership, renders the agreement all the more objectionable, as showing more clearly the purpose to stifle competition. If such an arrangement between two competitive bidders could be considered lawful, then it would follow that the same arrangement between any number of persons would likewise be lawful, because there is no limit upon the number of persons that may form a partnership, and that would lead to the destruction of competition altogether. But such an agreement is against public policy and is ground for avoiding the tax sale and deed. The authorities are not harmonious on the question here discussed; but we think the weight of reason, if not the greater number of adjudicated cases, supports our conclusion.

The land in the present case is worth over \$6,000, and was purchased for \$5.54, the amount of tax due on it. If Marple and Bender had competed for the purchase of it, it is more than likely that not more than one acre of it would have been sold for the tax. Is it not more consonant with justice, and far the better policy, to hold such speculative contracts, which tend to destroy competition, unlawful, than it would be to uphold them? We think so. The purchasers lose nothing but their bargain. They get their money back with large interest. But, if the contract should be held lawful, plaintiff would lose its land. A purchaser who buys at a tax sale, knowing the land to exist, takes no risk. He has all to gain and nothing to lose. Justice, in the present case, is clearly on the side of the landowner.

The following authorities will be found to support this opinion, viz.: *Dudley v. Little*, 2 Ohio, 504, 15 Am. Dec. 576; *Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796; *Kerwer v.*

Allen, 31 Iowa, 578; Easton v. Mawkinney, 37 Iowa, 601; 1 Blackwell on Tax Titles, § 559; 2 Cooley on Taxation (3d Ed.) p. 943.

We affirm the decree of the lower court.

BRANNON, J. (dissenting). I cannot see that an agreement between two persons to buy jointly at a tax sale is unlawful; there being no combination to prevent competition. It is a sale under state authority. Two may purchase at a judicial sale. Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369. What difference? "No combination to prevent competition at a tax sale is to be implied from the mere fact of a joint purchase by two persons of tracts of land struck off at such sale." Kerr v. Kipp, 37 Minn. 25, 33 N. W. 116. "It being lawful to buy at tax sales, a partnership to acquire lands at such sales is legal." Dawson v. Ward, 71 Tex. 72, 9 S. W. 106. "Two persons or more may unite in bidding off property, if their purpose is not to prevent competition among bidders, but for their mutual convenience, as with the view of enabling them to become joint owners, or in case each desires to purchase a part only of certain property offered entire, or for any other reasonable or proper purpose." Blackwell on Tax Titles, § 559. Black on Tax Titles, § 246, says it is clear that two or more persons may agree to bid jointly, if they do so to protect their own interest and not to prevent competition. I cite, also, 27 Am. & Eng. Ency. Law, 840, and 37 Cyc. 1360, and Cooley on Taxation, 944. The cases cited by Judge WILLIAMS will not sustain him. They are cases of rings or agreements not to bid against each other, or where the purchaser had declared the owner would redeem, and the like. Even in the Ohio case (Dudley v. Little, 2 Ohio, 504, 15 Am. Dec. 575) there was combination. The opinion says it was not meant to hold that partners cannot purchase at a tax sale for convenience of business. Judge Poffenbarger, in Lohr v. George, 65 W. Va. 241, 64 S. E. 609, refers to this subject. There he suggests that the agreement must relate to the particular land. That is not the case in this instance. He cites authority for the proposition. Who is hurt by the agreement in this case?

POFFENBARGER, J., also dissents, and concurs in this note.

(70 W. Va. 122)

WORLEY v. RALEIGH LUMBER CO.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—APPLIANCES—CARE REQUIRED.

A master does not owe to his servant engaged in using appliances furnished by the

master in building a sawmill the same degree of care in furnishing safe appliances as he would owe in case of a completed and operating mill.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—APPLIANCES—CARE REQUIRED.

The rule of law is not that a master must furnish to his servant reasonably safe machinery, appliances, or instrumentalities for work; but it is that the master must exercise reasonable care and diligence to furnish reasonably safe machinery, appliances, and instrumentalities.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 137, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—APPLIANCES—CARE REQUIRED—BURDEN OF PROOF.

In an action by a servant against a master for injury from a defect in an appliance, machine, or instrumentality furnished by the master, it is incumbent on the servant to show such defect, and that the injury comes from it. If it might have come from one or another cause, for one of which the master is not liable, there can be no recovery. Recovery cannot rest on mere surmise or conjecture as to the cause or source of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 894-908; Dec. Dig. § 265.*]

Error to Circuit Court, Raleigh County.

Action by George W. Worley against the Raleigh Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed, judgment set aside, and new trial granted.

Vinson & Thompson, James J. Divine, and McGinnis & Hatcher, for plaintiff in error. Farley, Sutphin & Ward, for defendant in error.

BRANNON, J. Raleigh Lumber Company had about completed a new mill. It was engaged in putting in its place a pipe of considerable length running from the boiler to some part of the sawmill for the conveyance of steam, and was adjusting and testing the pipe. Steam was turned on into this pipe, and it disclosed a leak between two sections of the pipe. Steam was turned off, and George W. Worley, a workman who had been employed in the construction of the mill, was engaged at the point of leakage in tightening up a flange coupling which was leaking, when an ell burst at his feet, and a large quantity of steam, which had been turned on again, escaped and badly burned Worley. In an action brought by him against the lumber company he recovered verdict and judgment for \$3,000, from which the lumber company has sued out a writ of error.

Much argument is made to sustain a demurrer to the declaration overruled by the court. We think the declaration is good.

It involves nothing necessary to be here stated.

[1] Instruction No. 1 for the plaintiff is excepted to. It reads as follows: "The court instructs the jury that the duties of the master to provide a reasonably safe and suitable machinery and appliances for the business and to furnish a safe place in which his servant is to work are duties which the master can either perform personally or delegate their performance to some one else; but if both the master and the person to whom such duties are delegated fall in the performance of any of said duties, and injury results to the servant by reason of said failure, the master is liable for such injury." This mill was yet incomplete. It was not yet in actual operation. The piping that was being put down was indispensable for the operation of the mill. Worley was helping to put that pipe in place. The objection to this instruction is that it sets up a standard of duty of the employer applicable to a complete operating mill. It demands of the employer the same degree of duty as to machinery exacted of an owner of a running mill. The principle governing the trial seems to be wrong. The trial was upon an erroneous theory, that of a running mill. You cannot exact of a mill builder that high degree of care as to good machinery or appliances, when they are being put up and tested, as if completed and running. You cannot demand the same degree of duty as to a new and untried pipe, when being put down and tested, as you could in the case of a steam pipe in a finished and operating mill. Labatt on Master and Servant, § 29, says: "It is well settled that, where the instrumentality which caused the injury was still incomplete at the time of the accident, and the injured servant was engaged in the work of bringing it to completion, the question whether the master was in the exercise of due care is determined with reference to a lower standard than that which is applied in the case of instrumentalities which have been put in a finished condition and are in regular use in the normal course of the business. A similar qualification of the master's liability is admitted where the injured servant was hired for the express purpose of assisting in the repair, demolition, or alteration of some instrumentality, and the unsafe conditions from which the injury resulted arose from or were incidental to the work thus undertaken by him." In *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, it was held: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants."

[2] There is another objection to that in-

struction. It says that the master must provide "a reasonably safe and suitable machinery and appliances for the business." This makes the master guarantee the safety of the pipe. The law is that it is the duty of the master to use reasonable care and diligence to furnish suitable machinery and appliances. In *Osner v. Zadek*, 120 Ill. App. 444, an instruction like this one was given. The court said: "Under the instruction the jury may have found for the plaintiff, if they believed from the evidence that the machinery was not reasonably safe, even though the appellant used the utmost diligence to procure a safe machine, and even though there was no defect discoverable by the exercise of ordinary diligence. This is not the law. The master's obligation is not to supply the servants with absolutely safe machinery or any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary and unreasonable danger. The law imposes upon the company the obligation to use reasonable care and diligence in providing suitable and safe machinery." In *Belleville Pump Works v. Bender*, 69 Ill. App. 189, the court says: "The second instruction given for the plaintiff was erroneous. It told the jury that it was the duty of the master to furnish his servants with tools and appliances that were reasonably safe. The law is that he is only required to use reasonable and ordinary care and diligence in providing suitable and safe machinery. *Camp Point Co. v. Ballou*, 71 Ill. 421." In *Wonder v. B. & O.*, 32 Md. 411, 3 Am. Rep. 143, it is stated that: "All that can be required of the master is that he should use due and reasonable diligence in providing safe and sound machinery." In *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285, it is held that: "It is error to charge in an action by an employe for injuries received that one of the personal duties of the master is to furnish safe and sound machinery for the use of the servants, since it is his duty to use only ordinary care and diligence to provide reasonably safe and suitable machinery." Much law sustains this position. *Atlantic & D. Ry. Co. v. West*, 101 Va. 13, 42 S. E. 914; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467. The rule is so stated in 9 *Encyclopedia Digest of Va. & W. Va.* R. 674.

Another objection to instruction No. 1 is that it requires the defendant to furnish a safe place for work. The plaintiff had been, and at the time of the injury was, working in the construction of this new mill. Could he expect a safe place to work in when the mill was in process of construction?

But that is not all as to this feature of the instruction. There was no evidence as to the unsafety of the place, or of that being the cause of the misfortune. If the evidence tends to show anything as the cause of the accident it is the want of drain holes in the

ell of the pipe. That only is alleged by the plaintiff as such cause. This instruction makes the safety of the place of work an element to be passed on by the jury. It tended to mislead the jury. This instruction told the jury that the master must furnish a safe place for work when he was only bound to use care to do so, as in the case of suitable machinery. And this instruction did not suit the case of an incomplete mill. It strikes me that this instruction is also wanting in failing to put to the jury the question whether the master knew or should have known of the alleged defects in the pipes. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53, point 11. These terrible accidents will happen in such operations as that in this case. Negligence must be established. The master does not guarantee the safety of the servants. His duty is reasonable care having relation to the parties, the business on hand and in view of the situation of the parties under the circumstances. *Oliver v. Ohio River Co.*, 42 W. Va. 703, 26 S. E. 444; *Fulton v. Crosby Co.*, 57 W. Va. 91, 49 S. E. 1012. Remember that this was not an operating mill, but still in process of construction, especially so as to this piping. Worley was engaged in constructive work.

Instruction No. 3 is bad for reasons above stated. "The court instructs the jury that it is the direct personal and absolute obligation of the master to provide a reasonably safe and suitable machinery and appliance for the business. This includes the exercise of reasonable care in furnishing such appliances. The master must furnish a reasonably safe place in which his servant is to work. And the jury are further instructed that a master is liable for any injury due to the neglect or failure of the master to provide such reasonably safe and suitable machinery and appliances for the business, or to exercise such reasonable care in furnishing such appliances or to furnish his servants a reasonably safe place in which to work." This instruction seems to introduce the rule of reasonable care in furnishing appliances. Instruction No. 1 does not do so. If instruction 3 is to be construed as stating that all that is required of the master is that he use care in furnishing appliances, it is inconsistent with No. 1, which declares that the master must provide reasonably safe appliances and machinery and safe place to work in. Which instruction would the jury follow? But does instruction 3 say that all that is required is that the master use care in furnishing good appliances? It opens by saying that it is the "direct personal and absolute obligation of the master to provide a reasonably safe and suitable machinery and appliances." It then says that this includes reasonable care in furnishing such appliances. Which standard of duty are we to take as spoken by this instruction? It is unclear and uncertain, and liable to mislead the jury in addition to

reasons given above rendering it bad. It does not properly and clearly state the duty of the master.

We do not think instruction 4 is bad.

[3] On consideration of the evidence of the plaintiff alone we have come to the conclusion that it does not sustain the action, because it does not clearly show and identify the cause of the injury to the plaintiff. This is an action based on negligence, which the plaintiff must prove. He must show the cause of the injury and also the defendant's negligence responsible for it. The plaintiff's evidence is aimed to show that there were no traps or drain holes in the steam pipes, and that from condensation of steam there was a water deposit in the pipe, and that when the steam would be turned on it would break the pipe because of the presence of this water producing what is called "water hammer," which broke the pipe. It is not shown that the want of drain holes caused the pipe to burst by producing water hammer which would break the pipe. It is claimed that water in the pipe when steam is turned on will produce water hammer which may break the steel pipe. It is not established that water hammer will break the pipe. Water hammer makes a loud noise. Nobody heard it. No evidence at all proves it.

The evidence is indefinite to show that the want of drain holes caused the accident. It may have come from latent defect in the pipe, a theory more plausible than that a little water in the pipe would burst it. The law requires definite evidence fixing the cause of disaster. "The doctrine stated in the last section involves the corollary that a servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master or of an employé for whose acts and omissions he is responsible." *Labatt, Master & Servant*, § 837. In *Patton v. Texas R. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the Supreme Court said: "It is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of a half dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." For this plain proposition abundant law will be found in *Green v. R. R. Co.*, 72 S. C. 398, 52 S. E. 45, 5 Am. & Eng. Ann. Cas. 165, and note. The evidence of three of the plaintiff's witnesses tends to show that the want of these drain holes was the source of the accident; but one of them, perhaps two, say that they could not say with any certain-

ty what caused the accident. They seem to surmise that such was the cause—give that as their opinion. Their evidence to that effect is given with hesitancy. They do not assert it with any confidence, but manifest uncertainty of opinion. On the other hand, nine witnesses for the defense, experienced millwrights and mechanics who had erected mills of this type, declared that drain holes or steam traps were for the purpose of draining the pipes to prevent freezing or to protect the engine or cylinder, and not to secure safety or to prevent bursting of the pipes. Two other witnesses declared that drain holes were not necessary for safety. The witnesses for the plaintiff had only worked about mills some, but were not machinists, mechanical engineers, or millwrights. The plaintiff did not sustain his case.

Again, if the pipe burst from want of drain holes, who is responsible? Who should have put them in? The millwright, his negligence, if any, is negligence of a fellow servant. But the case does not establish any negligence.

We think that the plaintiff's instruction 7, directing the jury to find for the defendant, should have been given. Under these principles we are led to reverse the judgment, set aside the verdict, grant a new trial and remand the cause.

(69 W. Va. 560)

SCHOONOVER v. BALTIMORE & O. R. CO.
(Supreme Court of Appeals of West Virginia.
Oct. 24, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 273*)—ENTRY NUNC PRO TUNC.

A final judgment, rendered but not entered by reason of inadvertency of the clerk, may be entered by a nunc pro tunc order at a term of the court subsequent to the one at which it was rendered, provided the evidence of the rendition thereof is sufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.*]

2. APPEAL AND ERROR (§ 134*)—RECORD—CORRECTION.

A writ of error to such a judgment awarded and perfected before entry thereof may be sustained by the filing of a supplemental record in the appellate court, showing amendment by such nunc pro tunc order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 898; Dec. Dig. § 134.*]

3. RAILROADS (§ 325*)—INJURIES TO MINORS—CONTRIBUTORY NEGLIGENCE.

In an action by an infant between 11 and 12 years old against a railroad company to recover damages for an injury sustained by the former on a highway crossing, or one treated as such, by the negligence of the latter, the trial court may hold the plaintiff barred by his contributory negligence, upon a proper application for such ruling, if the facts and circumstances of the case warrant it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1029-1036; Dec. Dig. § 325.*]

4. RAILROADS (§ 325*)—INJURIES—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In the use of highways, children must exercise such reasonable care, caution, and prudence for their safety as may be expected from them, in view of their immaturity. The standard or measure of duty in each case is determinable by the capacity ordinarily possessed and exercised by children of the age and development of the class to which the individual belongs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1029-1036; Dec. Dig. § 325.*]

5. RAILROADS (§ 300*)—OPERATION—INJURIES AT CROSSING—DUTY OF RAILROAD.

In passing its train over a crossing provided by itself for public use, though not legally a public crossing, a railroad company must comply with the common-law requirements, imposed for the safety of persons using public crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. § 300.*]

6. RAILROADS (§ 338*)—OPERATION—INJURIES AT CROSSING—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Though a person injured on such a crossing by a train was himself in fault, his negligence does not preclude recovery for the injury, if the servants of the railway company in charge of the train could have discovered the danger and prevented the injury by keeping a lookout on the crossing and checking or stopping the train. In such case, their failure of duty is the latest negligence and the proximate cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

Error to Circuit Court, Cabell County.

Action by Clifford Schoonover against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Williams, Scott & Lovett, for plaintiff in error. Vinson & Thompson, for defendant in error.

POFFENBARGER, J. In an action of trespass on the case, brought by Clifford Schoonover against the Baltimore & Ohio Railroad Company, in the circuit court of Cabell county, for the recovery of damages for a personal injury, alleged to have been wrought by the negligence of the defendant, there was a demurrer to the evidence of the plaintiff, which the court sustained, after a conditional verdict had been found by the jury, assessing the damages at the sum of \$3,000. Agreeably to the finding of the court upon the law of the case, an order was entered, sustaining the demurrer and giving the defendant a judgment for costs, but not dismissing the action. However, a writ of error was awarded, and the case submitted to the court as upon a final judgment. That this was not a final judgment in appellate law appears from *Epstein v. Totten*, 63 W. Va. 602, 60 S. E. 614; *De Armit v. Whitmer*, 63 W. Va. 301, 60 S. E. 136; *Ritchie County Bank v. Bee*, 60 W. Va. 386, 55 S. E. 380; *Corley v. Corley*, 53 W. Va. 142, 44 S. E. 132, 47 S. E.

145; *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152.

After submission of the case in this court, however, the circuit court entered an order, reciting rendition of judgment of nil capiat at the time of the entry of the order above described and clerical omission to include it in that order, and entering the judgment nunc pro tunc. This raises the question of power in the trial court to amend its record, after perfection of a writ of error and submission in the appellate court.

[1] Legally the inquiry divides into two parts, the first of which is whether a final judgment can be entered nunc pro tunc; and the other whether an amendment so made will sustain the writ of error. Such an amendment may be made. *Vance v. Railway Co.*, 53 W. Va. 338, 44 S. E. 461; *Ninde v. Clarke*, 4 Am. St. Rep. 832, note, pp. 828-830. In this valuable note, we find the following proposition, sustained by numerous decisions: "A court which has ordered a judgment which the clerk has failed or neglected to enter in the record has power, even after the term at which it was rendered has passed, to order the judgment so rendered to be entered nunc pro tunc, provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it." Sufficiency of the evidence upon which the amendment was made is not questioned.

[2] That an amendment of the record of a case in the trial court, pending a writ of error, may be carried into the record in the appellate court and made effective there is also affirmed by authority. After such an amendment, carried up as aforesaid, the appellate court will act upon the record as corrected. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903; *Hopkins v. Railroad Co.*, 42 W. Va. 535, 26 S. E. 187; 18 Enc. Pl. & Pr. 958. We find no authority inconsistent with this view. Hastily read, *Tatum v. Snidow*, 2 Hen. & M. (Va.) 542, may seem to be so, but it is not. Though the subsequent order therein entered recited omission of entry of the judgment by the clerk, the judgment was not entered nunc pro tunc and virtually dated back, as in this case, so as to work an amendment.

Reason and justice, as well as authority, sustain our conclusion. The defect resulted from mere inadvertence and was purely technical. Until the hearing on the writ of error, both parties proceeded under the impression that the judgment was technically, as well as substantially, final. Discovery of the defect then was matter of surprise to them, as, no doubt, it was to the trial court on the application for amendment. Correction thereof by amendment saves time and expense and facilitates disposition of business, without working injury in any respect.

The plaintiff, a boy about 11½ years old,

was so badly injured on the track of the defendant company that one of his legs had to be amputated below the knee. The injury occurred at a point used as a crossing, but the status of that crossing is an element in the case. It would be in the line of Seventeenth street, of the city of Huntington, if extended northward so as to cross the railroad, but had never been established by the city as a street or public crossing. The general direction of the railroad at that point is east and west. On the south side thereof and west of Seventeenth street, running to the railroad at right angles, there was a park, boarded up along the railroad on one side, and along said street on another, in which a game of baseball was played on the day of the injury. The grandstand, occupied by spectators, was in the angle. Occasionally, foul balls would go over the fence, and boys on the outside recovered and returned them, in consideration of which they were admitted into the park. The plaintiff and a number of other persons were on the outside; some watching the game through cracks in the fence, and others looking over the fence from the tops of box cars, standing on a switch on the opposite side of the railroad track. A foul ball having gone over the fence and diagonally across the railroad in a northeasterly direction, and stopped a short distance beyond, from 15 to 30 feet, the plaintiff ran after it, and having obtained it ran back on the track, whence he threw it into the park, halting momentarily, some of the witnesses say. At this time, a train, consisting of an engine and two cars, drawn by the engine running backwards, was approaching from the east at the rate of 10 to 15 miles per hour. When the boy threw the ball, in apparent ignorance of its approach, the engine was not more than 60 or 70 feet distant. The train was going west, and he diagonally across the track in a southwesterly direction. Hence his face was turned from the train, but he went on the track without looking for an approaching train or engine. Wholly absorbed in what he was doing, he was oblivious of the train. Some witnesses testify that they and others, seeing the danger, called to him, but are unable to say he heard them, as there was much noise and confusion, both inside and outside of the park. As he left the track, the train, rushing on, caught his right foot and leg. Some distance east of the place of the injury there was a cattle pen, near which some witnesses say there were two long blasts of the whistle of the approaching engine, one east and the other west. Others say they never heard them. There is no evidence that any bell was rung as the train approached the crossing, and all the witnesses agree that just about the time the boy was struck two or three short sharp blasts from the whistle were heard. There was nobody on the tender of the backing engine, nor does

it appear that anybody on the engine kept a lookout upon the crossing.

That the train was running at a higher rate of speed than the city ordinance permitted seems not to be controverted. At any rate, it could have been inferred from the evidence. That a lower rate of speed would have avoided the injury is another inference justified by it, since the boy was almost out of danger when the train struck him. Therefore we may safely assume negligence on the part of the defendant company.

[3] Whether the conduct of the plaintiff amounted to contributory negligence is an important inquiry in the case. Had he been an adult, his contributory negligence in going upon the railroad track directly in front of the approaching train, plainly in view, without looking in either direction along the track, or in any way exercising his powers of observation for his own safety, would be clearly manifest. *Riedel v. Traction Co.*, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123. But this boy was only about 11 years and 5 months old. He testified, in January, 1906, that he had attained his thirteenth year in the preceding November. The action was brought at October rules, 1904, and the declaration avers that he was hurt on the 23d day of April, 1904. As to whether a person of that age is *sui juris* within the law of negligence, and how the fact is to be determined, there is some conflict among the authorities. In some jurisdictions, the courts hold that, between the ages of 7 and 14, there is a presumption of a lack of prudence, foresight, caution, and comprehension of danger which carries every case to the jury, and denies to the court the power to say there was contributory negligence as matter of law. *Trumbo's Adm'r v. Street Car Co.*, 89 Va. 780, 17 S. E. 124; *Railway Co. v. Quayle*, 95 Va. 741, 30 S. E. 391; *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791. Other cases, proceeding upon the same theory, will be found cited in the note to *Barnes v. Railroad Co.*, 49 Am. St. Rep. 400, 410. See, also, 3 *Elliott on Railroads*, § 1261, note 122. But this rule is by no means generally accepted. Numerous decisions declare that in cases of injury occurring upon highways and railroads failure of a child to exercise such care, caution, and foresight as is ordinarily possessed and exercised by children of his age will bar recovery for an injury thereby occasioned.

[4] In these cases, the measure or standard of care required is not that of adults, but of the class of persons to which the injured party belongs, and seems to rest upon the view that, in using a highway, provided for all classes of persons who are accustomed to go abroad without guardians or protectors, the traveler is bound to use, in the exercise of that right, such judgment and prudence as are usually and ordinarily possessed by persons of the class to which he belongs; and

that failure to exercise the same constitutes negligence, whether he be above or below the age of 14. This proposition is sustained by a decided weight of authority in all actions by infants for personal injuries, except those between master and servant. *Railway Co. v. McDonnell*, 43 Md. 534; *Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Murray*, 71 Ill. 601; *Swift v. Railroad Co.*, 123 N. Y. 645, 25 N. E. 378; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Wright v. Railway Co.*, 77 Mich. 123, 43 N. W. 765; *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; *Messenger v. Dennie*, 141 Mass. 335, 5 N. E. 283; *Id.*, 137 Mass. 197, 50 Am. Rep. 295; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Stackpole v. Railway Co.*, 193 Mass. 562, 99 N. E. 740; *Fitzhenry v. Traction Co.*, 64 N. J. Law, 674, 46 Atl. 698; *Railway Co. v. Flanagan*, 57 N. J. Law, 696, 30 Atl. 476; *Brady v. Traction Co.*, 63 N. J. Law, 25, 42 Atl. 1054; *Payne v. Railroad Co.*, 129 Mo. 405, 31 S. W. 885; *Colcomb v. Railway Co.*, 100 Me. 418, 61 Atl. 898; *Fenton v. Railroad Co.*, 126 N. Y. 625, 26 N. E. 967; *Tucker v. Railroad Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; *Thompson v. Railway Co.*, 145 N. Y. 196, 39 N. E. 709; *Railroad Co. v. Todd*, 54 Kan. 551, 38 Pac. 804; *Railway Co. v. Elninger*, 114 Ill. 79, 29 N. E. 196; *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. 776; *Normand v. Electric Co.*, 35 Queb. 329; *Mowrey v. Railway Co.*, 51 N. Y. 666; *Evans v. Mills*, 119 Ga. 449, 46 S. E. 674; *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457.

Practically all courts hold infants between the ages of 7 and 14 capable of contributory negligence. Those in which the view here announced does not prevail submit to the jury, upon the facts and circumstances, the inquiry whether there has been contributory negligence. The mere submission of the question asserts capacity of the infant negligently to contribute to his injury, within the meaning of the law, under certain circumstances. The difference or conflict respects a rule of practice, not principle; some courts saying the question is always one for the jury, and others that it is for jury determination only when the evidence makes it a jury question, under the rules of practice applicable to other questions. If the act of an infant plaintiff is so obviously dangerous that no reasonable man can truthfully say children of his age do not ordinarily know it to be dangerous and voluntarily abstain from it, there is no more reason for submitting the question of contributory negligence to the jury than in the case of an adult plainly guilty of such negligence, and there is the same reason why it should not do so. Prudence and capacity to comprehend danger are not the only elements involved. These may be clear beyond doubt, as in the case of an adult. The defensive issue raised is negligence, in which the age, intelligence, and characteristics of

the plaintiff are only factors. Hence it is fallacious to say that, because these are inferior to those of an adult, the issue must be submitted to a jury. Though inferior in that sense, they may be amply and indisputably such as to hold the plaintiff to responsibility for his acts, under the circumstances of the case. Inferiority to an adult in these respects does not absolve him from responsibility. If it did, the case could not even go to the jury on the question of contributory negligence. That defense could not be made. But practically all courts admit it, except in the cases of very young children, deemed incapable of appreciating common or ordinary danger. The standard or measure of responsibility is lower than that for adults, but, if an infant plaintiff comes clearly up to it, there is no occasion for submitting his capacity to the jury as a doubtful question; and if the danger encountered by him was so plainly obvious that one of his years must have appreciated it, or the duty omitted by him so clear and natural that he must be deemed to have been cognizant of it, the court should declare his contributory negligence, upon a proper application, as in other cases.

The basis of the conflict in authority seems, therefore, to arise from failure or refusal on the part of those courts which insist upon making the question of negligence on the part of an infant between the ages of 7 and 14 years always one for the jury to recognize any standard or measure of responsibility in children. That they have some intelligence cannot be denied. Nor is it possible to say they do not have enough to enable them to appreciate or comprehend certain forms of obvious danger, or to know how to avoid it, or to feel a sense of duty under certain circumstances. If the court can say, and it does, as matter of judicial knowledge, that an adult ought to know certain things and be able to take adequate precaution for his own safety, why has it not the same power to say, as a matter of judicial knowledge, that children of certain ages are able to comprehend and avoid certain kinds of danger? The adoption of the theory or view that a child must exercise such care, caution, prudence, and foresight as children of his age ordinarily possess and exercise makes the question of contributory negligence in the case of a child, treated as one of law for determination by the court, just as easy of solution as in the case of an adult, and the conclusion is reached by exactly the same process of reasoning.

That contributory negligence in cases of this class is frequently declared to be generally a question for the jury is not inconsistent with the conclusion here stated, for that is said of all cases involving this defense, and it is true. More cases of each class go to the juries than are decided by the courts. The expression means only that determination by the jury is the general

rule, and by the court the exception thereto.

This conclusion does not necessarily conflict with the principle declared in *Bare v. Coal Co.*, 61 W. Va. 28, 55 S. E. 907, 8 L. R. A. (N. S.) 284, 123 Am. St. Rep 966, and *Wilkinson v. Coal Co.*, 64 W. Va. 93, 61 S. E. 875, 20 L. R. A. (N. S.) 331, and other cases arising between master and servant, and vastly different in many respects from this. As between master and servant, there is a contractual relation. There is none here. These parties were strangers, standing substantially upon an equal footing in respect to the use of a highway. The difference between the reciprocal rights of the plaintiff and defendant here and those between an adult and such a defendant, in a similar situation, is the requirement of more care on the part of the latter in its relations with the former, in view of his immaturity, lowering the standard of responsibility. Highway and railroad risks, dangers, and reciprocal rights are matters of daily cognizance and experience with boys as with men. No presumption of their ignorance thereof can be indulged or supposed. They are not brought into or kept in contact with them by the compulsion of restraint of the railroad companies or other persons using the highways. Boys employed in mills, factories, and mines are held by their contracts to duties which necessitate unaccustomed precautions against danger, and constantly expose them to hazards dangerous and unfamiliar. Frequent recurrence of these exposures and precautionary duties, incident to the performance of the work, requires vigilance, constancy, and singleness and steadiness of purpose—characteristic of adults, rather than children. That such ability, natural or acquired, is necessary to the protection of themselves and their fellow servants in such situations seems to be reasonably clear. Hence there is cogent reason for a higher standard or measure of capacity on the part of the infant in cases arising between master and servant. In service the boy is charged with novel duties and exposed to unaccustomed hazards, and charged with responsibilities like or very similar to those imposed upon adults. He has not grown up with them, as he has with the hazards of the street, the playground, and mere casual contact with men, structures, machines, animals, vehicles, and other means of injury. Without noting it or giving any reason for it, the courts seem to make this distinction. In cases between master and servant, in which the plaintiff is an infant under 14 years of age, contributory negligence is seldom declared as matter of law. In other cases, this result is of frequent occurrence, as will appear from an examination of the long list of decisions herein cited.

We have no doubt the plaintiff knew the danger of going upon a railroad track without looking for trains. His home was in Clay county, on the line of a railroad, and

he was in Huntington, at the time of the injury, attending the spring term of school at Marshall College. His situation and engagement at the time indicate possession of the intelligence and discretion of boys of his age, thousands of whom daily cross railroads, trolley lines, and highways, exercising discretion and prudence requisite to their safety. Hence the trial court properly held him guilty of negligence as matter of law.

[5, 6] But, if the servants of the railway company in charge of the train omitted a duty, performance of which would have avoided the injury, such omission must be deemed the proximate cause thereof, and the defendant is liable, notwithstanding the plaintiff's negligence. Though not established by the city as a public one, the crossing on which the boy was hurt was a way provided by the defendant company itself for travel across its tracks. It was at the end of a city street regularly established and maintained, and planked between the rails and on the outside thereof by the defendant, and a post with cross-arms, bearing the warning: "Look out for the locomotive. Railroad Crossing"—stood near it. Under principles declared in *Ray v. C. & O. Ry. Co.*, 57 W. Va. 333, 50 S. E. 413, this may have been such a crossing as required the statutory signals. Be that as it may, persons coming upon the track at that point were there by invitation, and the company owed them the common-law duty imposed in favor of persons on a public crossing, since they were neither trespassers nor bare licensees. *Elliott on Railroads*, § 1154, sustained by ample authorities cited. Such common-law duty includes maintenance of a lookout or other adequate means of avoiding collision at crossings, and failure to do so is negligence, constituting proximate cause of injury, even though the plaintiff himself was negligent in going upon the track, if the performance of such duty would have prevented injury. 2 *Thomp. Neg.* §§ 1596, 1597; *Elliott, Railroads*, § 1175. The principle has been recognized and applied in a crossing case, as well as others, by this court. *Riedel v. Traction Co.*, 71 S. E. 174; *Washington v. Railroad Co.*, 17 W. Va. 190; *Downey v. Railway Co.*, 28 W. Va. 732; *Vance v. Railway Co.*, 53 W. Va. 338, 44 S. E. 461; *McKelvey v. Railway Co.*, 35 W. Va. 500, 14 S. E. 261; *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123; *Raines v. Railway Co.*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226. Opinions of witnesses vary as to the distance of the train when the boy came upon the track, as well as the rate of speed; but the jury could have found the distance to be 50 or 60 feet, and the rate of speed 12 miles per hour, and also that injury would have been avoided by a checking of the speed of the train. Uncontradicted testimony was adduced, showing the engineer could have checked the speed almost in-

stantaneously, had he seen the boy when he came on the track, and adopted emergency precautions. It was also competent for them to infer that the engineer would have seen him when he came on the track, or even earlier, and apparently intending to come upon it, if he had performed the duty incumbent upon him in running his train over a crossing. Opposing this is evidence tending to prove the boy was struck almost as soon as he got on the track, and that the train was so close no assistance could be rendered him; but this is not conclusive. We are of the opinion, therefore, that the case should have been permitted to go to the jury, and that the trial court erred in sustaining the demurrer to the evidence.

The judgment will be reversed, the demurrer to the evidence overruled, and judgment rendered for the damages assessed by the jury and costs, both in this court, and the court below.

Reversed.

BRANNON and MILLER, JJ., concur. WILLIAMS, P., and ROBINSON, J., concur only in result and syllabus; WILLIAMS, P., reserving right to file concurring note.

WILLIAMS, P. (concurring). I concur in the judgment, but not in the correctness of all the principles asserted in the opinion. I do not believe it accords with the weight of authority, and I know it does not with our own previous decisions, to say that the court can determine, as matter of law, whether or not an infant under the age of 14 is guilty of negligence. Nor do I acquiesce in the view that the relation of master and servant can have any effect to vary the rules of evidence respecting negligence. Such relation may, and often does, determine relative duties. But once they are determined, it must be ascertained what is negligence in any given case, independent of any contractual relation. The law of negligence rests upon relative duties. The policy of the law forbids any one to contract against negligence. Every one is bound to exercise reasonable care for his own safety and for the safety of others. He may by contract enlarge his duties, but he cannot lessen them, whether he be employer or employé. The degree of care required must be commensurate with the danger attending the business the party is engaged in, if he is employer; or commensurate with the amount of risk he has assumed, if he is employé. Negligence which causes injury is a wrong, and the remedy therefor is by an action in tort. The duty to exercise care, both for one's own safety and the safety of others, exists, independent of contractual relations, and I can see no sufficient reason for applying one rule of evidence to prove what is negligence in one case, and a different rule to prove it in another. Of course, con-

tractual relation may have the effect to create duties which did not before exist, but once the new duties are determined, the rules respecting the kind and quantity of evidence necessary to prove whether a party has failed in the performance of his duty, or not, are the same. In other words, an infant under 14 years of age is no more capable of caring for his safety when he is unemployed than when he is employed.

According to the weight of authorities, and according to our own decisions, the question of negligence in an infant under 14 years of age cannot be determined, as matter of law, by the court, but must be left to the jury to decide, under proper instructions by the court as to the principles of law to be applied in determining a fact. Negligence of an infant under 14 depends largely upon his capacity, knowledge of danger, and the degree of caution which a child of his temperament will exercise, even in the presence of a known danger. There are such variable quantities in children between 7 and 14 years of age that the law provides no fixed standard by which to measure the negligence of all children between those ages. The same act which would constitute negligence in one child might not amount to negligence in another of the same age. By a unanimous opinion, we held, in *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487, that an infant under 14 years of age is not presumed to have sufficient capacity to avoid danger; and that his capacity had to be proven, in order to make out the defense of his contributory negligence. Now, if there is no presumption in favor of capacity, and the capacity is a question of fact essential to be proven, in order to determine whether or not the child has been guilty of negligence, how can it be properly said that the court can determine the question of negligence as matter of law?

(69 W. Va. 754)

CRIM et al. v. O'BRIEN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 19*)—
MISTAKE IN DEED.

Before equity will reform a deed on the ground of a mistake, it must be established by clear proof that the mistake was mutual between grantor and grantee.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 74-78; Dec. Dig. § 19.*]

2. DEEDS (§ 112*)—CONSTRUCTION—DESCRIPTION OF LAND.

If a grantor describe the land intended to be conveyed by his deed only in general terms, and then make reference to another deed of conveyance for the same land which contains a more certain description of it by boundary lines and corners, for the purpose of a more

definite description, he thereby adopts such lines and corners as a part of the description of the land which he conveys.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 323, 324; Dec. Dig. § 112.*]

3. DEEDS (§ 111*)—CONSTRUCTION—DESCRIPTION OF LAND.

If two inconsistent descriptions of land intended to be conveyed are contained in a deed of conveyance, one general and indefinite as to boundaries, and the other specific as to boundary lines and corners, the latter description will prevail over the former.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 315; Dec. Dig. § 111.*]

Appeal from Circuit Court, Barbour County.

Bill by Edward H. Crim and Cora M. Peck against Daniel O'Brien and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. T. Ice, Jr., for appellants. Wm. T. George, for appellees.

WILLIAMS, P. E. H. Crim and Cora M. Peck, devisees of J. N. B. Crim, deceased, brought a suit in equity in the circuit court of Barbour county against Daniel O'Brien and others, for the purpose of correcting what is alleged to be a mistake in the description of a certain tract of land intended to be conveyed by them as the devisees and heirs of J. N. B. Crim to said O'Brien, on the ground that the mistake was a mutual one. On the 29th of September, 1908, the court heard the cause upon the pleadings and evidence, and denied plaintiffs relief and dismissed their bill, and they have appealed.

The deed sought to be corrected is dated May 3, 1906, and describes the land conveyed in the following language, to wit: "All that certain tract or parcel of 645 acres of land, more or less, situate on the west side of the Tygarts Valley river, in Valley district of Barbour county, West Virginia, owned by the said J. N. B. Crim and devised to said devisees, parties of the first part, by his last will and testament, which is duly probated in the office of the clerk of the county court of said county in Will Book No. 2, and the same land theretofore conveyed to the said J. N. B. Crim by Melville Peck, special commissioner, in the chancery cause of J. N. B. Crim v. Melville N. O'Brien and others, lately pending in the circuit court of Barbour county, by deed which is duly recorded in said county clerk's office in Deed Book No. 47, at page 405, and being the same tract of land theretofore conveyed to said Melville N. O'Brien by Benjamin Rich and others, by deed dated November 12th, 1883, which is recorded in said county clerk's office, in Deed Book No. 23, at page 354, and therein described as containing 795 acres, except 150 acres thereof, now owned by Daniel O'Brien, which was devised to him by the last will and testament of one Hannah O'Brien, deceased, to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all of which said several deeds, reference is here made for a more particular description of the said tract of 645 acres of land, more or less, hereby conveyed as aforesaid, but this is a conveyance in gross, not by the acre." The 150 acres excepted is not involved.

A brief history of the title to this and other adjoining tracts of land is essential to a clear understanding of the question here involved. The 645-acre tract is a part of a tract of 795 acres, surveyed and entered by Daniel O'Brien and Enoch Hall in 1858. They did not obtain a grant for it, but, on discovering that it lay within the boundary of a tract of 100,000 acres owned by Benjamin Rich and others, Melville N. O'Brien, the son of Daniel O'Brien, procured a conveyance thereof from them to himself, on the 12th of November, 1883. That deed described the 795 acres by metes and bounds, and as "being the same land embraced in a survey made for Enoch Hall and Daniel O'Brien, dated the 29th of April, 1858." In 1858, Daniel O'Brien conveyed to Bridget McGinnis, by metes and bounds, 243¼ acres, a part of which lies within the bounds of the Rich deed to M. N. O'Brien. That Daniel O'Brien did not then have title is not material, inasmuch as the controversy relates only to the question of identification by description. In 1883 Bridget McGinnis divided the 243-acre tract, and conveyed 147 acres to Patrick McGinnis, and the balance to Bridget Caughlin. These two tracts are known in the suit as the Caughlin and the McGinnis tracts. The former is not claimed by any of the parties to the suit. But the boundary lines of the Rich deed to Melville N. O'Brien include 13.8 acres of the McGinnis tract. The 13.8 acres is the bone of contention; plaintiffs contending that it was included within the description of the boundaries of their deed to Daniel O'Brien for the 645 acres by mistake; and O'Brien denying that there was such mistake.

At the time they made the deed to O'Brien, plaintiffs were the owners of both the 645 acres and the McGinnis 147-acre tract, having acquired title to the latter tract by judicial sale and a commissioner's deed, made in a suit against Patrick McGinnis by his lien creditors, and title to the former by a judicial sale and commissioner's deed, made at a later time, in a suit against M. N. O'Brien by his lien creditors. Melville Peck was the commissioner to make deed in the latter suit, and in 1901 did make deed to J. N. B. Crim, the purchaser of the 645 acres. Said commissioner, in his deed, did not describe the land by metes and bounds, but only generally, as "being the land described in the deed of Benjamin Rich, etc., to said O'Brien, dated Nov. 12, 1883, and of record in the proper office in Deed Book 23, page 354, except 150 acres thereof now owned by said Hannah O'Brien, containing

645 acres, more or less, being the home place of M. N. O'Brien and Daniel O'Brien."

By the testimony of Alva Wolverton, who surveyed the lines of the Rich tract, and also the lines of the McGinnis and the Caughlin tracts, and made plats thereof, which are parts of the record, it appears that the Rich tract includes 13.8 acres of the McGinnis tract, and also a considerable portion of the Caughlin tract, but how much of the latter tract is included does not appear, nor is it material. The 13.8 acres is therefore a part of both the Patrick McGinnis tract and the 645-acre tract, to both of which tracts plaintiffs had title at the time of making the deed to Daniel O'Brien for the 645 acres.

At the time plaintiffs sold this tract to Daniel O'Brien, a number of suits were pending, in which the Crims and O'Briens were interested; one suit, styled Nancy O'Brien v. J. N. B. Crim and others, the object of which was to cancel certain judgments recovered by said Crim against Melville O'Brien, Hannah O'Brien, and Wm. S. O'Brien; another suit, brought by M. N. O'Brien against J. N. B. Crim and others, the object of which was to establish a trust between M. N. O'Brien and said Crim, in relation to the 645 acres of land; and still another suit, styled State of West Virginia v. W. F. S. Auvil and others, one object of which was to sell the 645 acres, as forfeited to the state for nonpayment of taxes. It was for the purpose of compromising and settling these suits that the sale and conveyance of the 645 acres was made by the plaintiffs to Daniel O'Brien. J. N. B. Crim had died testate, devising the land to plaintiffs. On the 30th of April, 1906, the executors and devisees of J. N. B. Crim, deceased, and Daniel O'Brien and M. N. O'Brien, acting by their attorney in fact, Samuel V. Woods, made a written contract, which recites that Daniel O'Brien and J. N. B. Crim had both filed petitions in the suit last above named, each claiming the right to redeem the 645 acres of land; that it was agreed that the title to the 645 acres should be redeemed by the devisees of J. N. B. Crim; and that it should then be by them conveyed to Daniel O'Brien in consideration of \$10,000. The \$10,000 was paid, and the land was conveyed to Daniel O'Brien, pursuant to that written agreement which describes the land as follows: "All their [plaintiffs'] right, title and interest, whether now owned or hereafter acquired in said redemption proceedings, in said suit as aforesaid or in any other suits or proceedings, touching the same, in and to the said tract of 645 acres of land, which is situate in Valley district, of said county, on the Tygarts Valley and Middle Fork rivers, which is the same land heretofore conveyed by Melville Peck, special commissioner, in the chancery cause of Crim v. Melville N. O'Brien, etc., lately pending in

said circuit court to said J. N. B. Crim, deceased, by deed which is duly recorded in the county clerk's office of Barbour county."

[2, 3] The bill does not aver that there is any mistake in the description in the contract; neither does it aver fraud. Hence the written contract is the best evidence of what the grantors intended to convey by the deed to be made in consummation thereof; and parol evidence is not admissible to vary it. The description of the land in the deed is substantially the same as in the contract; they vary a little in verbiage, but they both describe the same identical tract of land. Both descriptions are general, it is true; but they both refer to the Melville Peck commissioner's deed to Crim, for description, and, by reference to that deed, we find that it contains a reference to the Benjamin Rich deed to M. N. O'Brien, for description, and reading that deed we find it describes the land by metes and bounds, by lines and corners. The deed which the bill prays to have reformed describes the land by direct reference to both the Peck commissioner's deed and the Benjamin Rich deed, for the express purpose of "*a more particular description of the said tract of 645 acres of land.*" Thus, by reference to the Rich deed, the grantors have given a description of the land by metes and bounds. It is the only deed in the chain of title which does give courses and distances, and plaintiffs have adopted the particular description given in that deed by referring to it for description. And Wolverton's survey and map, read in connection with his testimony, locates the boundary lines, and shows them to contain 13.8 acres of the McGinnis tract. Therefore, plaintiffs cannot now be heard to say that it was not their intention to include that portion of the McGinnis tract in their deed to Daniel O'Brien. General description must yield to particular description, when there is discrepancy. Hence such general description of the land as "the home place of M. N. O'Brien and Daniel O'Brien" must yield to the description by boundary lines found in the Rich deed. *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020; 13 Cyc. 631; *Tiedeman's Real Prop.* § 592. But the description, "the home place of M. N. O'Brien and Daniel O'Brien," is not found in plaintiffs' deed to Daniel O'Brien. That description is found only in the deed from Melville Peck, commissioner, to J. N. B. Crim, and the fact that grantors did not use those words of general description in their deed to Daniel O'Brien is a circumstance which would seem to indicate that they did not mean to so limit the quantity of land, which they were conveying, because they owned both the O'Brien home place and the McGinnis tract adjoining it. When reference is made in a deed, containing only a general description of land, to another deed or plat, which contains description by metes

and bounds, for the purpose of describing the land intended to be conveyed, it has the same effect as if such particular description in the deed or plat referred to were incorporated in the deed. 13 Cyc. 632; *Tiedeman's Real Prop.* § 605; *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; *Bank v. Stewart*, 93 Va. 447, 25 S. E. 543.

O'Brien denies that there was a mistake, and plaintiffs have not only failed to prove that O'Brien knew there was a mistake when he took the deed, but, in view of the written contract of sale, the correctness of which they have not assailed, they have failed to establish that a mistake occurred on their own part.

[1] The only ground of relief is an alleged mistake in the description in the deed of the land intended to be conveyed, and before equity will correct such mistake, unaccompanied with fraud, it must be clearly proven, and must be a mutual one. To correct a mistake, not mutual between the parties, would be in effect to make a contract for them. *Robinson v. Braidon*, 44 W. Va. 183, 28 S. E. 798; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Pusey v. Gardner*, 21 W. Va. 469. See, also, *Diman v. Providence, etc., R. R. Co.*, 5 R. I. 130. Before a deed will be reformed for mistake, the evidence to establish it must be clear and convincing. *Koen v. Kerna*, 47 W. Va. 575, 35 S. E. 902.

The testimony of witnesses as to the impressions or opinions Byrer may have had concerning the particular land intended to be conveyed is hearsay, and altogether improper. He acted only as scrivener in drawing up the deed, which was evidently prepared according to the written contract of compromise and sale. Plaintiffs themselves did not know the land and its surroundings; they had never been on it, and, of course, were not familiar with its boundaries. Therefore it clearly appears that they are resting their case upon proof of facts and conditions which, although they existed at the time, have become known to them since they made their deed to O'Brien. This makes their case very much weaker than it might otherwise have been, because, not knowing the land, how could they have been mistaken as to its boundary lines? The inference is that they described it by referring to another deed with metes and bounds, because that was the surest way of describing it then known to them.

That a public road separates the 13.8 acres from the other portion of the 645 acres, and that, on the day after the deed was made to O'Brien, he sold the coal underlying all the land, except the 13.8 acres, are facts relied on by plaintiffs to prove that O'Brien knew that it was not plaintiffs' intention to include in the deed any part of the McGinnis tract. But these are only circumstances tending to prove a fact; they are not

inconsistent with O'Brien's claim that he knew the deed conveyed to him a part of the McGinnis tract; he had a right to sell any, or all, of his coal. These facts are not sufficient to overcome the presumption that it was the grantors' intention to convey all the land in the bounds of the Rich deed, except the 150 acres not in dispute.

O'Brien has strung a wire fence around the McGinnis tract, and apparently claims the whole of it, by virtue of his deed from plaintiffs, but the decision of this case affects 13.8 acres only of the McGinnis tract; it being that part of it included within the boundary lines of the deed from Benjamin Rich to Melville N. O'Brien. Title to said 13.8 acres passed from plaintiffs to O'Brien, by virtue of their deed.

Bridget Caughlin is not a party to the bill, and, of course, her rights are not affected; no party to the suit seems to be claiming any part of her land, notwithstanding a part of it, also, is included within the boundary lines of the Rich deed.

It appears from the evidence that no part of any of the smaller tracts of land which Daniel O'Brien, after receiving his deed, conveyed to Joseph O'Brien, Lucy O'Brien, Maggie J. O'Brien Booth, and George Booth, and to Melville N. O'Brien, lies within the McGinnis tract, and none of the coal conveyed to Lewis underlies any part of it; and hence none of those parties was a proper party to the suit.

For the reasons herein stated, the decree of the lower court will be affirmed.

(70 W. Va. 186)

ICE v. MAXWELL et al.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1097*)—SECOND APPEAL—LAW OF THE CASE.

This is a review of this case on writ of error to a judgment rendered in a second trial. There was also a review by this court of the first trial, reported in 61 W. Va. 9, 55 S. E. 899. The law governing this review of the case will be found in the syllabus to the former review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

Error to Circuit Court, Randolph County.

Action by E. Clark Ice against W. B. Maxwell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. H. Scott and H. G. Kump, for plaintiffs in error. James A. Bent and Samuel T. Spears, for defendant in error.

WILLIAMS, P. Plaintiff recovered a judgment for \$500 against W. B. Maxwell, L. P. Loudin, William Flint, and J. A. Cunningham, and they have obtained this writ of

error. This case was reviewed upon a former writ of error, and will be found reported in 61 W. Va. 9, 55 S. E. 899.

Plaintiff's suit is for services rendered in procuring a purchaser for a tract of timber land in Randolph county controlled, and later owned, by defendants, pursuant to an alleged oral agreement that for such services he should be paid \$500. That he did procure a purchaser and introduce him to defendants, and that defendants thereupon began negotiations with him, which in a short time thereafter ended in their selling the land to him, are undisputed facts. In relation to a number of facts, however, the testimony of the plaintiff and of the defendants is irreconcilably in conflict. But as to the credibility of witnesses, the weight of this testimony, the jury were the judges. We cannot disturb the verdict when it rests upon conflicting testimony of witnesses.

At the time plaintiff was employed to find a purchaser defendants were not the owners of the land in question, but Mr. Cunningham had an option contract with the owners to purchase it at a certain price. That option expired on the 28th day of February, 1903. It was on the 11th of March following that plaintiff introduced to defendants the man who purchased from them. On the day before the option expired, the land was taken over by defendants. It was then conveyed by the owners to L. P. Loudin, trustee, who held it in trust for himself and the others in the following proportions, viz.: Flint and Maxwell each a fourth, Loudin one-eighth, and Cunningham three-eighths. On the same day a written declaration of trust was signed by all four of the defendants, showing the several interests as above stated. Prior to that time Mr. Maxwell had become jointly interested with Mr. Cunningham in the option, and, not finding a purchaser and seeing the option about to expire, they decided to purchase the land themselves, and did so, by interesting the two other defendants, Loudin and Flint, as partners. They bought the land for the purpose of speculation, and were as anxious to find a purchaser after the 28th of February as before. The cause for limiting plaintiff to the 28th of February as the time in which he could find a purchaser was removed by their taking over the land themselves, and by their continuing desire to sell, and they never notified plaintiff of their own purchase of the land, but apparently permitted him to continue his efforts to find a purchaser, without any new agreement or understanding. Being now the owners, they had the power to extend plaintiff's time, as well as the opportunity to receive the benefit of his services. Whether or not the time was extended was a fact, which the jury might have inferred from the facts and the conduct of the parties.

Plaintiff testifies that, on the day the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chaser with whom he had been in correspondence arrived in the city of Elkins, he went to Mr. Maxwell and asked him if the land was still for sale, and told him, if it was, he would bring the man to his office and introduce him to him, and that Mr. Maxwell replied that the land was still on the market, and that the man had come just at the right time, because Mr. Cunningham was in town, and could show him the timber thoroughly, and would more probably make a sale than anybody else. He says Mr. Maxwell told him to bring the party around, and that he did so, and introduced him to Mr. Maxwell and Mr. Cunningham. He also says that, before introducing the purchaser, he asked Mr. Maxwell what figures he should price the land to him, and that Mr. Maxwell replied that he had better price it at \$31 per acre, and give them a chance to drop a little on it. The land was sold to this purchaser at \$27 per acre. After the sale was consummated, and the consideration, or a portion of it paid, \$100 was left in the hands of Mr. Maxwell to pay plaintiff for his services; defendants admitting that he was entitled to something, but claiming that, as the land had not been sold before the 28th of February, and was sold for less than \$30 an acre, plaintiff was not entitled to \$500, as per the original agreement. But, if plaintiff's testimony is true, it tends to prove a waiver of the time limit in the contract of employment, or an extension, rather, of the original agreement. Defendants accepted the benefit of plaintiff's services, after the 28th of February, and at a time when his services seem to be just as beneficial to them as if they had been rendered before the 28th of February. Point 5 of the syllabus, declared by this court on the former hearing, is binding on both this court and the litigants. It is the law of this case, whether it correctly states the law or not. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009. By that law, if plaintiff's testimony is true, defendants are liable for the sum fixed by the agreement.

Seven instructions were given on behalf of plaintiff. It is useless to review them seriatim, as they involve no novel legal proposition. It suffices to say that we have carefully considered them, and find that they conform to the law as announced on the former hearing.

Five instructions asked for by defendants were refused. As an abstract proposition of law, No. 1 is correct; but, if applied to the facts of this case, it would be misleading, because it ignores the question of any implied extension of time beyond the 28th of February for plaintiff to find a purchaser. Nos. 2 and 4 are bad, because they are confusing and misleading. They would lead the jury to believe that the purchase of the land by defendants themselves would defeat re-

covery, unless there was a new contract of service made thereafter, or an express extension of the old one. This, we have already said, is not the law to apply to this case. Defendants' purchase under the option, and the conveyance of the land to Loudin, trustee for all the defendants, does not defeat plaintiff's right to recover on the original contract of service, because it is admitted that he furnished a purchaser to whom defendants afterwards sold. That the purchaser was introduced after the 28th of February, and the sale made to him at a price under \$30 per acre, does not defeat recovery, in view of the law of this case, above referred to. By accepting plaintiff's services, by selling to the purchaser whom he found and introduced to them, defendants became liable under the original agreement.

No. 3 is objectionable, and was properly refused, because there is no evidence whatever that plaintiff's services were to be gratuitous. And No. 5 is bad because it introduces the element of a new, or additional, contract concerning which there is no evidence offered, by either party.

But for the special contract, plaintiff might have recovered a judgment two or three times as large, on a quantum meruit, under the common assumpsit counts. His evidence tends to prove that such service as he rendered was reasonably worth much more than he had agreed to accept.

We find no error calling for a reversal, and will affirm the judgment.

(70 W. Va. 190)

CARR v. COFFMAN.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. SALES (§ 126*)—RESCISSION—UNREASONABLE DELAY.

Delay for 30 days by the buyer to rescind the purchase of a sow, bought for breeding purposes, under a guaranty that she is pregnant, and giving him the right to rescind the sale if she should afterwards prove not to be pregnant, is not unreasonable delay.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

2. SALES (§ 121*)—PROPOSITIONS OF SETTLEMENT—ACQUIESCENCE BY BUYER.

Mere silence and failure to reply to a written proposition, when there is no legal duty to reply, does not amount to acquiescence therein, so as to constitute an agreement between parties.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 296-301; Dec. Dig. § 121.*]

Error to Circuit Court, Mercer County.

Action by W. W. Carr against W. H. Coffman. Judgment for plaintiff, and defendant brings error. Affirmed.

Ritz & Ritz, for plaintiff in error. Hale & Pendleton and Longley & Jordan, for defendant in error.

WILLIAMS, P. This suit is to recover the price of a sow, known as Lady Premier the III, of Willowdale, which W. H. Coffman sold to W. W. Carr on the 2d of February, 1907, at the price of \$425, under the following guaranty, viz.: "Every sow sold in pig is guaranteed to be safe in pig, or will be kept at our risk and expense until safely over two periods. If by chance a sow should come in again after shipping we will satisfy the buyers either by refunding his money and shipping charges and taking sow back, or, if he prefers, we will substitute another sow in pig and equally good, or else he can breed the sow himself and we will refund him a reasonable amount for loss of time."

The sow was shipped to plaintiff on June 20th, and he was notified that she was due to farrow the latter part of July, or first of August. She did not farrow at that time, and plaintiff wrote defendant on the 27th of August that she had not farrowed, and that there was no indication that she was with pig, and that on the 30th of August he would ship her back. In the letter he says: "I paid you \$190 cash and gave you note for \$500 for six hogs (5 sows and boar) ('tis five) after returning Lady Premier 3rd of Willowdale I will have only Danesfield Majesty 2nd, \$75 and Premier Lad, \$55, making a total of \$130. Please let me know what the express has been on hogs both ways, so that I may know just how we stand. * * * I do not like to take the sows, but if you can't get them to breed with all of your facilities, they don't look promising for me off here by myself. Judging from your last sale you can resell them at much higher prices than I bought them, and I certainly hope so and wish you all success in future sales." Pursuant to this notice, plaintiff shipped the sow on the 30th of August.

On the 29th of August, 1907, defendant wrote plaintiff as follows: "Replying to your letter of August 27th, will say that we are almost grieved that Lady Premier 3rd of Willowdale did not prove to be safe. We felt sure that she was safe before we shipped her. She should have been safe to farrow long about the first of August. I am sorry that you allowed so much time to elapse in case you want us to breed her again. We will look out for this sow and do the best we can for her." On August 30th defendant again wrote as follows: "Lady Premier arrived. I will send her over to a lot in the woods. I will have to keep her in quarantine before I can let her come in contact with my hogs. In the crate she looks pretty good. I think we can fix her up for you, especially when the weather gets a little cooler. Lady Premier is in excellent condition at this time. We felt sure that this sow was safe before we shipped her. Possibly she had some accident." To this letter plaintiff made no reply, but on the 10th of October following he again wrote defendant, demanding a return of the money paid

for the sow, and threatening to sue if the money was not refunded. On the 12th of October defendant wrote a lengthy reply to this letter, in which he complained because plaintiff had kept the sow 30 or 40 days after her time to farrow had passed, without making complaint, and says: "There was that much time lost. When she was returned to us to be bred, we stated that we could not breed her until she passed through quarantine. * * * We think it is too soon for you to kick, and more especially when we have had one of your hogs ready to ship for some time. You must consider that we have kept this hog for you and she has been no expense to you. This has been helping us to keep our guarantee." In this letter he also denies the right of plaintiff to demand a refunding of the price.

The facts are that when the sow was returned defendant placed her in quarantine and kept her there about two months, that he then put her in what he called the detention lot, and after she had been in there for a week or ten days she became lame, and never recovered from the lameness, and he never allowed his boar to go to her after her return. The sow died on the 27th or 28th of January, 1908, of pneumonia, having been sick with this disease only about three days. The suit was begun on the 17th of January, 1908.

Coffman defends the suit on two grounds: (1) He insists that plaintiff waived his right to "rescind" the contract of sale by his failure to act promptly after discovering that the sow was not in pig; and (2) that plaintiff's failure to reply to defendant's letter of August 30th amounted to an acquiescence in the proposition therein contained to re-breed the sow for plaintiff.

What were plaintiff's rights under the contract of warranty, when he discovered that the sow was not in pig? Clearly he could elect to do any one of three things, all of which are expressly stipulated in the written guaranty. (1) He could return the sow, and demand that the price be refunded; (2) he could return her, and demand another, safe in pig, equally as good; or (3) he could keep her and breed her himself, and demand a reasonable sum for the loss of time in breeding. His letter of August 27th, above quoted from, indicates very clearly that plaintiff had elected to take the benefit of the first of said provisions. We do not see how his letter and his conduct, in view of the contract, could have been otherwise interpreted by defendant. He did not intimate that he was returning the sow to have her bred. But, on the contrary, he suggests to defendant that he can resell the sow at a better price than plaintiff had paid for her.

[1] It is insisted that plaintiff did not exercise his right to "rescind" the contract within a reasonable time. But this is not a case involving the right of rescission, where no such right is reserved in the contract.

Here the right to rescind is a part of the express agreement, and in rescinding the sale plaintiff is only exercising a contractual right. He is not breaking the contract, but he is complying with its very terms. Rescission of the sale is one of the three means stipulated in the contract of sale whereby, according to plaintiff's election, defendant can make good his guaranty. No doubt plaintiff would have to exercise his choice of rights within a reasonable time, but we do not understand that he is held to such strict diligence in exercising such a contractual right as he would be if he were seeking to rescind a contract of sale for fraud. But he should, at least, be reasonably diligent; and we think plaintiff has shown such diligence. He explains why he did not ship the sow back as soon as he learned that she was not in pig, and, in view of the facts in this case, we do not think the delay was unreasonable. He testified that another sow that he bought of defendant had gone two weeks over the time when he was advised she would farrow, and that he wanted to give Lady Premier a fair test, and be sure she was not in pig before returning her; and, furthermore, that at the time he became satisfied she was not in pig he knew defendant was in Illinois, and he wanted to reship the sow when defendant was at home, and waited for his return. Moreover, it appears from defendant's own evidence that the delay was no disadvantage to him. He states in his letter that he would "fix her up" when the weather got cooler, meaning he would have her bred to his boar. It was then the last of August. Plaintiff had kept the sow through the hot month of August, a time when defendant would not have bred her, if he had had her.

[2] This case is not controlled by *Ford v. Friedman*, 40 W. Va. 177, 20 S. E. 930, as counsel for defendant insist. The goods, in that case, were not sold upon a guaranty, as was the sow in the present case. In that case the buyer refused to receive the goods because they were shipped too late for the spring sales, for which they had been bought. The seller wrote the buyer, recognizing his right to return the goods, and proposed that, if he would accept them, he would extend the time of payment. To the letter the buyer made no reply, and did not return the goods. The court properly held in that case that fair dealing required that the buyer should either have replied to the seller's letter, or re-marked the goods for return, and mailed to seller the bill of lading; and that, not having done either, his silence and his refusal to act amounted to acquiescence in the seller's proposition to keep the goods in consideration of an extension of the time of payment. But in the present case the sow was returned in a reasonable time, pursuant to express agreement that she might be returned and the price refunded, if she proved not to be in pig, and was received by the sel-

ler "in excellent condition," as he himself states. The buyer then owed the seller no further duty. He had done all that the seller had any right to require, or to expect, of him under their agreement. The seller then had both the sow and her purchase price. The contract of sale did not provide that the buyer might return the sow to have her rebred; and therefore the seller had no right to interpret the buyer's letter, or his action in returning the sow, to mean that he wished her to be rebred. In view of the terms of the agreement, the return of the sow could have meant nothing more or less than a rescission of the sale.

But, suppose defendant did interpret plaintiff's refusal to reply to his letter of August 30th to be an acceptance of the proposition therein contained, his own evidence clearly proves that he was not thereby misled to his injury. He did not attempt to rebreed the sow, notwithstanding he had her in his possession from August 30th to some time in November, during nearly all of which time she appears to have been doing well. He does not explain why he did not let his boar to her on some cool morning in October, after she had been in quarantine for more than a month. He has not shown reasonable diligence to comply with his own proposition, to which he now seeks to hold plaintiff bound, as if it had been accepted. He first complains that plaintiff did not return the sow soon enough, but, after receiving her "in excellent condition," as he states, he placed her in quarantine and kept her there for two months, and then transferred her to the detention lot and kept her there for a week or 10 days before she became lame; and all this time he did not let his boar to her, and the only explanation given is that there was danger of losing his boar by allowing him to go to a sow when the temperature of the weather was above 70 degrees.

As to the second point of defense, that plaintiff's failure to reply to defendant's letter of August 30th should be construed to be an acquiescence in the proposition to rebreed the sow, it may be said that that was a thing wholly different from anything stipulated in the agreement. It was a proposition which required acceptance before becoming an agreement. Mere silence and refusal to accept a proposition will not be construed into acquiescence, when there is no duty to reply. Carr's failure to reply to Coffman's letter was not an acquiescence in the proposition submitted to rebreed the sow. There is no evidence that their minds ever met on that proposition. True, plaintiff testifies that he had not fully made up his mind not to keep the sow until about the 10th of October, but his indecision was never communicated to defendant; and therefore he could not have been misled by plaintiff's silence. He may have been all that time deciding whether or not he would accept defendant's proposition.

Such proposition, being a departure from the original contract of sale, could not become binding upon plaintiff until it was accepted, and it never was accepted.

The judgment of the lower court will be affirmed.

(69 W. Va. 572)

**CASSIDAY FORK BOOM & LUMBER CO.
v. TERRY et al.**

(Supreme Court of Appeals of West Virginia.
May 19, 1911. Rehearing Denied
Jan. 18, 1912.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 229*)—CONSTRUCTIVE TRUST IN LAND—NOTICE OF EQUITABLE TITLE IN THIRD PERSON.

In a suit in equity, the object of which is to establish a constructive trust in land, founded upon an alleged fraudulent conveyance, made by a corporation, the fact that the deed of the corporation was delivered in consideration of money paid to, or a debt due from, the president of the corporation, without proof of want of consideration moving from the president to the corporation, is not notice of an equitable title to the land so conveyed in a third party.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.*]

2. CORPORATIONS (§ 429*)—FRAUD OF AGENT—NOTICE.

That one of two deeds contemporaneously delivered to the same grantee subsequently turned out to have been forged, and was canceled as a forged deed, is not alone evidence of fraud on the part of the grantee in the acceptance of the other deed, or of knowledge on his part of fraudulent intent on the part of the grantor or his agent in executing and delivering the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723; Dec. Dig. § 429.*]

3. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASER FOR VALUE—BURDEN OF PROOF.

When a claim to protection as a bona fide purchaser for value and without notice is involved, the burden is on the party denying the validity of the purchase to prove notice of his equity, and upon the other party to prove good faith and payment of an adequate consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

4. VENDOR AND PURCHASER (§ 236*)—BONA FIDE PURCHASER—CONSIDERATION.

If the property in question in such case has been purchased along with numerous other pieces of property for a lump sum, the purchaser is not denied protection because he is unable to show that a specific price was fixed upon the property in controversy, if he proves payment of an adequate consideration for all the property included in the purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 570; Dec. Dig. § 236.*]

5. DEPOSITIONS (§ 111*)—EXAMINATION OF PARTY BEFORE TRIAL—REFUSAL TO ANSWER QUESTION—NECESSITY FOR RULING.

A decree pronounced upon the pleadings and evidence as made up and filed in the court below will not be reversed for failure of a defendant, examined as a witness in another state, to answer questions propounded to him, if it appears that he has submitted to an examina-

tion, answered many of the questions substantially covering the case, but declined to answer others, claiming he is not bound to do so, and no ruling of the court below, respecting his duty to answer, has been asked for or taken, and he has had no opportunity to answer them after an adverse ruling on his objections thereto. By submitting the case without having made an attempt to obtain answers to the questions, the plaintiff is deemed to have waived any rights he may have had respecting them.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329-339; Dec. Dig. § 111.*]

6. PRINCIPAL AND AGENT (§ 177*)—NOTICE TO AGENT BINDING UPON PRINCIPAL.

The principle of law making notice to an agent bind his principal applies in the case of a purchase of property through an agent, in violation of an equitable title thereto, or right respecting it, in a third party; and, if the agent with such notice purchases the property for his principal, the latter holds the title in trust for such third person.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670-679; Dec. Dig. § 177.*]

7. PRINCIPAL AND AGENT (§ 14*)—EXISTENCE OF RELATION—NECESSITY FOR EXPRESS CONTRACT.

Proof of an express contract of agency is not essential to the establishment of the relation. It may be inferred from facts and circumstances, including conduct.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. § 14.*]

8. PRINCIPAL AND AGENT (§ 70*)—AGENCY FOR BOTH PARTIES TO A CONTRACT.

The law does not inhibit agency for both parties to a contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 146; Dec. Dig. § 70.*]

9. PRINCIPAL AND AGENT (§ 189*)—SUIT TO ESTABLISH—SUFFICIENCY OF BILL.

A bill against a purchaser of land who has acquired it by an agent on the theory of a purchase, in violation of an equitable right in the plaintiff, known to the agent at the time of the purchase, need not aver notice to the principal by or through the agent. It suffices to charge notice of the right generally.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 189.*]

Robinson and Brannon, JJ., dissenting.

Appeal from Circuit Court, Randolph County.

Bill by the Cassiday Fork Boom & Lumber Company against Henry C. Terry, Trustee, and others. Decree of dismissal, and plaintiff appeals. Reversed and remanded.

Van Winkle & Ambler, for appellant. W. B. Maxwell, W. E. Baker, and E. A. Bowers, for appellees Henry C. Terry, E. J. Berwind and H. C. Davis.

POFFENBARGER, P. From a decree of the circuit court of Randolph county dismissing its bill against Henry C. Terry, trustee, the Middle Fork Coal & Lumber Company, the Roaring Creek Coal & Ooke Company, and Samuel B. Diller, praying relief against them in respect to two tracts of land, containing, in the aggregate, 1,788½ acres, the

Cassiday Fork Boom & Lumber Company has appealed.

The appellant is a corporation to which on the 2d day of November, 1891, said land, known as lots No. 16 and 17, of a certain tract, containing, respectively, 916 acres and 872½ acres, had been conveyed by one O. C. Womelsdorf and wife. On the 16th day of August, 1893, said corporation conveyed the same to the Roaring Creek Coal & Coke Company for and in consideration of \$9,000 of the bonds of the Roaring Creek & Charleston Railroad Company and \$131 in cash. At the time there was a lien on the land for \$2,500 of the original purchase money in favor of J. N. B. Crim and G. B. Harvey which sum the Roaring Creek Coal & Coke Company agreed to pay. By deed bearing date March 30, 1894, and admitted to record in the clerk's office of the county court of Randolph county on April 6, 1894, said two tracts of land were conveyed by the Roaring Creek Coal & Coke Company to the Middle Fork Coal & Lumber Company, another corporation. On the 22d day of May, 1894, an order was made by the directors of the Cassiday Fork Boom & Lumber Company instructing its treasurer to give to S. B. Diller for the repurchase of said two tracts of land from the Roaring Creek Coal & Coke Company said railroad company bonds and \$131 in cash, and \$500 to pay to the Roaring Creek Coal & Coke Company on account of the unpaid purchase money, which it had then paid, or was supposed to have paid, to Crim and Harvey, and to arrange for the payment of the remaining \$2,000 later. Diller was the president of the Middle Fork Coal & Lumber Company, and it was understood and agreed that he was to take the bonds and cash to the office of the Roaring Creek Coal & Coke Company in New York, and have a deed made conveying these tracts to the plaintiff company. As we have seen, the Roaring Creek Coal & Coke Company had already conveyed the land to the Middle Fork Coal & Lumber Company, and on the 21st day of September, 1894, a deed was made by that company, through its president S. B. Diller, conveying the timber on the land back to the Roaring Creek Coal & Coke Company, and on the 11th day of June, 1895, said company, by Diller, its president, conveyed said two tracts of land to the defendant Henry C. Terry, trustee. The plaintiff alleges its ignorance until a short time before the institution of this suit, July 21, 1898, of the conveyances made by the Roaring Creek Coal & Coke Company to the Middle Fork Coal & Lumber Company, and by that company back to the Roaring Creek Coal & Coke Company and Terry, trustee, and fraud on the part of Diller and notice thereof and participation therein on the part of Terry, trustee, the Roaring Creek Coal & Coke Company, and the Middle Fork Coal & Lumber Company. It further charges that

the Middle Fork Coal & Lumber Company, though in form a corporation, consisted of the defendant S. B. Diller, and never had any legal board of directors, and never authorized any conveyance by Diller to Terry, and never paid anything either to the Roaring Creek Coal & Coke Company or the plaintiff for said land.

An amended and supplemental bill was filed making Edward J. Berwind a party defendant, and containing the following additional allegations of fact: That the defendant Henry C. Terry represented said Berwind in a large number of transactions relating to real estate and other property in Randolph county, including the two tracts of land in controversy, and acted as his trustee in respect thereto; that Berwind had entered into a contract with Henry G. Davis, dated February 15, 1902, by which he had sold all of said property, including said two tracts of land, to said Davis; that said contract made specific reference to the claim of the Cassiday Fork Boom & Lumber Company to said two tracts of land, wherefore Davis had notice thereof; that, although the deed made by the Roaring Creek Coal & Coke Company, bearing date March 30, 1894, conveying said two tracts of land to the Middle Fork Company, antedates the meeting of the Cassiday Fork Company, at which the money and securities were turned over to Diller with instructions to repurchase said two tracts of land, negotiations had been pending for the repurchase thereof through Diller long before said meeting was held, and the Roaring Creek Company had agreed to reconvey the same in consideration of the railroad bonds and cash aforesaid, and it was then understood and believed that the title to said tract of land still stood in the name of said company; that the plaintiff did not at that time know the same had been conveyed to the Middle Fork Company; that Diller was president of the Middle Fork Company, and fully aware of the right of the plaintiff to have the legal title to the land which the Roaring Creek Company had conveyed to said Middle Fork Company; that it had also been discovered, shortly before the institution of this suit, that the Middle Fork Company, holding the title to said land with full notice of the plaintiff's right thereto in equity, had attempted to convey the same to said Terry; that about the date of the deed in question here Diller had forged a deed purporting to convey from the plaintiff to said Terry, trustee, 5,000 acres of land, which deed had, before the institution of this suit, been declared a forgery and set aside in another suit brought by the plaintiff against Terry and others in the circuit court of Randolph county; that Terry's participation in that fraudulent transaction, contemporaneous with the transactions complained of in this suit, and the intimate business relations existing between him and

Diller since about the 1st day of January, 1895, and the fact that the railroad bonds mentioned had in some way passed into the hands of Terry, trustee, all taken together, established Terry's fraudulent participation in the transaction now in question; that no money or other thing of value was given by Terry, trustee, or any person claiming by, through, or under him for said land; that as plaintiff is informed and believes Berwind, or Terry, trustee, had about the middle of April, 1896, advanced to Diller, on account of the purchase of certain lands and property, about \$448,872.09, in consideration of which Diller, on demand for additional security therefor, undertook to transfer and convey said \$5,000 acres and 2,000 acres of plaintiff's lands; that these conveyances were made in fraud of the rights of the plaintiff, and accepted with notice of the fraudulent intent; that, if said lands were conveyed as security, Berwind had sold the same, together with other property of Diller's for a sum largely in advance of the indebtedness, to wit, \$875,000, and, besides, Berwind had received large returns from the property as proceeds of coal and timber taken therefrom; and that Davis in the purchase of said lands and other property did not estimate said two tracts of land as having any value to him, in view of the claim of the plaintiff thereto, and did not pay anything therefor.

Berwind answered the amended bill, denying all allegations of fraud on his part, and on the part of his trustee, and knowledge of any fraudulent intent on the part of Diller. His answer avers that all the property sold to Davis was sold for a lump sum, and that the respondent is unable to say how much of the purchase money was treated or regarded as applicable to said two tracts of land. It further avers that the respondent in the latter part of December, 1894, upon representations made to him by Diller, which afterwards proved untrue, had invested a large sum of money in the mortgage bonds of the Roaring Creek & Charleston Railroad Company, and, in order to save the money so invested, was compelled to acquire further interests in the railroad property, and also large quantities of timber and coal lands in the section of country in which the road was located; that his purchases of all this property were made in the name of Terry, his trustee; that he was informed and believed full and fair consideration in money had been paid for all of said property, including the two lots in question; that some of the lands so purchased were lands which Diller claimed to own or control, and which he had, at the time, proposed to give respondent as security for a proposed loan and as a bonus for such loan; that none of said property was in fact taken as security, it having been ascertained that Diller did not own the same, but that, on the contrary, they were purchased from the owners there-

of, or those who appeared by the records to be the owners thereof and were believed so to be; that he had allowed Diller, at his request, to attempt to find a market for the property, or make sale thereof, under an arrangement by which Diller would have profited, had such disposition been made, but not under any agreement or understanding which imposed upon the respondent any legal or moral obligation to make sale thereof; that neither respondent nor his trustee ever held said properties or any of them as security for advances to Diller; and that neither Diller nor his representative, nor any other person, has, or ever had, any rightful claim to any settlement of account in respect to the acquisition or disposition of said properties or any of them. The answer of Terry, trustee, to the bill and amended bill, is equally as broad, direct, and specific as to all allegations of fraud and notice thereof as that of Berwind, and makes substantially the same averments of fact, but goes more into the details thereof giving dates, particulars, and circumstances not stated in the answer of Berwind, but all subsidiary in character, and tending to the same legal effect as those stated more generally in the answer of Berwind. The answer of Henry G. Davis admits knowledge of the claim of the plaintiff, and sets up no rights or equities superior to those of Berwind and Terry, trustee. In substance and effect it is the same as those of Terry and Berwind. It denies fraud and notice thereof on their part, avers good title in them, and therefore in himself.

The evidence consists principally of the depositions of W. F. Diller, O. C. Womelsdorf, and Henry C. Terry, and a large number of documents, brought into the record as exhibits and otherwise, principally copies of records in other suits, both in this state and in Pennsylvania, relating to the transactions between Diller on the one side, and Terry and Berwind on the other. W. F. Diller was president and treasurer of the plaintiff company. He proves the sale of the two tracts of land to the Roaring Creek Coal & Coke Company in 1893, and the delivery to S. B. Diller of the bonds and cash, hereinbefore mentioned, for the repurchase thereof, and says his company never intended to part with the title to said lots permanently, and that a repurchase thereof was understood between the two companies from the date of the sale thereof. He says there was a verbal understanding and agreement from the date of the conveyance that this property was to be repurchased. He further says he made repeated demands upon his brother for the deed from the Roaring Creek Coal & Coke Company to the plaintiff company for said two tracts of land, and was assured by him that it had been made and sent to West Virginia for recordation, and later that he, said S. B. Diller, had the same in his safe in his office in the city of

Philadelphia. He testifies further that, after the discovery of the forged deed for the 5,000 acres, his company examined the records as to the title to their other lands, and found that lots 16 and 17 had been conveyed first to the Middle Fork Company, and then to Terry, trustee, and denies that any authority or direction had ever been given to make such conveyances. He further says that in 1899 Terry informed him that he would probably be able to arrange for a sale of all the West Virginia properties to a Mr. Steck, of Pittsburgh, and suggested the advisability of a conveyance of lots 16 and 17 from him to the Cassiday Fork Company, and then a deed from that company to the purchaser, and said he could convey said lots with a recital that they had been misconveyed to him. Womelsdorf testified that in 1899 he, under instructions given to him by Diller, pursuant to a conversation had between Diller and Terry at the office of the latter in Philadelphia, went to Beverley, W. Va., and had a deed prepared for the conveyance, by Terry, of lots 16 and 17 to the Cassiday Fork Company. Just what the conversation between Diller and Terry was he did not know, since he had not heard all of it. This is evidently the occasion and conversation spoken of by W. F. Diller in his testimony.

It further appears from the testimony of Womelsdorf that he was the general manager of the Cassiday Fork Company in 1893, and for some time thereafter, charged with the duty of taking care of its lands and paying the taxes thereon, and that probably in the year 1893 S. B. Diller came there in company with one Slaymaker, of the firm of Witmer & Sons, and a man by the name of Savage, and executed, on behalf of the Middle Fork Company, a contract with Witmer & Sons for the cutting of timber on lots 16 and 17, which contract Womelsdorf witnessed, but, assuming that Diller, who had been prominent, conspicuous, and influential in respect to the affairs of the company, was doing nothing more than he had authority to do and was proper, he did not inform the Cassiday Fork Company of the transaction. He was not only general manager of said company, but a stockholder and director. Terry's deposition is very lengthy. Deeming a great many questions irrelevant and immaterial, he declined to answer them, sometimes of his own volition, and, at other times, by direction of his counsel. He admits that he was trustee for Berwind, and, as such, handled and disbursed for him in the purchase of various properties in West Virginia many thousands of dollars. How much was paid for each of the several properties he does not disclose, and he repeatedly refused to state the exact amount paid for the two tracts of land in question, but persisted in the statement that they were included among the purchases made, and had cost his principal a large amount of money.

He says lots 16 and 17 were conveyed to him by virtue of a written agreement between Berwind and S. B. Diller, which is not produced, and which he says cannot be found.

He supplements this with the following additional statement: "The original conveyance to me as trustee by the Middle Fork Company was an absolute one for a full consideration, so far as I can now state. There was no specific sum that I can fix in my mind which made up that consideration; but the deed, as I recall it, not having looked at it for some time, was an absolute one, and was a part of the transaction which involved the payment of a very large sum of money by Mr. Berwind through me, in excess, I believe, of what the value of these lots was." Being asked what the amount advanced was, he said: "I cannot recall the exact amount accurately, but it was approximately more than \$400,000." The conveyance was made, it will be remembered, by the Middle Fork Company, and Mr. Terry says, in response to a question: "I do not think any consideration was paid to the Middle Fork Coal & Lumber Company, but full consideration was paid to Mr. Samuel B. Diller individually, to the best of my knowledge, although I cannot state in dollars and cents how much; but it was a part of the general advances made by me." He says further: "I do not not recall the payment of any specific sum; but I was making advances on behalf of Mr. Berwind to Mr. Diller almost continuously, and on the day that the deed was delivered, which day I do not recollect, I may or may not have paid Mr. Diller money. But I certainly paid to him at some time or other, in some way, moneys which covered the consideration for the conveyance of this property, but I cannot now recall what the value of the property in question was fixed at." Being asked as to the amount paid for the 5,000 acres and lots 16 and 17, he replied that he could not tell the specific amount paid for said lots or any other lots embraced in the question, and said he did not think a reference to any books or accounts kept by him would disclose such information. He says he thinks the deed for the 5,000-acre tract and for lots 16 and 17 were delivered to him at the same time. As to whether the advancements made and charged to Diller before the deed for lots 16 and 17 was delivered included moneys that had been paid in the acquirement of the stock of the Roaring Creek & Charleston Railroad Company, he declined to answer. He also declined to say whether the property which had cost him over \$400,000 included \$100,000 of the bonds of the Roaring Creek & Charleston Railroad Company, and also to say what property he had bought with said \$400,000 other than the land in question; but he did say the amount charged against Diller was for moneys advanced to him in a general way, and was represented in property which Diller had

secured to be conveyed to him as trustee, and that these properties included lots 16 and 17. He says all these advancements were made to Diller personally, and not to the corporations represented by him, and that he understood that Diller owned a majority of the stock of the Middle Fork Company, substantially all of it, as he believed at the time. The minute book of the Middle Fork Company was demanded of him, and he said he was unable to produce it. This important book was not produced by anybody, and its contents are not disclosed by any part of the record.

A matter deemed important by counsel for the appellant is a disclosure made by Terry of a transaction between him and Diller in April, 1896. On the 17th day of April, 1896, Diller made a written proposition to purchase numerous tracts of land, including the 5,000-acre tract and lots 16 and 17 and a vast amount of personal property, for the sum of \$748,672, payable in 60 days from that date, for which sum he gave his collateral note, pledging for the payment thereof all of the property named in the instrument, and, in addition thereto, a large amount of other property. This note, dated April 18, 1896, recited the delivery of the property to Terry, trustee, as collateral, authorized sale thereof in case of default, and gave authority to said Terry, as attorney at law, or to any other attorney of any court of record in Pennsylvania, or any other state, to appear for the maker thereof and confess a judgment against him for the amount thereof, with attorney's fees and costs. Default having been made, Terry sold the property at auction in his own office in Philadelphia, and purchased the same for the sum of \$100, which amount he credited on the note, and at the June term of court, 1896, took a judgment against Diller for the sum of \$748,672.09, and had execution issued thereon, which was returned nulla bona. This transaction occurred about two years after the conveyance of lots 16 and 17 to the Middle Fork Company, the deed from the Roaring Creek Coal & Coke Company to it having been made March 30, 1894; but it may have been contemporaneous with the recordation in Randolph county of the deed from the Middle Fork Company to Terry, which, however, appears to have been executed in June, 1895. But if Diller was virtually the owner of the Middle Fork Company, and had been paid for this land in the manner in which Terry says he was paid, and could, as such virtual owner of the Middle Fork Company, convey the lands to Terry in compliance with his alleged agreement, or had authority from the board of directors to do so, the consideration, if any, had no doubt been paid prior to the date of the deed as well as to the recordation thereof. Mr. Terry says the transaction of April 17 and 18, 1896, was regarded by them as in the nature of an option, since

the property belonged to him as trustee, and he had made a sort of an agreement of sale to Diller to enable the latter to make disposition of the property, if he could, and, he having failed to do so, the sale of the property by him, as collateral security for the note, only passed such interest as Diller had—an option to purchase—which was really of no value, and that the sale was nothing more than a mere formal extinction of that right. Terry still held the legal title, and the sale extinguished whatever contractual interest Diller had. Being further examined as to the properties mentioned in Diller's memorandum of purchase, he says he had paid for all of them prior to that time, and there was no property mentioned in that proposition which he had not theretofore purchased and paid for with moneys of Berwind. On cross-examination he testified that prior to the time he received the deed for lots 16 and 17 he had paid for them, and that he was not treating money paid for other properties as having been paid for these lots, and says he had overpaid Diller at the time of the delivery of the deed, and that he had not at the time of the conveyance of said lots to him any notice or knowledge of any authority vested in Diller by the Cassiday Fork Company to repurchase or secure a reconveyance to it of said lots. Admitting the possession of the railroad bonds delivered by the Cassiday Fork Company to Diller for the repurchase of lots 16 and 17, he says he had no notice or knowledge of the terms or conditions on which Diller had acquired possession of said bonds, and that he had no knowledge, at or before the time of the conveyance of said lots, of any fraud on the part of Diller in procuring the land to be conveyed to the Middle Fork Company. He denied, also, that at the time he received the conveyance of lots 16 and 17, or prior thereto, he had any notice or knowledge of the forgery by Diller of the deed conveying the 5,000-acre tract. He further denies that at the time of said conveyance he had any notice or knowledge, directly or indirectly, of the claim of the Cassiday Fork Company to said lots or any part thereof.

According to the testimony of William F. Diller, the Roaring Creek Coal & Coke Company took title to the two tracts of land and held the same temporarily for a special purpose, on the accomplishment of which it was to be reconveyed, on repayment of the purchase money. He says that, in order to aid the building of the Roaring Creek & Charleston Railroad, the land was conveyed to the Roaring Creek Coal & Coke Company, with the understanding that it should be reconveyed as soon as the Roaring Creek Coal & Coke Company should obtain some other coal lands, and that this was verbally agreed upon from the time the original conveyance was made in August, 1893.

Whether this is sufficient evidence to justify the view that the Middle Fork Company held the equitable title as vendee under an executory contract of sale might be questionable, since the deed of conveyance was absolute, and there was to be no reconveyance, according to this testimony, until the Roaring Creek Coal & Coke Company should have obtained some other coal lands. It might be regarded as having been a conditional sale which placed both legal and equitable title in the grantee, subject to be defeated by a subsequent contingency. However, conceding, for the purposes of this inquiry, that the plaintiff held the equitable title, it cannot have relief, unless it appears that Terry acted in bad faith, or had notice of the fraud of Diller, or of the equitable title of the plaintiff company, or did not pay full and fair consideration for the property. A more accurate statement would be that, in view of the equitable title in the plaintiff company, the burden is upon Terry to prove that he purchased in good faith, paid full and fair consideration, and had no notice of the equitable title of the plaintiff company. However, as regards notice, the rule seems to require no more than a denial, and then the plaintiff must overcome it by proof; but a purchase in good faith and payment of an adequate price are affirmative matters which the defendant must aver and prove.

[1] The conveyance of the land by the Middle Fork Company, a corporation, to Terry, for a consideration passing to Diller, the president of that corporation, who executed the deed on behalf thereof, is relied upon as a circumstance proving notice of a misappropriation of the property of the Middle Fork Company by its agent, and also as proof of bad faith on the part of Terry. It is urged that this circumstance brought home to Terry notice of the equitable claim of the Cassiday Fork Company to the land in question. This seems to be an attempt to carry that fact beyond what it naturally and fairly imports. If it can be said to prove a misappropriation on the part of Diller, abuse of his power as president, or a turning over of the property of that company in satisfaction of his own personal debt, we do not see how it can go further and fix upon Terry notice of transactions, contractual relations, or equities subsisting between the Middle Fork Company and a third party, the Roaring Creek Coal & Coke Company. The acquisition of the plaintiff's equitable claim had no apparent connection with the conveyance to Terry. They were separate and distinct acts, not only in nature, but in time, place, circumstances, and parties. Nor does it necessarily, logically, or probably result differently when we add the circumstance that Terry or Berwind obtained from Diller the railroad bonds placed in his hands for delivery to the Roaring Creek Coal & Coke Company to obtain a re-

conveyance of the land; for there is nothing in the record that indicates any knowledge or information on the part of either Berwind or Terry as to how those bonds came into the possession of Diller. For all that appears here, they may have been taken from him in absolute ignorance of the means by which, the source from which, or the purpose for which, he had obtained them. The authorities invoked for the proposition that property taken by deed from a corporation upon a consideration moving to the president thereof in his individual capacity is to be treated and regarded in equity as having been misappropriated by the officer, and fraudulently acquired by the grantee, are not applicable here. The corporation is not asking any relief against the act of its president. The plaintiff is a third party, attempting to rely upon this fact as proving notice, not only of misappropriation of the corporate property, but of the additional, remote, and disconnected fact that it, the plaintiff, was equitably entitled to the property, by virtue of an oral agreement, knowledge of which, on the part of the grantee, is not shown in any way.

[2] The acceptance by Terry of a forged deed at the time he accepted the deed in question is relied upon and urged as a circumstance proving his participation in a fraudulent contemporaneous transaction, and therefore as evidence of his fraudulent intent and bad faith in the acceptance of the deed here involved. The adjudication of the fact of forgery of a deed contemporaneously accepted does not imply or argue any knowledge of the forgery on the part of Terry. It is not pretended that he forged the deed, and the cancellation thereof as having been forged by Diller destroyed his title independently of any knowledge or motive on his part in accepting the same. It being a forged deed, he acquired no title under it, and could have acquired none, although he accepted it in good faith, without any notice of the forgery, and paid full and adequate consideration for the property. Had it been set aside as having been fraudulently obtained, the adjudication would necessarily have implied guilty participation in the fraud by the grantee. There is no evidence here tending to prove knowledge on Terry's part of the forgery at the time he accepted the deed.

The fault found with the evidence offered by the defendant Terry to prove payment of the value of the land is his failure to show the value at which the land was taken by him, or, in other words, the price agreed upon between him and Diller at which it was credited on the large advancements made to the latter. That Terry, for and on account of Berwind, made large advancements to Diller, amounting to more than \$400,000, does not seem to be questioned, and the circumstances and transactions disclosed by the record leave no doubt of the fact. The witness

swears that these advancements were not only equal to, but greatly in excess of, all the property conveyed to him by Diller and others in consideration thereof. He further states his inability to say just what part of the money so advanced was apportioned or applied to the purchase of these two tracts of land, and says none of the books, papers, or memoranda kept by him will disclose such fact. His statement amounts to this: That Diller was in debt to him for these advancements largely in excess of all the property he had conveyed to him, including these two tracts and the 5,000-acre tract, which indebtedness was acknowledged and admitted by Diller at the time, and the conveyances made without any such apportionment. It is not difficult to conceive a situation of that kind. Instances of the kind often occur in the course of large business transactions, resulting disastrously to the parties. It appears that Diller's operations in Randolph county were far beyond his financial means and ability, and resulted in his insolvency. It is true that Berwind did not meet a like fate; but he appears to have been a wealthy man, able to bear misfortune and adversities by making additional investments, and combining properties advantageously so as to put them upon the market in an attractive form and retrieve his losses. Terry's failure to specify or fix the value put upon these two tracts of land does not amount to an obstinate refusal to answer in that respect. It is accompanied by his statement of inability to do so by way of explanation and excuse; and, for all that we can see his statement is true, and the truth thereof is made highly probable by the circumstances revealed by the record. An attempt is made to cast doubt upon the truth of his statement, as well as upon his good faith, by the taking of the judgment note of April 18, 1896, the sale of the properties pledged for the payment thereof, after default had been made in respect thereto, and the judgment obtained for the amount due thereon. These transactions were, according to the testimony of the witnesses, long subsequent to the execution of the deed here involved and appear to have been independent thereof. The proposal of purchase made by Diller to Terry treated these lands as then held by Terry. Just why Diller should have obligated himself in the manner in which he did for about \$300,000 it may be difficult to conceive. On the showing here made, he evidently expected to sell the properties for more than \$750,000. He took them at a valuation of about \$748,000 from Terry. Apparently this would have given Terry a profit of something like \$300,000, and, to have obtained any additional profit, it would have been necessary for Diller to have sold for more than that amount. At this time he was insolvent. Being so, he could afford to be liberal in his undertakings and desperate in his adventures, having all to gain and nothing to lose. What prospects he

had for effecting such a sale and meeting his obligations within 60 days is not disclosed by the evidence. Loose and improvident as this arrangement appears to have been, it did not relate directly to these two tracts of land; and nothing in its terms or the proceedings relating thereto tends to show that Terry at that time had any knowledge of the equitable claim of the Cassiday Fork Company or specific intention to defeat the same. He and Berwind had had extensive dealings with Diller out of which many controversies might have arisen, and this arrangement seems to have been made largely with a view to a final settlement between them and an extinction of any claims that Diller might otherwise thereafter have set up against them. At the same time Diller executed an instrument under seal, releasing Berwind, his heirs, executors, and administrators from all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever, in law or equity, which he then had against said Berwind, or ever had had, or which his heirs, executors, administrators, or assigns or any of them might have, for or by reason of any cause, matter or thing whatsoever. No doubt Diller at this time had numerous creditors who, it was supposed by Berwind, might attempt to set up claims against him on the theory of indebtedness to Diller, and the apparent object of all these transactions was to forestall and provide against the assertion of any such claim; and, in the absence of evidence tending to show a secret agreement or arrangement to cover up assets of Diller in the hands of Berwind, to the detriment or prejudice of the creditors of the former, the taking of this release and the judgment note and the judgment on the note could be regarded as nothing more than mere precautionary transactions, unobjectionable in any view, except that of creditors, on an attempt by Terry to set up to their prejudice, the large judgment, founded on the note of April 18, 1896. The plaintiff here has not that status. It comes claiming certain specific property as the equitable owner thereof, not as a creditor, demanding participation in the distribution of the assets of an insolvent estate.

Much argument to sustain the bill is predicated upon the repeated declinations of Terry to answer questions propounded to him. His obstinacy or failure to disclose matters within his knowledge or power does not prove the plaintiff's case, or relieve it from the duty to sustain the burden of proof, put upon it by direct and positive denial of the allegations of fraud.

[10] It is only when a prima facie case is made by one party, and doubt is cast upon it by the rebuttal evidence of the opposite party, or otherwise, that suppression or withholding of evidence raises an inference

against the party failing to produce evidence which it is in his power to produce, and determines the point in favor of the other party. *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428.

[5] If we could assume that under the statutes authorizing the taking of the testimony of opposite parties, and the taking of depositions out of the state, the courts of this state have the powers and remedies for compelling specific and full answers to questions conferred by statutes, providing for the propounding of interrogatories, the plaintiff has neglected to invoke the exercise of such powers and the application of such remedies. Instead of making application to the court below, as it may have had the right to do, for rulings upon the refusal of the defendant to answer questions, and direction from the court as to whether he was bound to answer them, or whether he had sufficiently answered so as to give him an opportunity to make further answers in case the court ruled against him, the plaintiff submitted its case on the evidence as it appears here. There was not a total failure to answer, and the answers, in some form and to some extent, covered all the questions propounded. In such a state of the case neither a judgment of nonsuit against a plaintiff nor of default against a defendant can be rendered in those jurisdictions in which statutory powers to do so in proper cases are conferred upon the courts. A party who has answered is entitled to a ruling upon the sufficiency of the answers made, and the propriety of the questions propounded, before such judgment can be rendered against him. By submitting its case, without requiring further answers, the plaintiff waived its right to a decree pro confesso, if any it had, and is bound by the evidence as it stands. *Fels v. Raymond*, 139 Mass. 100, 28 N. E. 691; *Harding v. Morrill*, 136 Mass. 291; *Wetherbee v. Winchester*, 128 Mass. 293; *Townsend v. Gibbs*, 11 Cush. (Mass.) 159; *Amherst, etc., Ry. Co. v. Watson*, 8 Gray (Mass.) 529; *Cooper v. Central Railroad*, 44 Iowa, 134; *Hogaboom v. Price*, 53 Iowa, 703, 6 N. W. 43; *Garvin v. Cannon*, 53 Iowa, 716, 6 N. W. 122; *McNamara v. Ellis*, 14 Ind. 516; *Cleveland v. Hughes*, 12 Ind. 512.

[6] The issue here is whether Terry is a purchaser for value and without notice. Thus far, we have treated him and Diller as strangers, dealing at arm's length, and, if that was the relation subsisting between them, we have no doubt of the correctness of the conclusions stated. But, if the circumstances, taken as a whole, establish a relationship of principal and agent between them, Terry cannot be regarded as a bona fide purchaser, even though he had no actual knowledge of the fraud of his agent.

[7] That a principal cannot retain the benefit of the fraudulent or unauthorized act of his agent is a proposition universally recognized and acted upon by the courts. In

seeking to hold the property he adopts the fraudulent act, and thus destroys his own title in one aspect of the case, and ratifies it and binds himself in the other, according to the nature of the demand made upon him by the injured party. This is undoubtedly the rule applicable between the immediate parties to the contract. Is the principle operative in the case of a purchase through an agent, in violation of the equitable rights of a stranger, with notice to the agent? The authorities uniformly answer this in the affirmative. *Le Neve v. Le Neve*, Amb. 436; 2 *White & Tud. L. Cas. Eq.* (4th Am. Ed.) t. p. 109, m. p. 35; *Clark v. Fuller*, 39 Conn. 238; *White v. King*, 53 Ala. 182. On this principle notice to a trustee is notice to his cestui que trust. *Insurance Co. v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180; *Mining Co. v. Coal Co.*, 8 W. Va. 406; *Beverley v. Brooke*, 2 *Leigh (Va.)* 425; *French v. Loyal Co.*, 5 *Leigh (Va.)* 627; *Wickham v. Lewis*, 13 *Grat. (Va.)* 427; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846. In these Virginia and West Virginia cases, the trustee is regarded as a purchaser, and not as a mere agent, but the other cases cited involved nothing more than simple agency. The case falls clearly within the general principles of notice. *Wade on Notice*, § 672, says the rule may be tersely expressed thus: "Notice to an agent is notice to the principal." This author further says it is either actual notice or the equivalent thereof. The rule is subject to some limitations, but none, so far as we have observed, that forbids its application in the class of cases under discussion.

The defense of a bona fide purchase for value is affirmative in character, though ordinarily the burden of proof as to notice is on the plaintiff. The rules and principles of equity, not only make it affirmative in the ordinary sense of the term, but impose an additional burden. They require the purchaser not only to prove his purchase, but also that in equity and good conscience he ought to be permitted to retain the property. The existence of an equity in violation of which he obtained the property constitutes ground of appeal to his conscience, demanding a full disclosure of all material facts and circumstances. He must deny notice, even though it is not alleged and both plead and prove payment of an adequate consideration. *Lohr v. George*, 65 W. Va. 241, 64 S. E. 609.

Enough has been said of defendant's testimony to show uncertainty and indefiniteness as to the character of his transactions in general. He repeatedly says he advanced to Diller large sums of money and took these lands an account of the advancements. He stubbornly refuses to give any price agreed upon between him and Diller for them, protesting his inability to do so, since they were taken in part satisfaction of large sums of

money advanced. It is hardly probable that the lands and other properties, such as the bonds intrusted to Diller, to be exchanged for the lands in question, were paid for in advance. Circumstances disclosed by the record make it equally improbable that these large sums of money were loaned to Diller. Then upon what basis were they advanced? They could have been advanced to him as agent, if at all.

[4] It appears from the separate answers of Terry and Berwind that about December, 1894, Diller, having been associated with his brothers and other parties in the promotion of various land deals and mining and railroad enterprises in Randolph county, applied to Berwind for financial assistance in the form of purchases of bonds of corporations he was interested in and loans on the faith of some of these properties. Relying upon Diller's representations, Berwind purchased a large amount of the bonds of the Roaring Creek & Charleston Railroad Company. Berwind says in an answer in another suit made a part of this record that a written agreement was entered into between him and Diller on the faith of the representations of the latter, by which he agreed to render such aid, and was to have, in addition to ample security, a certain interest in some of the property as a bonus or reward. He subsequently ascertained Diller's inability to carry out this agreement and the insufficiency of the properties as security, wherefore it became necessary for him to make large investments, on a different basis, in order to save what he had invested in the railroad bonds. Accordingly the agreement was abandoned, and he proceeded to make purchases and investments in Randolph county through Terry and other agents. The answer in this cause does not set this out so much in detail, but pursues the same general course of defense. Terry says in his testimony he made his large advancements in pursuance of that agreement and on the faith thereof, and not under any agreement of his own with Diller, although he protests that he paid the latter full consideration for the land. This does not accord with Berwind's admission, just stated. Indeed, Mr. Terry's answer to the amended bill substantially agrees with the defense of Berwind. He says: "It is true that this respondent, Henry C. Terry, trustee, and said Samuel B. Diller, were on intimate business relations with reference to properties in said Randolph county. This was natural and almost necessary, because, upon what turned out to be untrue representations by said Diller, Edward J. Berwind, acting though this respondent, had been in or about December, 1894, induced to invest a large sum of money in the acquisition of mortgage bonds of the Roaring Creek & Charleston Railroad Company, and in order to make this investment of any avail, and,

indeed, in order to save the money invested, it became necessary for said Berwind to acquire further interest in said railroad and also tracts of coal land in the vicinity of said railroad, and, through this respondent as trustee, said Berwind did proceed in the early part of the year 1895 to acquire this interest and these tracts of land, in every instance paying full and fair consideration therefor in money to the owners or those who were believed to be the owners or those who represented or acted for the owners thereof. Among these tracts so acquired and so paid for were said lots Nos. 16 and 17. Some of these lands, so acquired by the respondent as trustee for said Berwind, were lands which said Diller had prior to the investment by said Berwind in said railroad bonds represented to said Berwind as owned or controlled by him, Diller, and which said Diller had at that time proposed to give said Berwind as collateral for a proposed loan; but none of them was obtained by said Berwind, or by this respondent as trustee, as collateral or security for any loan, as it was early discovered that none of said lands was owned by said Diller and only some of them by companies in which he was interested and which he managed and claimed to control, and none of them was acquired by said Berwind or by this respondent as trustee, except upon full and fair consideration paid to the owners thereof, or to those who appeared by the records to be the owners thereof, and were believed by this respondent to be the owners thereof, or to those duly authorized to act for such owners. And neither said Berwind nor this respondent had any knowledge or information prior to the acquisition of these several properties and especially prior to the acquisition of lots Nos. 16 and 17 by this respondent of any defect in title, or anything whatever, that would in any way impeach, or tend to impeach, or cast any suspicion on, the respective conveyances by which title became vested in this respondent."

Diller was not the sole owner of the properties he represented in his application to Berwind. A great deal of it was held by corporations in which Diller was a stockholder, and in some of which he was an officer. These concerns were financially embarrassed when both Berwind and Terry first met him. He applied to Berwind for funds, representing the properties as then jeopardized by indebtedness. The whole record discloses, too, that Diller was not a man of any considerable means or wealth, and he came out of these transactions apparently, if not actually, insolvent. He and his associates were loaded down with wild, unproductive lands, the market value of which depended largely upon undertakings they were wholly unable to carry out. Under a greater burden than they could carry, they had come to Berwind for aid, and he had found them in much worse

condition than had been represented to him. Acting as a representative of Mr. Berwind in the effort to make good his investments in Randolph county, Mr. Terry must have been equally well informed as to Diller's financial condition. If it be true that \$400,000 was put into the hands of Diller by Terry, it is almost inconceivable that he received it as a borrower or as a vendor of property. That he did not own all the properties acquired with that money, and Terry's knowledge of this, are fairly inferable from the facts disclosed by the record. The latter knew a great deal of it stood in the names of corporations and individuals other than Diller, and yet Diller seems to have had something to do with the acquisition of nearly or quite all of it. The answer substantially admits this, and Terry's testimony, broadly considered, conforms to the answer. He distinctly says the amount advanced to Diller was "approximately more than \$400,000." This seems to have been regarded and treated as the original cost of the properties embraced in the contract of sale or option of April 17, 1896, being apparently all that had been acquired in that part of West Virginia by Mr. Terry. Many of these were admittedly purchased from persons other than Diller, and yet, according to this testimony, the money went through his hands. In other words, Terry put this vast sum of money in the hands of Diller with which to purchase the property of other people, and take conveyances thereof, not to himself or in his own name, but in the name of Terry. Thus, through Diller, Terry was giving money in exchange for real and personal property. This clearly imports agency and the circumstances suggest agency as the safest, most expedient, and efficacious arrangement. Diller knew all the properties and their owners. Terry's knowledge thereof was limited. As agent his relation was confidential. All advancements became immediately due, and the principal had the protection of the criminal laws against misappropriation. As vendor or debtor, he would have had vastly greater liberty and discretion and Berwind less protection and more limited remedies. Mr. Terry is significantly silent on the subject of the exact relationship between himself and Diller. No definition thereof can be found in either his answer or his testimony. He lays stress upon payment and lack of personal knowledge of fraud. If Diller was his agent, he can truthfully do both and still not make out a good defense. Notice of the plaintiff's equity on the part of his agent was notice to him, and the fraud of his agent avoids the contract as completely as if it had been his personal act. We think it was his clear duty to negative the inference of agency, arising from all the facts disclosed, and, as he has not specifically contradicted it, the plaintiff must be accorded the benefit thereof.

[8] Diller's agency of some of the corporations from which the property was acquired

does not preclude the relation of principal and agent between him and Terry. Such double agencies afford opportunities for fraud, but no rule of law forbids them. It is obviously possible for the agent to represent both principals fairly and honestly. Clark & Skyles, Agency, § 414. Mr. Terry, fully advised of Diller's agency for the owners of the property, and employing him as agent to purchase it, cannot be heard to say the existing relation of Diller to the owners rendered it impossible for him to accept an inconsistent agency. Terry could assent to agency for both parties. The dual capacity only imposed further duties upon the agent and required of him greater care and circumspection. The assent of the former employers to the subsequent inconsistent employment was not essential thereto. With knowledge of the existing relation, Terry could bind himself.

[9] Though the bill proceeding upon the theory of personal notice of fraud and a trust estate of Diller in the hands of Terry ignores agency as ground of relief or means of notice, we do not think this precludes adoption of that theory. The bill distinctly charges a purchase with notice, and we are aware of no rule requiring specification of the mode or manner of acquisition thereof. Besides, a prior equitable title in the plaintiff having been shown, establishment of a better right by purchase for value and without notice became an affirmative defense, requiring denial of notice and proof of payment of an adequate price. Occupying such a position, the defendant was bound to repel every inference of knowledge of the prior equity, whether actual in the sense of personal or of different character and tantamount to personal knowledge. He has the affirmative of the issue, and is partially excused from the burden of proof under a mere rule of convenience, relieving from duty to prove a negative. The operation of that rule ceases with the reason therefor. When facts are disclosed, raising a clear inference of knowledge or a relation from which it results as matter of law, that rule does not excuse silence. To require the defendant to repel it imposes no hardship upon him, and places him at no disadvantage.

[7] We deem the evidence of agency sufficient in kind as well as quantity. An admission of proof of an express contract of agency is not essential. The authorities uniformly say the relation may be inferred from facts and circumstances. *Slers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460; *Clark & Skyles, Agency*, § 64, citing a very long list of cases fully sustaining the text.

Pending this suit Henry G. Davis, having admitted notice of the plaintiff's claim, purchased this property with other holdings of Berwind. Hence his rights are wholly dependent upon those of Terry. In purchasing the lots involved here he took the risk of title in the latter. As Terry paid off a prior

lien on the property and claims to have paid some of the taxes thereon, he or Berwind or Davis is entitled to have such sums repaid as a condition to relief. The Roaring Creek Coal & Coke Company, holding the title to the timber on the land, made no defense. The process upon the original bill was served on it, but it was proceeded against on the amended bill by order of publication; no representative of it being found in the state upon whom service could be had. It has not appeared nor made any defense. As to it, the allegations of the original bill are very brief and perhaps defective. The amended bill takes no notice of it. In this imperfect state of the record we do not feel warranted in pronouncing a decree on that branch of the case.

Before entering upon the inquiry as to fraud, we suggested possible lack of equitable title to the land in the plaintiff. Having concluded that Terry was a purchaser with notice of the facts relating to the title, it becomes necessary now to say whether, by virtue of those facts, the plaintiff had such title. We think it had. The evidence of a contract for reconveyance already adverted to is uncontradicted. William F. Diller testifies positively to a verbal agreement for reconveyance at the date of the conveyance to the Roaring Creek Company. Since that company, pursuant to the agreement, did actually convey the land to the Middle Fork Company, and makes no denial of the agreement or its deed, neither the statute of frauds nor the rule inhibiting parol evidence to contradict written agreements is involved. Though the conveyance was not made to the plaintiff, the circumstances strongly indicate that it was made in consideration of the bonds and money delivered to Diller with which to procure the reconveyance. Diller was virtually the Middle Fork Company. Neither he nor it had any money. Terry made no purchase from the Roaring Creek Company. Diller manipulated the title out of that company into the Middle Fork Company and then into the hands of Terry, and, though subsequently, yet near the same time, got the bonds and money from the Cassiday Company ostensibly to repurchase these lands for it, and represented that he had done so. Thus the Middle Fork Company obtained the title, with knowledge of the Cassiday Company's right, for Diller was its president and virtual owner, and so did Terry by making Diller his agent in the procurement of the title.

Our conclusion is to reverse the decree complained of, enter a decree, requiring Edward J. Berwind, Henry C. Terry, trustee, and Henry G. Davis to convey said two tracts of land to the appellant on payment to them, or such of them as may be entitled thereto, the money expended by said Terry, trustee, in discharging liens to which said property was subject at the date of his acquisition thereof, and remand the cause for ascertainment of the sum so expended and

the person or persons to whom due, and for further proceedings necessary to the execution of such decree, as well as for such further proper proceedings, respecting the timber on said land, as may be desired, including amendment of the bills or either of them. Costs in this court as well as in the court below will be decreed to the appellant.

MILLER, J. (concurring). I concur in reversing the decree below based on the relationship of principal and agent between Terry and Diller. But I do not agree that it is necessary to establish that relationship to justify reversal. In my view of the evidence it fully establishes the fraud and collusion between Terry and Diller, as charged in the bill, and that the decree below denying plaintiff relief on that ground is erroneous. I do not intend, however, to detail the evidence, or discuss the familiar legal principles, applicable in such case. I only wish to record the fact that my concurrence in the decision is not based alone on the theory of principal and agent.

ROBINSON, J., dissents.

BRANNON, J. (dissenting). This case involves the question whether Terry, when he acquired title, had notice of the equitable title of the Cassiday Fork Boom & Lumber Company. This is purely a question of fact, dependent on oral evidence and circumstances. As to the question whether Terry had actual notice fixing upon him sedate, intentional fraud, the case is one resting solely on oral evidence to fix fraud. I can safely say there is no evidence of such notice except circumstances; and I have never met with a case in which an old established rule more fitly applies. That rule is that where a decree rests on oral, circumstantial evidence, about which different minds might differ, the decree is presumed to be right, and will not be reversed. Our labored discussion for hours in conference over this case, and the nearly equal division of the court, is evidence that the case is one falling under this rule. In fact, as to this question of actual notice, a majority of the court fails to find such notice, as the opinion by Judge POFFENBARGER does not rest the decision on such actual notice, but places it on the theory of constructive notice—that is, that Diller was Terry's agent—and, as Diller knew of the right of the Cassiday Fork Boom & Lumber Company, so had Terry notice, not that he had actual notice, but on the legal principle that notice to the agent is notice to the principal. I cannot concur in this. Why? Because the bills do not allege any relation of principal and agent. No such basis for relief is hinted in them. From the relation of principal and agent the opinion deduces the legal proposition that notice to agent is notice to principal; but my understanding is that, when you would deduce a legal proposi-

tion from facts, those facts must be stated. You cannot make a rule of law flow from facts not pleaded. Moreover, the fact of agency rests on doubtful circumstances, and is not established by that quantum of evidence justifying reversal under the rule just stated of the presumption of correctness of the decree unless clearly wrong.

(70 W. Va. 45)

HELLIEL v. PINEY COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Nov. 23, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.

The duty to see that refuge holes along motor roads in coal mines are kept, as required by section 10 of chapter 78, Acts of 1907 (Code Supp. 1909, c. 15h), rests on the mine foreman, not on the mine owner, and for injury to a miner resulting from their absence the mine owner is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Error to Circuit Court, Raleigh County.

Action by George Helliel against the Piney Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Watts, Davis & Davis, for plaintiff in error. T. N. Read and A. A. Lilly, for defendant in error.

BRANNON, J. George Helliel was a coal miner in the employ of Piney Coal & Coke Company, digging in its mine. While going home, walking through the main entry, he was caught by some coal cars, which had broken loose from the motor to which they were attached and ran back downgrade, and caught him and injured him by reason of the space between the cars and the rib or wall of the mine being too narrow. He sued the company and recovered judgment, and the company sued out a writ of error.

The evidence presents only two matters charged as constituting negligence—one the want of lights on the rear car of the train, the other the want of refuge holes in the mine along the entry. This case depends on the construction to be given sections 10 and 15 of chapter 78, Acts of 1907, Regular Session, Supplement Code of 1909, serial sections 408 and 410. As to the want of lights on the car we may at once dismiss it from consideration, because, as the attorney for the plaintiff concedes, the duty to see that lights are kept on such cars is one resting on the mine foreman, not on the mine owner. The real question of this case is whether the failure to make refuge holes is a failure of duty on the part of the coal company, or a failure of duty on the part of the mine

foreman, for which the coal operator is not liable. Said section 10 provides that "all alopes, engine-planes or motor roads used by persons in any mines shall be made of sufficient width to permit persons to pass moving cars with safety, or refuge holes of ample dimensions, and not more than sixty feet apart, shall be made on one side of said slope, engine-plane or motor road." That section does not expressly say whose duty it shall be to see that such refuge holes are made, and it is claimed that such duty rests on the mine owner. We must read this section, using the language quoted along with a provision found in section 15 reading as follows: "On all haulways space not less than ten feet long and two feet and six inches wide, between the wagon and the rib, shall be kept open at distances not exceeding one hundred feet apart, in which shelter from passing wagons may be had." Section 15 is that which requires the coal operator to appoint mine foreman and prescribe his duties, and those duties prescribed in that section rest upon the mine foreman, and a failure to perform them does not render the operator liable, as held in *Bralley v. Coal & Coke Company*, 66 W. Va. 278, 66 S. E. 684, and cases there cited. Under principles of those cases it is clear that the duty of seeing that spaces 10 feet long and 2 feet and 6 inches wide are kept between the rib or wall of the haulway and coal cars is a duty of the mine foreman. The duties in that section 15 are those imposed on the mine foreman. I repeat that the duty of making those spaces mentioned in the quotation above given from section 15 is one imposed on the mine foreman.

Are the spaces so required by section 15 the same thing as the refuge holes mentioned in section 10? We conclude that they are. Is it intended that there shall be both such spaces and such refuge holes? We think not. They are both designed for safety of the miner. Both sections in this respect aim at the same thing and are designed to accomplish the same purpose. Section 15 is one containing many provisions designed to promote safety of the miners. Its special purpose is that one. Its opening clause says that the requirement of the mine foreman is "in order to better secure the proper ventilation of every coal mine and promote the health and safety of persons employed therein." And in that section we find many duties committed to the mine foreman to secure safety to the miner, and among them this duty of having spaces between the cars and walls of the haulway to save persons employed in the mine from injury from the cars, and it is reasonable to include these refuge holes among the many things required by section 15 to secure such safety. It is reasonable to classify such refuge holes among the things provided in section 15 for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

such safety. That section has for its special purpose the requirement of things conducive to safety of miners. Suppose we say that the refuge holes and the spaces are different things. Then, I would ask, where is the sense of imposing on the mine owner to see that such refuge holes are kept and on the mine foreman to see that such spaces are left? Both the refuge holes and the spaces are intended to accomplish the same end, safety of miners. We held in the Bralley Case that the obligation to see to break-throughs is placed by section 15 upon the mine foreman, and principles there stated would assimilate duty as to refuge holes to break-throughs. I note that section 15 requires the mine foreman to remove loose coal, slate, and rock overhead in working places and along the haulways, and it is reasonable to say that the duty of having refuge holes along those same haulways from which the mine foreman must remove slate rests on him also. The presence of such holes and the removal of slate are both for the purpose of rendering the same haulway safe. The letter of the statute does not impose the duty of having the refuge holes on the coal operator; but section 15 does commit the duty of having spaces to prevent injury from cars to the mine foreman. We think that the refuge holes mentioned in section 10 and the spaces mentioned in section 15 are the same things. We think that the duty to see that there are such refuge holes rests on the mine foreman, and under principles in the Bralley Case and prior cases there cited no action lies against the coal operator for the want of such refuge holes.

We reverse the judgment, set aside the verdict, grant a new trial, and remand the case to the circuit court.

(70 W. Va. 195)

WOODFORD et al. v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 213*) — CARRIAGE OF LIVE STOCK—TIME FOR DELIVERY TO CONSIGNEES.

In the absence of special agreement by a railroad company to deliver cattle at the place of destination in a specified time, there is an implied obligation to deliver them within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.*]

2. CARRIERS (§ 230*) — CARRIAGE OF LIVE STOCK—TIME FOR DELIVERY—QUESTION FOR JURY.

What is a reasonable time for transportation is a question for the jury, depending upon the facts and circumstances of each particular case, and upon the nature of the freight to be carried.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.*]

3. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—ACTIONS AGAINST CARRIER—BURDEN OF PROOF.

Proof of failure to deliver cattle at place of destination within the usual or schedule time establishes a prima facie case of negligence, and makes it incumbent upon the railroad company to justify the delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 958; Dec. Dig. § 228.*]

4. CARRIERS (§ 213*) — CARRIAGE OF LIVE STOCK—TIME FOR DELIVERY—LIABILITY FOR DELAY.

Without special agreement to deliver in a specified time, a common carrier is not liable for delay in the delivery of freight, due entirely to unavoidable accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.*]

5. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—VALIDITY.

A common carrier cannot lawfully contract against its common-law liability for negligence of its employees.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 935; Dec. Dig. § 218.*]

6. CARRIERS (§ 229*) — CARRIAGE OF LIVE STOCK—DELAY IN DELIVERY—MEASURE OF DAMAGES.

The difference in the market value of cattle at the time when they were actually delivered and at the time when they should have been delivered is an element of damages, in an action against the carrier for unreasonable delay in making delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.*]

(Additional Syllabus by Editorial Staff.)

7. APPEAL AND ERROR (§ 525*) — RECORD—INSTRUCTIONS.

Instructions appearing in the printed record, but not made parts of the record by any bill of exceptions, and there being no showing whether they were given or refused, will not be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2379; Dec. Dig. § 525.*]

Error to Circuit Court, Barbour County.

Action by John F. Woodford and another, partners, against the Baltimore & Ohio Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed and new trial granted.

Blue & Dayton, for plaintiff in error.
Wm. T. George and John B. Dilworth, for defendants in error.

WILLIAMS, P. John F. Woodford and J. C. Watson recovered a judgment against the Baltimore & Ohio Railroad Company for the sum of \$138.18, damages for the alleged failure to deliver two car loads of cattle, within reasonable time, which were shipped from the town of Philippi, in West Virginia, to Philadelphia, and the defendant has brought the case here on writ of error.

The cattle were loaded on defendant's cars at Philippi about noon, Thursday, September 3, 1908, and did not arrive in Philadelphia until about 6 o'clock p. m. on the following

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Saturday, too late for that day's market. Plaintiffs had shipped cattle over the defendant's road from Philippi to Philadelphia for about 15 years, and they testify that 36 hours is the usual time for transportation. On this occasion, however, the north-bound train, which usually passed Philippi about 1 or 2 o'clock p. m. daily, and which was the train that should have picked up the cattle cars and carried them as far as Grafton, W. Va., had an accident before reaching Philippi, which delayed it 4 or 5 hours, and it failed to make connection with the east-bound fast freight, known as "No. 98," scheduled to pass Grafton about 7:30 p. m. No. 98 left Grafton that day at 8:15 p. m. The cattle were then held over in Grafton to wait the arrival of another freight train from the west, designated as "No. 82," which carried fast freight as far as Grafton, for points farther east. But on the arrival of No. 82, it was ascertained that it had no freight to be carried any farther east, and a train was then made up, which included the two cars of cattle. That train left Grafton for Cumberland, Md., at 4:45 the next morning. Cumberland is about 102 miles east of Grafton, and the train arrived there at 1:45 p. m. of the same day. The cattle were then unloaded, fed, and watered, and reloaded and put into a train of cars which left Cumberland for Philadelphia at 7:40 p. m. A tire came off one of the blind drivers of the engine some distance south of Philippi, which delayed the train from Philippi to Grafton, and caused it to miss connection, at the latter place, with the fast freight, No. 98.

[1, 2] In the absence of special contract, there is an implied obligation on a carrier to deliver freight at its destination, within a reasonable time. What is a reasonable time depends, in a large measure, upon the carrier's equipment and facilities, and the nature of the freight to be carried. 2 Hutchinson on Carriers (3d Ed.) § 652. Live stock requires more rapid transportation than coal or lumber, for instance, and it is the duty, as well as the custom, of railroad companies to furnish more rapid transportation for the former than for the latter. The usual time for shipping cattle from Philippi to Philadelphia is shown to be 36 hours, and if defendant's trains had been run on the usual time the cattle would have arrived in Philadelphia Friday night, or early Saturday morning, in time to be sold in the Saturday's market.

[3, 4] Plaintiffs having proven that the cattle arrived in Philadelphia 10 or 12 hours later than the usual time, a prima facie case of negligence was established, and it was then incumbent on the railroad company to justify the delay. *Bosley v. Railroad Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871. It seeks to do so by proving the accident which happened to its engine before reach-

ing Philippi, on the day the cattle were loaded on the cars. Defendant is not to be held liable for delay occasioned by unavoidable accident. 2 Hutchinson on Carriers, § 654. But, notwithstanding the accident, the duty still rested upon defendant to use reasonable diligence to carry the cattle to Philadelphia without unreasonable delay. Whether it did so or not was a question for the jury to determine from all the facts and circumstances in the case, including the evidence relating to defendant's equipment and its facilities for hauling freight. 2 Hutchinson on Carriers, § 652. Defendant is only liable in this case for the failure, if any, of its employees to use reasonable care and diligence in the shipping of the cattle, making due allowance for such delay as was attributable to the accident to the engine. The proof shows that the company maintained a roundhouse and repair shops at Grafton. It was therefore for the jury to say whether or not it was negligence in the company not to dispatch an engine from Grafton to Philippi, only 24 miles away, and bring the two car loads of cattle down to Grafton in time to connect with No. 98, instead of waiting until the crippled engine was repaired. Whether the company was negligent in not ascertaining by telegraph whether No. 82, destined for Grafton, carried any fast freight on that day for the east, instead of holding the cattle there until the arrival of No. 82, and then finding that it had no such freight, is also a jury question. So, also, the jury had a right to say whether it was negligence to hold the cattle at Cumberland from 1:45 p. m. to 7:40 p. m.

[6] Objection is made to the measure of damages which the trial court allowed. Plaintiffs proved that the cattle arrived in Philadelphia too late for the Saturday market, and that they were compelled to hold them over and sell on the following Monday, when the market was 15 cents per hundred-weight less than on Saturday. This is a correct rule for the measure of damages in such a case. 2 Hutchinson on Carriers, § 651. The reduced price at which plaintiffs were compelled to sell was a direct consequence of the delay, and was an injury to them, and, if the delay was occasioned by defendant's negligence, it is liable to plaintiffs for the difference in price of the cattle.

[5] The bill of lading contains a stipulation that, in the event of unusual delay or detention, "caused by the negligence of said carrier or its employees or its connecting carriers or its employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained." This stipulation is void. It is against the policy of the law to permit a common carrier to contract against its common-law liability for its

own negligence, or that of its employes. *Bosley v. Railroad Co.*, 54 W. Va. 563, 48 S. E. 613, 66 L. R. A. 871; 6 Cyc. 409; 1 *Hutchinson on Carriers*, § 450.

The court, at the instance of plaintiffs, gave the following instruction, viz.: "The court instruct the jury that when the defendant company received the plaintiff's cattle for shipment the law implies a contract on the part of the defendant that it would carry the said cattle safely to Philadelphia, and deliver the same at that place within a reasonable time, and that it was the duty of the defendant so to do; and if the jury believe that the said company did not deliver said cattle in Philadelphia within a reasonable time then they shall find for the plaintiffs." This instruction leaves out of account any delay properly attributable to the unavoidable accident to the company's engine, and was evidently misleading, and should not have been given. The jury were not instructed as to the legal effect of any delay in the shipment occasioned by unavoidable accident. Under this instruction, they might have believed, and no doubt did believe, that the failure to deliver the cattle in Philadelphia within the usual scheduled time, to wit, 36 hours, was an unreasonable delay; whereas, the correct rule applicable to this case would credit the railroad company with so much of the delay as was necessarily occasioned by the accident to the engine, and would hold it to the exercise of reasonable diligence for all the time after the accident.

The court refused defendant's instruction No. 1, which would have told the jury that, in the absence of any contract to deliver the cattle at their destination "at any specified time or date, or for any particular market," then the defendant was not required to use any special diligence, but was held to only ordinary and reasonable diligence. In view of plaintiffs' own testimony, which proves that there was no contract to deliver at a specified time, or for a particular market, this instruction correctly states the law, and it should have been given. But it must be remembered that, in view of the character of the freight, it being live stock, requiring more rapid transportation than most other kinds of freight, and in view of the evidence concerning defendant's equipment and facilities for handling and transporting such freight, it is for the jury to determine what is ordinary and reasonable diligence as applied to this case. What would be ordinary and reasonable diligence in handling dead freight might not be reasonable diligence, under a similar state of facts, in handling and transporting live stock.

It follows from what we have said respecting the measure of damages that the court

did not err in refusing defendant's instruction No. 3. If, by the exercise of reasonable diligence, defendant could have delivered the cattle in Philadelphia in time to be sold on the Saturday market, and it failed to exercise such diligence, and in consequence thereof plaintiffs were compelled to hold them until Monday, and sell them in a less favorable market, defendant is liable for the difference in price.

Defendant moved the court to set aside the verdict and grant it a new trial. That motion should have been sustained.

[7] Three instructions appear in the printed record, two of which are evidently drawn on behalf of plaintiffs and one on behalf of the defendant. These instructions, however, are not made parts of the record by any bill of exceptions. It does not appear whether they were given or refused. Consequently it is not necessary to discuss them.

For the foregoing reasons, the judgment will be reversed, the verdict set aside, a new trial granted, and the case remanded.

(69 W. Va. 770)

STATE v. HUFFMAN.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. ARSON (§ 20*)—INDICTMENT—VALUE OF PROPERTY.

It is unnecessary in an indictment for arson, under section 6, chapter 145, Code 1906, to charge the value of the building and the property therein separately; and an indictment charging the value of the building and contents as a whole is good on demurrer.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 41-44; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—SIMILAR OFFENSES.

On the trial of an indictment for arson evidence of numerous other fires and depredations suffered by the owner of the property burned, covering a series of years immediately preceding the burning of the building charged in the indictment, though not traced to defendant, is admissible on the issue whether such fire was accidental, or the work of an incendiary.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 344*)—EVIDENCE—OPPORTUNITY.

The evidence showing that most of such other fires and depredations occurred on Sunday, when the owner of the property and his family were absent at church, evidence of defendant's general habit of absenting himself from church on that day was not incompetent, on the question of opportunity of defendant to commit the other offences occurring on that day, and as tending to connect him therewith, and, under an exception to the general rule, as tending to show intent, malice and the like, and bearing on the question of his guilt or innocence of the offence charged in the indictment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 795; Dec. Dig. § 344.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

Though it is the better practice to combine them in one comprehensive instruction, it is not error on the trial of an indictment for arson, to state to the jury the law of reasonable doubt applicable to the whole case, in several distinct instructions or legal propositions to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906, 1907; Dec. Dig. § 789.*]

5. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS ALREADY GIVEN.

As many times decided, it is unnecessary to repeat instructions which have already been given to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 847*)—TRIAL—INSTRUCTIONS—REQUESTS—OBJECTION TO MODIFICATION—WAIVER.

Though, by the statute of 1907 (Acts 1907, c. 38 [Code Supp. 1909, c. 131, §§ 9a1-9a5]) the right is given a party to object to the modification of a proposed instruction to the jury, and if modified over his objection, to have the same as modified given as the court's instruction, and read in the order prescribed by the statute, yet, if without objection, the court is permitted to read such modified instruction as the instruction of the proponent thereof, such right will be regarded as having been waived.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 847.*]

7. CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The rule applicable to motions for new trial based on after-discovered evidence, stated in *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113, applied to the facts in this case, and justifying the court below in denying the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

Error to Circuit Court, Nicholas County.

C. B. Huffman was convicted of arson, and brings error. Affirmed.

Corley & Duff and Osenton & Horan, for plaintiff in error. Wm. G. Conley, Atty. Gen., and J. O. Henson, Asst. Atty. Gen., for the State.

MILLER, J. [1] The indictment, on which defendant was found guilty, and by the judgment below, sentenced to an indeterminate term of imprisonment in the penitentiary, charged, substantially in the language of the statute, section 6, chapter 145, Code 1906, that the defendant "on the ——— day of March, 1910, in said County of Nicholas, feloniously and maliciously did burn a certain building, to-wit, a granary, the property of J. J. Reynolds, situate in the said county, which said building and the property therein was then and there of the value of two hundred dollars."

The first point of error is, that the demurrer should have been sustained. The statute reads: "If a person maliciously burn any building, the burning whereof is not punishable under any other section of this chapter,

he shall, if the building with property therein be of the value of one hundred dollars or more, be confined in the penitentiary not less than three nor more than ten years; and if it be of less value, be so confined not less than two nor more than five years, or in the discretion of the court, in jail not more than one year, and be fined not exceeding five hundred dollars."

It is insisted that under this statute, the indictment should have charged separately, the value of the building and the property therein, so as to give the prisoner notice. The indictment does charge the value of the building and contents. This is all the statute requires. It is generally sufficient to charge a statutory crime in the language of the statute. *State v. Gould*, 26 W. Va. 258, 262; *People v. Murray*, 57 Mich. 396, 24 N. W. 118, 6 Amer. Cr. Rep. 31; 1 Bishop's New Cr. Pro. (4th Ed.) section 611. In *Wolf v. Com.*, 80 Grat. (Va.) 833, the demurrer to an indictment under the same statute, was grounded on the proposition that the offense was not charged with sufficient certainty, there being no allegation that there was actually any property in the barn, alleged to have been burned, and that the property therein was not specified, or in any way stated so as to give defendant any notice of what he was called upon to answer. The Virginia court was of opinion the point was without merit, observing that the indictment was framed nearly in the language of the statute, and that there was nothing in the statute requiring that the property in the building be described independently of the building; that the term of imprisonment being fixed by the value of the building and the property therein, wholly matters of proof, the prisoner could not have been surprised by the manner of alleging the offense. This point must therefore be overruled.

The second point of error is that the court below erred in admitting on behalf of the state, (1) evidence in chief, of other fires and acts of trespass suffered by said Reynolds, covering a period of several years prior to the burning of the granary in question; and, (2) evidence of defendant's habit of absenting himself from church on Sunday.

[2] Much evidence was admitted over the objection of the prisoner, of the burnings of storehouses, barns, fences, hay stacks, and of fires set out in the wood lands of said Reynolds; also of the poisoning of his cattle, and laying down of his fences, and of the turning of stock into his growing crops, and of other depredations suffered by him, covering the period from 1895, down to the year 1910, and showing, not that all, but that many of these things had occurred on Sunday. The state did not undertake to in any way connect the prisoner with either of these offenses. The defendant on the stand, de-

nied all responsibility for or connection with these many offenses, and no attempt was afterwards made by the state to connect him with them, except the one charged in the indictment. When the prisoner, on his defense, put in issue his previous good character and reputation, on cross examination, and for the purpose of testing the truthfulness of defendant's character witnesses, the state was permitted to ask them whether they had not heard the defendant charged with some of those depredations, with the result that one of them at least answered that he could not testify as to defendant's good character subsequent to those burnings. Counsel urgently insist that this evidence, and the evidence of his Sunday habits, was very prejudicial to the prisoner, and that its admission demands a reversal of the judgment below, and a new trial.

The general rule against the admissibility of evidence of other crimes, as stated in Underhill on Cr. Ev., section 87, Walker v. Com., 1 Leigh (Va.) 574, and other authorities, is invoked. In this case, however, no attempt was made to connect the prisoner with other crimes. According to the general rule relied on, this evidence, for such a purpose would have been inadmissible. According to the attorney general, however, the evidence admitted was offered for entirely a different purpose, namely, as tending to show that the burning in question was not accidental, but the work of an incendiary. He argues that evidence of the fact that Reynolds had suffered so many prior depredations, covering a series of years immediately preceding the one charged against the defendant, of incendiary origin, tended to dispel any doubt that the fire in question was also the work of an incendiary, a fact necessary to be established before the accused could be connected therewith, and that in as much as such crimes, as in this case, are always clandestinely planned and secretly executed, and must be established in most cases by circumstantial evidence, the fact and circumstances of the other offences became most important as tending to dispel all doubt.

The authorities cited and relied on by the attorney general, and other authorities, seem to support the proposition, that where such evidence tends to show that the other fires were a part of one connected scheme or purpose of the defendant; or as tending to show that the particular fire with which the accused is charged was not accidental; or when, together with other evidence, it tends to show motive or intent, or to identify the accused with the offense charged, it is admissible. 5 Am. & Eng. Ency. Law and Pract. 633; 3 Cyc. 1007; State v. McMahon, 17 Nev. 365, 30 Pac. 1000; State v. Ward, 61 Vt. 153, 181, 17 Atl. 483; State v. Hallock, 70 Vt. 159, 40 Atl. 51; State v. Thompson, 97 N. C. 496, 1 S. E. 921; People v. Murphy, 135 N. Y. 450, 457, 32 N. E. 138; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Note,

on Evidence of other Crimes in Criminal Cases, and particularly that part of the note, under the different heads, relating to arson. Underhill on Cr. Ev., section 89; Sykes v. State (Tenn.) 105 Am. St. Rep. 976, note page 976. See, also, State v. Hyde, 234 Mo. 200, 136 S. W. 316.

Generally where evidence of previous offenses has been admitted for any of the purposes indicated they have been in some way traced to the defendant, but as we understand the authorities, this is not a prerequisite to its admission, if it is intended to be limited to proving that the particular fire in question was not accidental. 1 Wigmore on Evidence, section 354; People v. Murphy, 135 N. Y. 456, 32 N. E. 138; State v. Rohfrisch, 12 La. Ann. 382. Wigmore says: "Moreover, the principle of anonymous intent is recognized as being here occasionally of peculiar utility; i. e. the recurrence of a similar fire may tend decidedly to negative innocent intent, even though the author of the other fires is not shown; then the prosecution having negatived innocent intent in the present fire by whomsoever set, the defendant may be shown to have kindled it." Our trouble in the case at bar has been whether the evidence of so many fires and other depredations running back over so many years and disconnected in time, circumstances, and character, as these were, was properly admissible, as falling within the rules and principles of the decisions and the text writers cited. We have concluded, however, that taken in connection with the evidence of the bad feeling of the prisoner towards Reynolds, beginning about the same time, the unusual number of these offences, the peculiar character of them, and the time and circumstances of their occurrences, and taken in connection with all other evidence in the case, the evidence was admissible, at least on the question of the incendiary character of the fire in question. That Reynolds, a near neighbor of defendant should have sustained so many and unusual losses of property by fire and otherwise, beginning almost coincidentally with the commencement of his troubles with the accused is very significant, and constitute a composite fact bearing not only on the fact of incendiarism, but also, in the absence of any evidence of motive or opportunity on the part of any other person, pointing strongly to the prisoner as the guilty person. For these reasons we are not disposed to sustain this point of error.

[3] On the question of the admissibility of the evidence relating to defendant's Sunday habits, we are not disposed to attach much importance to this evidence. We do not see that it could have materially prejudiced the prisoner. The position of his counsel is that, in a rural community, it tended to prejudice him greatly with the jury, contrasted as it may have been with the church going habits of Reynolds, shown in evidence. This was not the purpose of the evidence.

Moreover, the evidence of the prisoner, and others, shows that he did frequently attend church on Sunday, his wife and family more frequently, though not so regularly perhaps as Reynolds and his family. We do not think an impartial jury of his own county, sitting in judgment upon the crime with which defendant stood charged, could have been prejudiced against him by this evidence. As showing opportunity to commit the numerous other offenses it may be classed along with evidence of the fact of his place of residence, and his situation in time, place and circumstance with reference to those offenses, and as constituting a fact or circumstance pointing to the prisoner, as the perpetrator of those crimes, and pertinent under the authorities cited, as an exception to the general rule, to show intent, malice and the like, and tending to show guilt of crimes of like character to that charged against him in the indictment. We overrule the point.

[4] Relying on *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152, in which Judge Sanders, *arguendo*, inveighs against the practice of propounding numerous instructions to the jury on the same subject, not a point of the syllabus, counsel for the prisoner complain that the court below erred in giving to the jury State's instructions numbered 3, 4, 6, 7, 8, and 11, defining reasonable doubt. If this be error, like error was committed at the instance of defendant's counsel. But we do not see that any error was committed. The instructions complained of consisted of several short propositions, which might very properly have been embraced in a single instruction, applicable to the whole case, on the law of reasonable doubt. It is not pretended that these segregated propositions, or taken together, do not propound the law correctly; but only that, separated they emphasize too prominently the subject of reasonable doubt. The several propositions are well supported by prior decisions, and need not be repeated. This point must also be overruled.

[5] The rejection of the prisoner's instructions numbered 22 and 23 is the subject of the next point of error. In the bill of exceptions certifying these instructions the court below gives the same reason for rejecting them, that it gives for rejecting numerous other instructions covered by the same bill of exceptions, namely, that they were covered by other instructions, given, and that they were wholly unnecessary and superfluous. The answer of the court below is a good one, and we make the same response. The court need not repeat instructions which have already been substantially given. *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

[6] The prisoner objecting to their modification, the court modified, and gave to the jury as modified, and as his instructions,

defendant's instructions numbered 17 and 19. This is the subject of another point of error. It is not claimed that as modified, and given, these instructions did not propound correct legal propositions, on the subject of circumstantial evidence, to which they related; but that after modifying them, the court, in violation of the statute of 1907 (Acts 1907, c. 38 [Code Supp. 1909, c. 131, §§ 9a1-9a5]), in place of reading the instructions in the order required, as the instructions of the court, they were read as the instructions of the defendant. The court fully covered the subject of those instructions by instruction number 20, given for the prisoner, and might properly have refused instructions number 17 and 19 on this ground, but this is not the point of the exception. What counsel for prisoner complain of is, that the court after his objections to the modifications, gave the instructions as modified, as the instructions of the prisoner. In its bill of exceptions certifying these instructions the court below says, that they were so given, without any objection by the defendant at the time to their being given as his instructions. We decided in *State v. Clark*, 64 W. Va. 625, 63 S. E. 402, and we think properly, that the statute in question is mandatory; but, as there held, the right given by the statute may be waived by the party. According to the record, no objection was interposed by the prisoner, to the reading of these instructions, as modified, as his instructions, and within the rule of *State v. Clark*, we think the prisoner thereby waived his right. He should have objected at the time, if he relied upon the statute; and we may properly conclude, no objection being interposed, that he was willing that the court should give the instructions, as modified, as his instructions.

[7] As we cannot say the verdict is unsupported by the evidence, the only other point of error relied upon is, the refusal of the court to award a new trial on the ground of after-discovered evidence. The motion for a new trial on this ground was based on the affidavit of C. F. McQueen, a deputy sheriff, supported by the affidavits of the prisoner and his counsel, as to the time of the discovery of this witness, and the evidence he would give. The affidavit of McQueen relates to the part he took in measuring the tracks, leading to and from the granary in question, on the morning after the fire; and the relations those tracks bore to certain sticks used in measuring them, exhibited before the jury in connection with the testimony of other witnesses; and to the comparisons he had made after the trial, between the lengths of those sticks and the length of the overshoes of the prisoner, exhibited on the trial. His evidence would have been purely cumulative of the evidence of other witnesses, examined on the trial. The witness disclosed his identity and evidence to the prisoner's counsel at the bar of the court before the arguments were con-

cluded, or the case was submitted to the jury, and although it is shown by affidavit that the prosecuting attorney declined the request of the prisoner's counsel that the witness be then permitted to make his statement to the jury, no motion was made to the court to permit the witness to testify before conclusion of the argument and the submission of the case to the jury. Besides all this, the record shows that Reynolds, the first witness for the state, on a trial which lasted several days, disclosed the fact in the beginning of his testimony, that McQueen had been present when the tracks were examined and measurements taken, and that although present in the court room during the progress of the trial, so far as the record shows, neither the prisoner, nor his counsel, made any inquiry of him to ascertain what evidence he could give. This does not show such due diligence as the law requires, to secure a new trial on after-discovered evidence. The legal principles upon that question have been too frequently announced to require repetition. *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113.

The record shows the prisoner was given a fair trial, by an able and painstaking judge, and had the assistance of very able counsel in his defense; and though convicted upon circumstantial evidence for the most part, it was by a jury of his own county, and we ought not disturb their verdict, except for substantial reasons. Having discovered no errors of law, therefore, our plain duty is to affirm the judgment.

(70 W. Va. 129)

HARMAN v. CITY OF BLUEFIELD et al.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 101*)—PUBLIC IMPROVEMENTS—CHANGING GRADE OF STREET—DAMAGES.

If, by changing the grade line of one of its streets, a municipality injure the property of an abutting owner, it is liable.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.*]

2. EMINENT DOMAIN (§ 101*)—PUBLIC IMPROVEMENTS—CHANGING GRADE OF STREET—DAMAGES.

If the public have been permitted to use an open street on the natural grade, and to build on lots abutting thereon with reference to such natural grade, and the municipality thereafter improve the street and thereby cause injury to an abutting owner, it is liable.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.*]

3. MUNICIPAL CORPORATIONS (§ 647*)—PUBLIC IMPROVEMENTS—CHANGING GRADE OF STREET—DAMAGES.

If a municipality extends its corporate lines so as to include territory which had theretofore been laid off into building lots and streets, and thereafter permits such streets to be used by

the public, and later improves them, it thereby makes them public streets, and the municipality becomes liable for any injury to abutting lot owners occasioned by an alteration in the natural grade line of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1420; Dec. Dig. § 647.*]

4. EMINENT DOMAIN (§ 141*)—PUBLIC IMPROVEMENTS—CHANGING GRADE OF STREET—DAMAGES.

The true measure of damages to a lot abutting on a street, occasioned by a change in the grade line of the street, is the difference between the value of the lot immediately before, and its value immediately after, the street improvement, less any special or peculiar benefits to the lot because of the improvement of the street, but leaving out of account such general benefits as accrue to it in common with other property similarly situated.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

5. EMINENT DOMAIN (§ 141*)—PUBLIC IMPROVEMENTS—CHANGING GRADE OF STREET—EVIDENCE.

As an element affecting the value of his property, plaintiff may prove what will be the cost of any alterations in his property which have been rendered necessary, on account of the street improvement, to preserve it from further injury and render it fit for enjoyment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

(Additional Syllabus by Editorial Staff.)

6. EMINENT DOMAIN (§§ 79, 80*)—PUBLIC IMPROVEMENTS—CHANGE OF GRADE OF STREET—ESTOPPEL TO ALLEGE DAMAGES.

An owner of land abutting a street, who conveys a strip to the city for the purpose of widening the street, is not thereby estopped to claim damages on account of a change in the grade of the street, not contemplated at the time of the conveyance.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 205-214; Dec. Dig. §§ 79, 80.*]

7. EMINENT DOMAIN (§ 203*)—CHANGE OF GRADE OF STREET—DAMAGES—EVIDENCE.

Where, in changing the grade of a street, the city replaced a wooden bridge across a stream which ran through an abutting owner's lot with a concrete culvert, and made a considerable fill along the edge of plaintiff's lot on both sides of the stream, and in an action against the city the declaration alleged that, by reason of said trespasses, water has, from time to time, been caused to flow upon the lot, and to soak into and under the dwelling house, evidence that the culvert erected by the city was not large enough to let the water pass through at times of high tide, and that it caused the water to overflow his lot and endangered his property, was admissible.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 203.*]

Error to Circuit Court, Mercer County.

Action by M. K. Harman against the City of Bluefield and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Ritz & Ritz and D. E. French, for plaintiff in error. Sanders & Crockett, for defendant in error.

WILLIAMS, P. Plaintiff brought an action against defendant to recover damages

for alleged injury to his real estate, and recovered a judgment for \$800, and defendant has brought the case here on writ of error.

Plaintiff is the owner of a corner lot, fronting 54 feet on Bland street and extending back along North street 100 feet, in the city of Bluefield. Early in 1905, he erected a wooden frame building upon this lot, and used it for a store and dwelling house combined. He also built a wood frame stable on the back end of the lot. The house is 30x48 feet, and stands in the angle of Bland and North streets. At the time these buildings were erected, the lot on which they stand was not within the city, but, on the 1st of June, 1905, the corporate limits were extended so as to include it. There was a county road where Bland street now is, and plaintiff built his house with reference to the grade line of the county road. After the city had acquired jurisdiction over the new territory, it widened and changed the grade line of the county road, and also changed the grade line of North street, and paved both of said streets, and granted a franchise to the Blue-stone Traction Company, a corporation, to lay its tracks and operate its cars upon said streets. A branch, or natural drain, runs across the lot between the house and stable and across North street, and the lot slopes from both ends towards the branch. In grading the two streets, the city lowered the grade line by nearly a foot at the intersection of Bland street and North street, and elevated the grade line at the other corner of plaintiff's lot on Bland street, and also raised the grade line of North street along the side of plaintiff's lot from three to five feet in places, and erected a concrete culvert across the branch.

[1] It is the well-settled law of this state that a municipality is liable to an abutting lot owner for injury done to his property by changing the grade line of the street. *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

[3] But, it is contended, plaintiff was not entitled to damages on account of the elevation of the grade line of North street, because it was not proven that the city had ever, previous to the paving in question, established a grade line for that street. It is insisted that a municipality is not liable because of the establishment of a grade line in the first instance. It does not appear that North street was expressly adopted by city ordinance as one of its public thoroughfares and opened to travel, but it does appear that it was used by the public, on the natural grade, as a public street for about two years before the improvement in question was made. The corporate limits were extended to include the territory embracing North street, June 1, 1905, but that was after plaintiff had built his house with reference to the

natural grade line. Witness George H. Hill, city engineer, says he does not know when North street was located; he was then city engineer, and had been such engineer since the 1st of June, 1905. If North street had been located by the city during his incumbency, he certainly would have known it. Therefore, while negative in character, his testimony proves that North street had been located by some one, other than the city, and opened to the public, prior to the extension of the corporate limits of the city. Consequently, when the city took in the new territory, it must be considered as having adopted North street as a public street. True there is no formal ordinance opening the street to the public, but the improvement made on it, without change of its location, is sufficient evidence that the city adopted it, and permitted it to be used as one of its public streets, from the time its corporate lines were extended.

Plaintiff had a right to build his house to conform to the grade line of the county road and natural grade line of North street, and if the change in the grade line, afterwards made by the city, injured his property, it was an injury which entitles him to compensation. It was a damaging to his property, for the public use, and our Constitution says: "Private property shall not be taken or damaged for public use without just compensation. * * *" Section 9, art. 3, Code 1906, p. 1.

[2] It is not necessary that the city should have first, by ordinance, established a grade line, and then afterwards have changed it, to constitute liability. The use of North street by the public from 1905 to 1907, when it was improved and the grade line was changed, was tantamount to an adoption of the street with the natural surface as the grade line, and any subsequent change from that grade line, which injured plaintiff's property, rendered the city liable. *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; *Bor. New Brighton v. United Pres. Ch.*, 96 Pa. 331; *Jones v. Bor. Bangor*, 144 Pa. 639, 8 Atl. 252; *Davis v. Railway Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146.

[8] Plaintiff conveyed to the city a strip of land off his lot, along Bland street, for the purpose of widening that street, and counsel for the city insist that he is thereby estopped to claim damages on account of any change made in Bland street. This is true, so far as it relates to any damages which might result from cutting the strip of ground down to a level of the grade of the old road, for such damages must have been contemplated, and are regarded as compensated for by the consideration paid (\$220) for the strip of ground. In fact, a part of the considera-

tion recited in the deed is that Bland street is to be widened and macadamized. But there is nothing in the deed to indicate that a change in the grade line was then contemplated; and we do not see on what principle plaintiff could be properly denied right to damages, if any, resulting from a change of the grade line, when the deed is silent on that point, and there is no evidence that plaintiff knew, when he made the deed, that the improvement to be made contemplated a change in the grade line of the road or street.

[7] There was a wooden bridge over the branch which ran through plaintiff's lot and across North street, and in changing the grade of the street the city replaced this wooden bridge with a concrete culvert, and made a considerable fill along the edge of plaintiff's lot on both sides of the branch. Plaintiff introduced evidence tending to prove that the culvert was not large enough to let the water pass through in times of high tide, and that it caused the water to overflow his lot and injure his property. It is urged that the court erred in permitting this evidence to go to the jury, because, it is claimed, there is no averment in the declaration on which to base such testimony. The declaration, however, does contain, the following averment, viz.: "And the plaintiff avers that by reason of the said trespasses committed by the said defendants that water has, from time to time, since the committing of the grievances aforesaid, been caused to drain and flow in and upon the aforesaid lot of the plaintiff, and caused to soak, percolate, and flow into and under the aforesaid dwelling house, as it otherwise would not have done, and it has thereby caused the floors and walls of said house to become permanently damp, moist, and mouldy. * * * "While the law does not entitle plaintiff to damage on account of surface water cast upon his lot, unless collected and cast upon it in a body, still we think the averment, above quoted, is sufficient to admit the evidence objected to. It was not necessary to allege the particular manner in which the water was caused to flow upon the lot; the fact being alleged, the manner could be proven. It is one of the natural consequences of making the fill across the branch that, if the culvert was made too small to carry the water, it would cause it to overflow the land above.

[8] It is also insisted that the court erred in permitting evidence to go to the jury to prove the cost of constructing a concrete culvert entirely through the plaintiff's lot of sufficient size to carry the water of the branch. The admissibility of such evidence depends upon the existence of a necessity for such alteration or improvement, to preserve plaintiff's property from further injury and to render it fit for enjoyment. This court held, in effect, in *Godbey v. Bluefield*, 61 W. Va. 604, 57 S. E. 45, that costs of

making alterations in the premises was proper to go to the jury in estimating damages, if such alterations are necessary to preserve the property from further injury, or to render it fit for use and enjoyment. These are questions of fact; and the reasonable cost of such improvements is an element bearing upon the quantum of damages, because they affect the value of the property. If such improvements are necessary to preserve the property from further injury, the fact that the lot would be rendered more valuable thereby than it ever had been is not a matter entitling the city to reduce plaintiff's damages by the amount of the enhanced value, because the city's improvement of the street makes such alterations necessary for the preservation of the property, and if the alterations should not be made the property would be of less value than it ever had been. Plaintiff and a number of other witnesses who testified in his behalf were asked what alterations would be necessary in plaintiff's property to preserve it from further injury and to render it fit for use and enjoyment, and they answered that it would be necessary to put a stone wall, or foundation, under the house and dispense with the use of the basement or lower story of the house, which, plaintiff says, yielded him \$120 a year in rentals; that it would also be necessary to cover the branch with a concrete culvert, and to bring the surface of the lot up to the level of the street. Their estimate of the cost of that alteration ranged from \$2,200 to something over \$4,000.

[4] The true measure of damages in a case like this is the difference between the value of the property immediately before, and its value immediately after, the improvement in the street was made, less any peculiar benefit to the property because of the street improvement. Any general enhancement in value of plaintiff's property, occasioned by the street improvement, which affects, in the same manner, the value of other property situate in the same vicinity with plaintiff's property, is not to be taken into account. Such general advantage to his property does not lessen plaintiff's damages.

The court below tried the case according to the correct rule as to the measure of damages. But, as is almost always true in regard to the trial of cases of this character, there is much and wide difference of opinion among witnesses as to the amount of damages plaintiff had suffered. A number of them testified that, in their opinion, the damages amounted to \$2,500; some put it at more than this. The plaintiff and his brother estimated it to be as much as \$4,000. On the other hand, a number of witnesses for defendant gave it as their judgment that the property was not damaged at all; that the benefit to the property offset the damages. But, on their cross-examination, it is made to appear that their opinions

were based on the fact that the property had been enhanced in value, in a general way, because of the improvement of the streets and the establishment of a car line upon them; and that all property in the immediate vicinity of plaintiff's lot was also enhanced in value for the same reason. It is therefore evident that those witnesses failed to leave out of account the general benefit accruing to plaintiff's property on account of the public improvement. As before stated, such general enhancement of value should not go to diminish plaintiff's damages. It is almost impossible to determine, with strict accuracy, the exact amount of damage suffered in a case like this. There is always a great diversity of opinion among witnesses, who may be, and generally are, equally honest in their views. The jury did not adopt the opinion of any one witness as the basis for its verdict, because the verdict is less than half the amount fixed by any one of plaintiff's witnesses, and is largely in excess of the damages estimated by any one of defendant's witnesses. One of defendant's witnesses, W. S. Fouts, admitted that, in his opinion, the property had been damaged as much as \$100, leaving out of account the general enhancement of the value on account of the street improvement. But all of defendant's other witnesses were of opinion that the improvement of the street offset the damage to the lot.

It follows from what we have said that the court committed no error in giving plaintiff's instruction No. 1, and in refusing to give defendant's instructions Nos. 1 and 2. Plaintiff cross-assigns error in the giving of defendant's instructions Nos. 3 and 4. But, inasmuch as he asks for an affirmation of the judgment, it is unnecessary to discuss these assignments.

The judgment will be affirmed.

(70 W. Va. 53)

LATHROP v. COLUMBIA COLLIERIES CO.
et al.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 76*)—TENDER OF PRICE—DEFECT IN TITLE.

Where a vendor contracts to convey real estate free of defects of title, the vendee need not tender the purchase money on the day stipulated if the vendor is not then able to pass good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 119; Dec. Dig. § 76.*]

2. SPECIFIC PERFORMANCE (§ 116%*)—BILL—DEMURRER.

Though a bill for the specific performance of a contract for the sale of land shows the title to be in a third party, it cannot be assumed on demurrer that the statute of frauds will prevent the enforcement of the contract, when

the contract, exhibited with the bill, declares that the vendor owns and controls the land.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116%.*]

3. SPECIFIC PERFORMANCE (§ 116%*)—BILL—DEMURRER.

If one contract to sell the land of another, representing that he has power to cause a conveyance thereof, a bill brought by the vendee for the specific performance of the contract is not insufficient on demurrer merely because the vendor may not have title to the land.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116%.*]

4. EVIDENCE (§ 73*)—PRESUMPTIONS—CORPORATE CONTRACT—EXECUTION—AUTHORITY.

When a corporate contract is executed ostensibly by the corporation, and the officer executing the contract, professedly on behalf of the corporation, is the appropriate one to execute such a contract on its behalf, the law presumes a precedent authorization regularly and rightly made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

5. VENDOR AND PURCHASER (§ 22*)—VALIDITY—DESCRIPTION OF PROPERTY—INDEFINITENESS.

On demurrer to a bill for specific performance, the following description in a contract for the sale of land is not void for uncertainty: "All the real estate of the Columbia Collieries Company situated in the County of McDowell, State of West Virginia, on the south fork of Tug River, and on the ridge between the north and south forks of Tug River, containing fourteen hundred and twenty-six (1,426) acres more or less."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

6. VENDOR AND PURCHASER (§ 141*)—CONTRACTS—OBJECTIONS TO TITLE—EFFECT.

If a vendor has contracted to convey land free of defects of title, objections to the title by the vendee cannot absolve the vendor from the obligation.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 265; Dec. Dig. § 141.*]

7. SPECIFIC PERFORMANCE (§ 10*)—OUTSTANDING TITLE—RIGHTS OF PURCHASER.

When a vendor contracts to sell a larger interest in real estate than he can make title to, a court of equity may compel him at the suit of the vendee to convey such estate or interests as he may have in the premises contracted to be sold, with an abatement of the consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25; Dec. Dig. § 10.*]

8. SPECIFIC PERFORMANCE (§ 32*)—CONTRACTS—MUTUALITY.

A contract for the sale of land which so binds both parties that either one may compel the other to perform, cannot be held void for want of mutuality.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

9. SPECIFIC PERFORMANCE (§ 70*)—TRANSFER OF STOCKS AND BONDS.

Equity will compel the specific performance of a contract for the transfer of stock and bonds when they have a peculiar value to the party demanding the transfer.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

Appeal from Circuit Court, McDowell County.

Bill by W. A. Lathrop against the Columbia Collieries Company and another. Decree for defendants, and plaintiff appeals. Reversed and remanded.

Phlegar & Powell and Geo. W. St. Clair, for appellant. Anderson, Strother & Hughes and Vinson & Thompson, for appellees.

ROBINSON, J. Lathrop sued the Columbia Collieries Company and the Southwest Virginia Trust Company for the specific performance of a contract between him and the Trust Company. On demurrer, the court dismissed his bill as insufficient. He has appealed.

We deem it essential to recite some material portions of the contract:

"Witnesseth: That the party of the first part owns and controls the property hereinafter described and covenants and agrees, in consideration of one thousand dollars (\$1,000) paid by the party of the second part to the party of the first part this day, the receipt of which is hereby acknowledged, to convey and transfer the said property and perform the conditions of this contract as hereinafter set forth, provided the said W. A. Lathrop elects to purchase the same on or before the 20th day of February, 1908, in accordance with the provision of this contract, which election is to be made in writing and delivered to the party of the first part or mailed to it, addressing same to Roanoke, Virginia; and therefore, hereby covenants and agrees as follows:

"First: That, for and in consideration of the sum of eighty-five thousand dollars (\$85,000) to be paid as hereinafter provided, the party of the first part covenants and agrees:

"1. To cause to be conveyed in fee simple to the party of the second part, or his assigns, all of the real estate of the Columbia Collieries Company situated in the County of McDowell, State of West Virginia, of the south fork of Tug River, and on the ridge between the north and south forks of Tug River, containing fourteen hundred and twenty-six (1426) acres more or less, free of incumbrances and defects of title; and the deed of conveyance shall contain a covenant of general warranty of title, or,

"2. Will transfer to the party of the second part or his assigns all of the certificates of shares of the capital stock of the said Columbia Collieries Company, together with all the bonds authorized by said company to be issued, which said issue of bonds amounts to the aggregate sum of one hundred thousand dollars and is secured by a deed of trust on said real estate, which deed of trust is of record in the Clerk's office of McDowell County, West Virginia, or

"3. Will cause said land to be conveyed as hereinabove provided and transfer to be made of said stock and bonds as above set

forth, for the consideration above mentioned, which conveyance or transfer shall be made on or before the 27th day of February, 1908, on or before which date it is agreed between the parties hereto this contract shall be closed by the execution of the papers and payment of cash and notes as herein provided.

"Second: It is further covenanted and agreed on the part of the party of the first part that the party of the second part shall have until the 27th day of February, 1908, to examine the title to said lands and survey the same before accepting a deed to the said real estate, or a transfer of the stock and bonds; and the party of the second part agrees that he will, on or before the 27th day of February, 1908, make such examination as he desires and will then advise the party of the first part if said titles are satisfactory and if so, will also notify said party of the first part in writing whether he will require a deed to be executed in accordance with the terms of this contract as hereinabove set forth, or the delivery of the stock and bonds as above set forth, or will close said transaction by accepting both a deed and the transfer of said stock and bonds as hereinabove provided.

"Third: In the event the party of the second part shall ascertain that there exists such substantial defects in the title which cannot be remedied within a reasonable time, then the obligation of this contract on the part of the second part shall cease and be at an end, but in the event the defect reported, if any such is reported, is cured by the party of the first part within a reasonable time, then the obligation of this contract shall remain unimpaired and the terms hereof shall be carried out as soon thereafter as said defect may be cured."

The bill shows that plaintiff duly notified the Trust Company prior to February 20, 1908, of his election to take the property under the contract, and that on or before February 27, 1908, he further notified the Trust Company of certain defects of title to be cured and of his election to take both a conveyance of the land and a transfer of the stock and bonds. Other substantial averments of the bill are: That plaintiff did all the contract required him to do, but that the Trust Company has failed and refused, though demanded, to carry out the contract on its part; that the defects of title are such as can be cured; that plaintiff is willing to take the part of the property to which the defects of title do not pertain, with proper abatement of the purchase price; and that he is able and willing to take all the property and to make payment therefor as stipulated, whenever the Trust Company shall tender him a deed for the property and the stock and bonds in compliance with the contract.

Now, what other showing should plaintiff make to demand performance of the contract? He avers full compliance on his part

and a failure to comply on the part of the Trust Company. He shows that he has done all that the contract requires him to do until the other party shall tender the conveyance, stock and bonds for which the contract calls. Prima facie his case is a good one. Of course an answer to the bill may make a very different case. At present, however, we can look only to the face of the bill.

[1] Viewing the contract as a whole, and giving it reasonable meaning, we cannot hold that a tender of the installment of purchase money and of the purchase money notes on or before February 27, 1908, was essential to the right of plaintiff to demand the property, in view of the defects of title which he pointed out. Time in this particular was not of the essence of the contract, for another clause expressly contemplates further time in the event substantial defects of title are found. It must be observed that the contract expressly calls for a conveyance of the property in fee simple, free of incumbrances and defects in title. The obligation to furnish such conveyance is on the Trust Company. It assumed that obligation for a consideration. Until it performs the obligation, plaintiff is not in default for failure to tender the purchase money and notes. Indeed that would be true were time of the essence of the contract. The bill substantially avers that the Trust Company on February 27, 1908, was not then able to pass good title because of defects of title. The holding in *Gas Co. v. Elder*, 54 W. Va. 335, 46 S. E. 357, is in point: "Though in a contract for the sale of land a provision for payment on a day be made of the essence of the contract, yet if the vendor is not then able to pass a good title, equity will relieve against a failure to pay on the day, and enforce performance at the instance of the vendee." Since this principle is true where time is of the essence of the contract, certainly it is more applicable where, as in this case, time is not of the essence of the contract.

[2] Defendants insist that the statute of frauds prohibits the enforcement of the contract. How do we know that it does, on this demurrer? Though the Trust Company contracted to convey the property of another, we do not know that the statute of frauds will prevent that conveyance. An answer in the case may show that it will, but the fact does not appear from the bill and exhibits to which the demurrer applies. Indeed we may say that the bill and exhibits show the contrary. The Trust Company declares in the contract that it "owns and controls" the property. How then does the statute of frauds interfere? The Trust Company, it seems, has the property legally bound to it. Besides the bill avers that the Trust Company owns all the stock of the Columbia Collieries Company. That being true, it is completely within the power of the Trust Company to cause the conveyance which plaintiff

demands. *Kennedy v. Merchants & Miners Bank*, 67 W. Va. 475, 68 S. E. 32.

[3] The argument is made that the Columbia Collieries Company cannot be compelled to convey its land without corporate action on its part, nor until a contract has been signed by that corporation charging it to convey. We grant that this is true; but the fact does not argue against the sufficiency of the bill. The suit is to compel a conveyance by the Trust Company of land which it represented it had power to convey, though the property be that of another. If the land of that other party is not within the legal control of the Trust Company so that it can be conveyed as contracted, let that fact be shown by answer. As the case now presents the matter, the Columbia Collieries Company is in some way legally bound to the Trust Company so that the latter corporation may cause a conveyance of the property of the other. *Fry on Specific Performance* (5th Ed.) § 994; *Browne v. Warner*, 14 Ves. 412; 36 Cyc. 574, 575.

[4] The contract is executed in the corporate name of the Trust Company, by its president, the corporate seal is affixed, and the same is duly attested by the secretary of the corporation. Yet on this demurrer it is said that the bill does not aver authority in the president to make the contract. This point is untenable. The contract is prima facie proof of the corporate act which it evidences. That which we said in *Kennedy v. Bank*, supra, is applicable here: "The contract * * * is executed ostensibly by the corporation. The officer who executed the contract professedly in its behalf was the appropriate one to execute such a contract in behalf of the corporation. The law, under these circumstances, presumes a precedent authorization regularly and rightfully made, if the corporation itself had the power to make such contract."

[5] Another point urged is that the description of the property is void for uncertainty. The description recited in the contract is sufficient. *Mundy v. Vawter*, 8 Grat. (Va.) 518; *Vanmeter's Ex'rs v. Vanmeter*, 8 Grat. (Va.) 148. The property can surely be located and identified by it. This description is to be distinguished from such as was involved in *Crawford v. Workman*, 64 W. Va. 10, 61 S. E. 819. It is definite in that it calls for all. Extrinsic evidence may be used to apply a contract of the character of this one to its subject matter. *Kight v. Kight*, 64 W. Va. 519, 63 S. E. 335; *Harvey v. Edens*, 69 Tex. 420, 6 S. W. 306. Usually the records of the county readily disclose, with definite particulars, all the real estate owned by one therein.

[6] Then it is said that the option was not accepted in a manner that is binding on either the optionee or the optionor. The argument that it was not so accepted is based

on a construction of the contract which we cannot approve. This construction is, that plaintiff could only elect to purchase under the contract provided he found the title satisfactory to him. Since he did not find the title satisfactory, his election or acceptance amounted to nothing. In other words, if the titles were not satisfactory to plaintiff, the contract was at an end, unless the Trust Company cured the defects in a reasonable time, as provided in the third main clause of the contract. But clear import of the contract is not to this effect. The mere presence of defects of title did not end the contract. On the other hand the Trust Company contracted to convey free of defects of title, and plaintiff may give the notices of election and insist upon such a conveyance, as he has done. The contract plainly contemplates the removal of defects by the Trust Company, if plaintiff elects to take the property and defects are found. Plaintiff may insist upon having all that was promised him. True, a provision gave him the right to end the obligation he had assumed, in case substantial defects were not cured in a reasonable time; but that provision of the contract is one in his own behalf. The Trust Company cannot seek relief under it. Plaintiff is not asking to take advantage of it. He comes, virtually saying that he waives that provision, and demands that the defects of title be cured, or that the part of the property not affected by defects of title be conveyed to him, with a proper abatement of price. Reasonable interpretation of the contract gives him the right so to demand.

[7] Further, the defendants say the bill shows that the title to the land is outstanding in third parties. The bill does show that there are defects of title in this particular as to some parcels of the land. The bill, however, avers that all the defects can be cured. Besides, plaintiff expresses a willingness to take all the property not affected by adverse title. Let us here use the words of Lord Eldon: "If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement." *Mortlock v. Buller*, 10 Ves. 315.

[8] Defendants also say that the contract lacks mutuality, so that both parties are not bound. A perusal of the contract must convince one of the contrary view. Both the

vendor and vendee are bound. After plaintiff gave the notice of acceptance, the Trust Company could make him take the property if he refused. It is insisted that he could release himself from the contract by merely saying that the titles were not satisfactory. That is by no means a proper interpretation of the agreement. If good title, free of defects and incumbrances, were tendered him in a reasonable time, a court of equity would compel him to perform. There is mutuality of remedy. Both parties are so bound that either may be compelled to perform, unless some default of the other releases him.

[9] The bill is not bad wherein it calls for specific performance in relation to the stock and bonds. Equity will compel the specific performance of a contract for the transfer of stock and bonds when they have a peculiar value. It would seem that the stock and bonds of the Columbia Collieries Company have a peculiar value to plaintiff in relation to the title of the land which he seeks to obtain. They are really muniments of title which are peculiarly valuable to the owner of the land. They cannot be obtained in the market. The Trust Company has all of them. The usual reason against allowing specific performance in relation to stock and bonds cannot apply under such circumstances. *Hogg v. McGuffin*, 87 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491.

The court erred in dismissing the bill on demurrer. The decree will be reversed, the demurrer to the bill overruled, and the cause remanded to be further proceeded in.

(70 W. Va. 141)

HESSON v. PENN FURNITURE CO.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911. On Petition for
Rehearing, Jan. 12, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 256*)—INJURIES TO SERVANT—DECLARATION—CONTRIBUTORY NEGLIGENCE.

A declaration, in an action to recover damages for injury to the servant from defective machinery furnished by the master, is not bad on demurrer, as disclosing contributory negligence because the things making the machinery defective were evidently visible, when it does not appear that those things were palpably noticeable in relation to unsafe use of the machinery.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 256.*]

2. MASTER AND SERVANT (§ 221*)—INJURY TO SERVANT—ASSUMPTION OF RISK—PROMISE TO REMOVE DANGER.

Where the servant refrains from abandoning a dangerous service in consequence of assurances by the master that the danger shall be removed, the duty of the master to remove the danger is manifest and imperative, and he is not in the exercise of ordinary care until he makes good the assurances. In such case, the servant assumes the risk only when the danger

is so patent that a reasonably prudent man would not incur it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

3. TRIAL (§ 296*) — INSTRUCTIONS — CURING ERROR.

Although an instruction standing alone may have been misleading, the verdict of the jury will not be disturbed on its account where the objection was removed by the giving of other consistent instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

Error to Circuit Court, Cabell County.

Action by V. E. Hesson against the Penn Furniture Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother & Hughes, for plaintiff in error. Holt & Duncan, for defendant in error.

ROBINSON, J. Plaintiff was employed in the furniture factory of defendant. While planing timber on a machine called a jointer, he was injured. The knives of the machine cut off parts of the thumb and two middle fingers of his right hand. He claims the injury was caused by defects in the machine, carelessly allowed by defendant. In this action for damages, based on the injury, a jury awarded plaintiff five hundred dollars, and the court rendered judgment on the verdict. Defendant seeks a reversal.

[1, 2] The demurrer to the declaration was rightly overruled. Each count is sufficient. The first count does not disclose contributory negligence on the part of plaintiff, as defendant insists. It does not show that the defects in the machine were so palpable that a man of ordinary prudence must have observed them. True, as to one of the alleged defects, the absence of a guard, it may be said that any man with eyesight could observe that the machine had no guard over the knives. Still, while one would observe that the machine had no guard, the necessity of such a contrivance in relation to the safe use of the machine would not necessarily be palpably presented. The second count is good under principles recently reviewed in *Parfitt v. Veneer & Basket Co.*, 68 W. Va. 438, 69 S. E. 985. The insistence against its sufficiency is answered by the following: "If the servant * * * who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence." *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612.

The objections to some testimony that was admitted, and the exceptions to the

refusal of some that was offered, urged in the brief for defendant, must be overruled. It suffices to say that we see no error in this regard. All this testimony related to the absence of a guard on the machine. That ground of the case was properly submitted for the determination of the jury. Plaintiff, however, presented another ground on which the verdict and judgment may safely rest. That ground is that defects other than the want of a guard existed and caused his injury. He made a case under the second count of the declaration. He showed that though he reported to defendant's representative in charge the fact that there was "something wrong" with the machine yet he continued to work with it under order of defendant to do so and a promise that the machine would be speedily repaired. He introduced evidence tending to establish that the failure of defendant to repair latent defects in the machine, other than the want of a guard thereon, caused his injury in a few hours after he returned to work relying on defendant's promise to repair. There is ample evidence to support the verdict on this feature of the case. Plaintiff presented relevant facts and circumstances justifying a finding in his favor under the following sound principle: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks." 2 Cooley on Torts (3d Ed.) 1157. Of course this rule does not apply where the danger is so obvious that a reasonably prudent man would not incur it. In the case at hand, however, there is no evidence tending to establish that the danger of continuing work with the jointer was so patent.

[3] The case was properly submitted to the jury. We find no error in the giving or in the refusing of instructions. Those that were denied to defendant were fairly and fully covered by others given on its behalf. All of defendant's theories of the case were plainly presented by instructions to the jury. The instructions given for plaintiff are proper ones under the facts of the case and the law applicable thereto. Numbers one and two have been criticised because they do not take into consideration the theory of contributory negligence. In the sense of directly mentioning contributory negligence, they do not take it into consideration. But they indeed do provide for that feature of the case. The first one makes a finding in favor of plaintiff to turn on the jury's be-

lieving that the defects in the machine were "the direct and proximate cause of the injury." Those defects could not be the direct and proximate cause if plaintiff was injured by his own contributory negligence. The second one makes a finding in plaintiff's favor to turn on the jury's believing that the injury was "a result of the failure of defendant to equip said machine with a proper guard." The injury could not be such result if plaintiff caused it himself. So, both instructions do recognize defendant's theory of contributory negligence. Both are binding instructions, and if they stood alone, we should say they would be much better with plain provision in them as to the question of contributory negligence. But instructions for defendant in the plainest terms cover all this ground of contributory negligence. They indeed made clear to the jury the terms we have quoted from these two of the instructions given for plaintiff. Defendant's instructions on the subject of contributory negligence provide against all misunderstanding of the terms employed in these two instructions for plaintiff. Taken together, the instructions for both sides presented the subject clearly to the jury, even if these two instructions alone did not do so. As much as may be argued against the two instructions for plaintiff which we have specially mentioned is, that, standing alone, they would tend to mislead the jury because they do not affirmatively recognize the theory of contributory negligence. In *State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244, Judge Brannon commented on a situation analogous to the one under consideration. He said: "It has been often held that incompleteness in one instruction may be cured by another. *State v. Prater* (this term) 52 W. Va. 182, 43 S. E. 230, so holds. It is true we cannot say this where instructions are inconsistent, because they leave the way uncertain to the jury, *Ward v. Ward*, 47 W. Va. 706, 35 S. E. 873; but where both can co-exist, the one casting light on the other, each must have its effect, and both be considered like two statutes relating to the same matter; the one adds to the other. 'All instructions given are the instructions of the court regardless of who requests them, and are to be considered together.' *Gray's Case*, 92 Va. 772, 22 S. E. 858." Without doubt, these two instructions for plaintiff were made perfectly clear by defendant's instructions. While the former latently embraced consideration of contributory negligence, the latter, entirely consistent with the former, brought the subject plainly to the notice of the jury. We may indeed safely hold that, although an instruction standing alone may have been misleading, the verdict of the jury will not be disturbed on its account where the objection was removed by the giving of other consistent instruc-

tions. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

A thoughtful consideration of the record leads to an affirmance of the judgment. It will be so ordered.

On Petition for Rehearing.

ROBINSON, J. Defendant seeks a rehearing on the authority of *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14. It is true that the opinion in that case promulgates a doctrine, relative to the promise of the master to repair defective machinery, which is contrary to the well established rule affirmed by us in the foregoing opinion. But the Indiana court has expressly condemned *Standard Oil Co. v. Helmick* in the particular to which we refer. See *McFarlan Carriage Co. v. Potter*, 153 Ind. 117, 53 N. E. 465. This later case says that the former case cannot be accepted as authority on the point. And the later case directly sustains the very principle we apply in the case at hand.

(70 W. Va. 174)

BURKE v. JACKSON COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 193*)—DEFECTS—LIABILITY OF COUNTY—NOTICE OF DEFECT.

A county court is liable for injury to property of one using a highway arising from defect in it, though the defect is latent, and though the county court had no notice of defect.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 487-490; Dec. Dig. § 193.*]

2. HIGHWAYS (§ 5*)—"PUBLIC ROAD."

A road used, controlled, and occupied as a public road by a county court is a "public road," within the meaning of Code 1906, c. 43, §§ 31 and 53.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5819-5821; vol. 8, p. 7773.]

Poffenbarger, J., dissenting.

Error to Circuit Court, Jackson County.

Action by G. O. Burke against the County Court of Jackson County. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Hughes and John M. Baker, for plaintiff in error. W. F. Boggess and N. C. Prickitt, for defendant in error.

BRANNON, J. G. O. Burke brought action against the county court of Jackson county to recover for damage to a steam wheat thresher by the breaking down of a wooden culvert or bridge on a public road, and, having recovered verdict and judgment for \$125, the county court brings the case to this court.

[2] Complaint is made for the overruling

of a demurrer to the declaration. The defect alleged is that it does not sufficiently allege that the county court had opened, controlled, maintained, and treated the road as a public highway. The declaration alleges that when the accident occurred, and long before, the county court "used, worked, controlled, and occupied" said road and highway, and kept and maintained the wooden culvert over a ravine, and that it was a public road for all. This is a sufficient allegation to charge the county as for a public road. The Code, § 31, c. 43, says that every road used and occupied as a public road shall, in all courts, be deemed such whenever its establishment shall come in question. The charge is that the county used, occupied and worked the road. If so, it is a public road. *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673; *Campbell v. Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159. Declaration good under those cases and *Waggener v. Point Pleasant*, 42 W. Va. 798, 26 S. E. 352.

Various exceptions are made because of exclusion of evidence. We find them not ground of error, especially as it does not appear what was to be proven. We have examined the instructions. We find no error in them. We think as a whole they laid before the jury fairly the contention of the two sides, the question of liability of the county, and that of contributory negligence. They contain no points of law not already discussed and settled. We see no utility in discussing settled law in every case in which it arises, causing delay in the administration of justice and public expense. In my own opinion, much of it could be dispensed with.

[1] The brief of the county's counsel argues that a county court is not liable absolutely for damage coming from defect in a road; that it is not liable for latent defect, and not liable without notice of defect. We understand that under Code, § 53, c. 43, the county is absolutely liable, if there is actionable defect. No matter that the defect is latent, or whether the county court knows of the defect or not. *Campbell v. Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159; *Arthur v. Charleston*, 51 W. Va. 182, 41 S. E. 171; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

We affirm the judgment.

POFFENBARGER, J. (dissenting). I think the court should have set aside the verdict in this case. Desiring to cross the culvert with a traction engine several times heavier than the ordinary loads it was designed to carry, after having been notified that the culverts on the road were weak, the plaintiff drove the engine on it, without having taken any reasonable precaution against accident. The culvert was about 16 feet long and supported by log stringers about 8 inches in diameter. These stringers, old and de-

cayed, were unsupported by any middle pillars of any sort. Advised of the weakness of the culverts on the road, he stopped the engine before attempting to cross this one and examined it, but made no careful or adequate examination thereof. His own testimony is that he merely looked at the stringers, found them covered with bark, and thought they were sound. He applied no test whatever. The stroke of an ax or hammer would have revealed the rottenness of the stringers, and fully disclosed the insufficiency of the culvert. Then he would have taken his engine through an adjacent field, or set some braces under the stringers before going on the culvert, and thus escaped the injury of which he complains. In view of these facts, I regard his attempt to cross the culvert as a plain and palpable assumption of risk, without legal necessity therefor.

I am also of the opinion that the court erred in giving plaintiff's instruction No. 4, telling the jury to find for the plaintiff, if the decayed condition of the stringers was the proximate cause of the injury, provided due caution and care were used in conducting the boiler and engine over the culvert. It embodies an unsound proposition which seems to have governed the trial, namely, that a traveler may unnecessarily assume a risk in the use of a defective highway, if he is careful in doing so. We have expressly condemned that theory in *Shriver v. County Court*, 66 W. Va. 685, 66 S. E. 1062, 26 L. R. A. (N. S.) 377. It was not enough that the plaintiff "used due care and caution in conducting his said engine and boiler over said culvert," it being insufficient to bear the burden by reason of its decayed stringers, but the court here told the jury it was. Having knowledge of such condition, or under a duty by reason of notice to make a reasonable investigation which would have revealed it, he was bound to go extra viam, if he could, or shore up the culvert to the point of safety, if he could do that by reasonable effort and without unreasonable delay. *Shriver v. County Court*, cited. This instruction wholly ignores that duty of the plaintiff; nor does any other given impose it.

Some were given which, in general and abstract terms, gave the defendant the benefit of the principle of contributory negligence; but they were so worded as to conceal the true application of it to the facts in the case. In other words, they do not modify the false proposition propounded in the one here analyzed. Thus defendant's instruction No. 6 tells the jury the plaintiff cannot recover, if, knowing the engine would probably break the culvert down, he did not "proceed with such boiler and engine with greater care and caution than would be required of him with lighter vehicles"; and defendant's instruction No. 8 that they should find for the defendant, if the plaintiff was guilty

of contributory negligence "in not using ordinary care in proceeding along the public road in question, at the point therein complained of, with a traction boiler and engine." Under these, the jury were at liberty to find for the plaintiff, if they believed he exercised care in the matter of propelling his engine and none in any other respect. In other words, they were relieved from inquiry as to whether he knew the culvert was dangerous, or made a reasonable effort to ascertain the defect of which he undoubtedly had notice. He admits the road surveyor told him the culverts were all weak and likely to break down under his heavy engine, and furnished him two two-inch boards for use in passing over them, and also that he laid the boards aside and investigated this culvert only to the extent of looking at the stringers and seeing they still had bark on them. All this the jury could ignore under these two instructions, and were virtually directed to ignore by plaintiff's instruction No. 4.

The false proposition embraced in plaintiff's instruction No. 4, and not negated in any given for the defendant, was asserted in plaintiff's instruction No. 2, also, which reads as follows: "The court instructs the jury that, if they believe from the evidence in this case that the traction engine and boiler which the plaintiff was propelling along the public highway when the bridge broke, as alleged in the declaration in this case, was of ordinary weight for such engines, it was not necessary for him (plaintiff) to carry with him boards or planks to be used for the purpose of strengthening the culverts or bridges which he should pass over with his engine and boiler, in order to enable him to recover in this case, and that as to whether or not the engine and boiler which plaintiff was propelling, as aforesaid, was an engine and boiler of ordinary weight, such as is propelled along the highways of this county, the jury are the judges from the evidence in the case." In saying plaintiff was under no duty to carry boards with him, this instruction may be correct, but it carries by implication the unsound proposition we have been discussing. Its common-sense construction is that the plaintiff was under no duty to attempt to avoid injury, otherwise than by carefully moving his engine, however defective the culvert, and however thoroughly he knew it. In correctly telling the jury he need not carry certain boards to strengthen defective culverts, the court incorrectly relieved the plaintiff of all duty respecting a bald defect, except to drive carefully in attempting to get over it.

Plaintiff's instruction No. 3 carries the same vice. It reads as follows: "The court instructs the jury that if they believe from the evidence that the traction engine and

boiler of the plaintiff which was injured was of such weight as it was usual to propel over the roads of Jackson county, and that at the time the injury to the same occurred, the plaintiff was propelling the same with the use of due care and diligence, and was not negligent, but that the proximate cause of the injury to said engine was the decayed condition of the timbers in the bridge mentioned in the evidence, then they should find for the plaintiff such damages as they may consider the evidence shows him entitled to recover." The phrase "not negligent" leaves the false direction of this instruction in full force, since it is not defined. It means not negligent in merely propelling the engine.

The reasons here expressed constrain me to dissent.

Note by BRANNON, J. I make this note to say that no knowledge or notice to Burke of defect in the bridge was brought home to Burke. Nobody knew of any defect. His machine being heavy, the surveyor told him to be careful in going over it and to examine it. Burke did examine it, and thought it sufficient. Another man told Burke to be careful. That is all the notice he had.

(70 W. Va. 157)

CINCINNATI GAS TRANSP. CO. v. WILSON et al.

(Supreme Court of Appeals of West Virginia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 138*) — DAMAGES — TAKING LESS THAN ENTIRE FEE.

Where a company, organized to transport natural gas, proposes to take by condemnation for the use of its pipe lines, and for building telephone and telegraph lines thereon, a right of way or easement, less than the fee, over the lands of another, the owner is entitled to such damages as will justly compensate him not alone for the estate or interest actually taken, but also to damages to the residue, the fee in the whole tract, including therein the fee in that part of the tract covered by such right of way, beyond the peculiar benefits to be derived in respect thereto, from the work to be constructed. Construing section 14, chapter 42, Code 1906, and section 18, chapter 42, Code Suppl. 1909.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 370; Dec. Dig. § 138.*]

2. TRIAL (§ 194*) — QUESTIONS FOR JURY — CREDIBILITY OF WITNESSES.

It is proper for the trial court, by instructions to the jury, to tell them that they are the judges of the weight and credibility that should be given the testimony of witnesses, but not what effect, if any, should be given by them thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

3. EMINENT DOMAIN (§ 150*) — COMPENSATION — EXCESSIVE DAMAGES.

The verdict of the jury, awarding defendant fourteen hundred dollars, for the estate or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interest in his land taken by plaintiff, and damages to the residue, is, on the evidence adduced on the trial in this case, tested by the rule of prior decisions governing the same, grossly excessive, and the judgment of the court thereon is set aside and a new trial awarded.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 402; Dec. Dig. § 150.*]

Error to Circuit Court, Wayne County.

Action by the Cincinnati Gas Transportation Company against G. L. Wilson and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Simms, Enslow, Fitzpatrick & Baker and Geo. J. McComas, for plaintiff in error. Campbell, Brown & Davis and W. W. Marcum, for defendants in error.

MILLER, J. Plaintiff, alleging its right to construct, maintain and operate a pipe line on, through and upon the lands of defendant and others, and to take by condemnation such lands as may reasonably be necessary for the purpose of laying therein suitable pipes and constructing thereon suitable telephone or telegraph lines for the successful and proper operation thereof, declares in its petition its purpose to take, not an absolute fee simple therein, but such an interest in the lands of defendant and others, as under the statute and laws of this state it has the right to take, namely, the right or right of way to lay such pipe lines and to construct such necessary telephone and telegraph lines on and through said lands as may be necessary for the proper conduct of its business, and to this end to erect poles thereon and to have the right of ingress and egress for the purpose of constructing, maintaining and repairing and otherwise fully operating said pipe lines.

The commissioners reported, that in their opinion seven hundred dollars would be a just compensation to defendant for the interest which the petitioner proposed to take in his land. Their report was excepted to by both parties, and each demanded that the question of compensation to the landowner for the real estate proposed to be taken, as well as damages to the residue thereof, beyond the peculiar benefits which may be derived in respect to such residue from the work to be constructed, be submitted to a jury of twelve freeholders; and on the trial the jury impaneled were duly sworn "to well and truly ascertain what will be a just compensation for so much of the real estate as is proposed to be taken by the applicant in this case, as well as for the damages, if any, to the residue of said real estate beyond the peculiar benefits, if any, which will be derived in respect to such residue from the work to be constructed, or from the purposes to which the part to be taken by the applicant is to be appropriated, and a true verdict render according to the evidence"; the defendant

thereby assuming the burden of proof upon the exceptions to the commissioners' report.

On the trial the jury found for defendant damages to the amount of fourteen hundred dollars, and for which the court below gave him judgment.

[1] By objection to the form of the issue and to the oath administered to the jury; by exceptions and objections to certain parts of the evidence of defendants' witnesses, and by instructions proposed to the jury, which were rejected by the court, all preserved to it on the record by sundry bills of exceptions, defendant has presented, as one of the principal questions for decision here, whether under the statute laws and constitution of this state, a landowner whose land is to be condemned for public use, and less than a fee simple is to be taken, is entitled to "damages to the residue of the tract beyond the peculiar benefits to be derived, in respect to such residue from the work to be constructed." It is contended in argument that that provision of our statute, section 14 of chapter 42, Code 1906, giving such damages, is applicable only where a fee simple estate is condemned, and not where less than a fee is taken. This argument is predicated on a comparison of that portion of said section 14, giving such damages, with that portion of section 18 of said chapter, providing that: "When less than a fee is taken, in assessing damages, the commissioners and jury shall take into consideration the actual damage that is done or that may be done to the fee by such construction." It is contended that "damages . . . to the fee" authorized by this statute are limited, by proper construction, to the fee in that portion of the land, in, upon, under or over which the right of way or easement less than a fee is condemned, and that no matter what damages the owner may actually sustain to the residue of his land or the fee in the whole tract, the statute awards him no damages therefor, and that none can lawfully be assessed. This argument is attempted to be further fortified by reference to that provision of said section 14, relating to the manner of assessing damages by commissioners, where the fee simple is to be taken, which rule section 17 of said chapter makes applicable on the trial of an issue before a jury, which is: "Shall ascertain what will be a just compensation to the person entitled thereto for so much thereof as is proposed to be taken, and for damage to the residue of the tract, beyond the peculiar benefits to be derived, in respect to such residue, from the work to be constructed." The argument is, that the rule for assessing damages contained in the provision of said section 18, quoted, differing in language from said section 14, in not providing for first ascertaining a just compensation for the land actually taken,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and then damages to the residue less peculiar benefits, impliedly, if not in express terms, limits the damages recoverable when less than a fee is taken to damages to the fee in the land actually covered by the right of way or interest less than the fee, and gives nothing for damages suffered by the owner to the residue. We can not agree to this construction of the statute.

A preceding and pertinent clause of said section 18, not noticed by counsel for petitioner is: "A * * * company organized for the purpose of transporting * * * natural gas * * * by means of pipes or otherwise, and desiring to construct its pipe lines, may as to all or any part of the real estate sought to be taken for that purpose describe, in its application an estate or interest therein *less than a fee*, and with respect to the same may proceed as in other cases; and upon payment therefor, such estate and interest as is stated and described in the application shall vest in the applicant." Section 18, chapter 42, Code Suppl. 1909. Then follows the clause relied on by plaintiff's counsel. The clause just quoted and by its words, "proceed as in other cases," clearly refers to sections 14 and 18, and to the rule of section 14 for measuring damages; and requires that that rule shall apply and in the same way, when less than a fee is taken as when the fee is condemned, and that damages less special benefits to the residue, including the fee in the tract covered by the right of way or easement actually taken shall also be added. Unless we give these statutes this construction, as counsel for defendant suggest, we would be obliged to declare the statutes void for infraction of that provision of the constitution saying: "Private property shall not be taken or damaged for public use without just compensation."

Not only is this construction required by reason, but authority also justifies it. Thornton on Oil and Gas, section 361, says: "The courts will presume that it is a damage to land to conduct a pipe line through it, without any evidence of that fact. In determining the amount of damages, both present and future damages may be recovered. The measure of damages in the appropriation of a right of way is the actual value of the land appropriated and any injury to the residue." And in Indiana, construing statutes substantially like ours, the Appellate Court says: "The object, therefore, of the legislature in passing the act we are now considering was to provide landowners a just and adequate compensation for damages incident to the construction of pipe lines, etc., over and across their lands. Such compensation must be measured by the actual damages to the freehold occasioned by such construction, including the land appropriated and occupied, and the relation of the remaining land thereto." *Manufacturers', etc., Co. v. Leslie*, 22 Ind. App. 677, 51 N. E. 510.

In Pennsylvania, in an action by a landowner against a gas company, for injuries due to negligence in the operation of a pipe line through his land, it was held that as he was entitled to be compensated for the depreciation in the market value of his farm due to the location, construction and operation of a skillfully and carefully operated pipe line through the same, and that such damages must necessarily have been considered and compensated for in the proceedings for the assessment of such damages, nevertheless, damages caused by negligence in the operation of said pipe line could not be regarded as having been included and compensated for in such prior proceedings, and that plaintiff was entitled to recover therefor, in the absence of evidence that the alleged acts of negligence were consistent with proper construction, and not the result of negligent operation of said pipe line. We are of opinion, therefore, that there was no error in overruling the objection of petitioner to the form of oath administered to the jury, nor in rejecting its instructions numbered one, two, six and twelve; nor in overruling certain objections to the evidence of certain witnesses predicated on a different theory.

[2] Petitioner next complains of the rejection of its instruction number eight. It proposed to tell the jury in substance, that a witness who only knew defendants' land by having gone over the proposed right of way once, and was not acquainted with the market value of said land, or of land of similar character in the same neighborhood, was not a competent witness, and that the opinion of any such witness should be disregarded by the jury in arriving at their verdict. By petitioner's instruction number five, given, the court properly instructed the jury on the weight and credibility that should be given by them to the testimony of witnesses, considering their knowledge of the land, its character, quantity, fertility and its relation to the proposed pipe line to be constructed on or under the same, and in the light of the ownership of lands; but by instruction number eight it was proposed to tell the jury that they should wholly disregard, and accord no weight to the opinion of a witness if he had only gone over the right of way proposed to be taken once, and was not acquainted with the market value of lands in the same neighborhood. According to the brief of counsel this instruction was more particularly directed to the evidence of the witness Stender. This witness, though residing some six miles from defendant's land, testified that he did know the market value of this land, that he had dealt in lands all over the state, and though he did not instance any particular sale or sales of land in the same vicinity, yet he had discussed values with others, and had his opinion as to values, based on experience and observation, and of the value of defendant's land,

though he had not gone over it all and did not know the exact location of the lines. We think this knowledge qualified him to give his opinion. Its weight and credibility was for the jury, as they were told by said instruction number five. Instruction number eight was therefore properly rejected. *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, 72, 49 S. E. 1009.

[3] The next question to be considered is, was the verdict excessive? On the whole evidence before the jury we think it clearly was. The commissioners who had gone upon the land awarded defendant but seven hundred dollars. The highest price put upon the land covered by the proposed right of way, mostly through bottom land, was one hundred dollars per acre. The boundary covered thereby is but 4.38 acres. The aggregate assessed value of the three tracts constituting defendant's farm is \$3,570.00. The farm is largely hill land. All witnesses for defendant, remarkable to say, concurred in their opinion that \$2,000.00, would be a just compensation to defendant for the land or interest therein proposed to be taken and damages to the residue, but not one, so far as we see, was able to or did give his opinion, as to the value of the land before as compared with the value thereof after the appropriation of the right of way by the gas company. As was said by this court in *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 479, 35 S. E. 978, a witness "may not express his mere naked opinion of the amount of damages caused by the work, but must state his opinion of the value of the land before and after the construction of the railroad, in connection with the facts and circumstances relative to the land flowing from the construction of the railroad." The testimony of all the witnesses in the case violates this rule. This rule, alluded to in the case just cited, and laid down in prior and subsequent decisions, as interpreted in *Morrison v. Traction Co.*, 60 W. Va. 441, 448, 55 S. E. 669, and *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 50 S. E. 521, 110 Am. St. Rep. 785, is the test by which damages must be assessed. As these later cases hold, the rule must not be so interpreted as to charge the landowner with benefits common to the public in general, but with special benefits only, accruing to him by the proposed work. This is especially made clear in *Railroad Co. v. Buskirk*, supra, where the railroad company was proposing to take the whole of defendant's land, leaving no residue. But with due regard to the rule, as thus interpreted, it seems to us no data were given by any of these witnesses, on which to support their mere naked opinions, that defendant's land would be damaged \$2,000.00. These opinions are all there is in the evidence to support the verdict. The jury did not personally view the premises. If they had done so, though their verdict could not stand, on the evidence alone, we

might not be warranted in disturbing it. *Railroad Co. v. Buskirk*, supra, 57 W. Va. 480, 50 S. E. 521, 110 Am. St. Rep. 785. Viewing the case as presented our conclusion is that the verdict is excessive, and not warranted by the evidence, and that the judgment thereon for this reason ought to be set aside, and a new trial awarded, and it will be so ordered.

(70 W. Va. 201)

CINCINNATI GAS TRANSP. CO. v. KRESS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1911.)

(Syllabus by the Court.)

CONDEMNATION PROCEEDINGS.

For syllabus, see *Gas Transp. Co. v. Wilson*, 73 S. E. 806, this term.

Error to Circuit Court, Wayne County.

Action by the Cincinnati Gas Transportation Company against John Kress and others to condemn right of way. From the judgment, plaintiff brings error. Reversed.

Simms, Enslow, Fitzpatrick & Baker and Geo. J. McComas, for plaintiff in error.

BRANNON, J. The Cincinnati Gas Transportation Company instituted a proceeding in the circuit court of Wayne county seeking condemnation of a strip of land, of the width of 30 feet, out of a tract of 152 acres owned by John Kress, for laying an underground pipe line for conveyance of oil or gas, and for the erection of telegraph or telephone poles. The parcel sought to be condemned contains 1.21 acres. The commissioners of the court to assess compensation reported \$300 as compensation. A jury having been asked, it found the sum of \$750 as compensation, and, the court having rendered judgment for that sum, the company brings the case to this court.

We are of opinion that the sum of \$750 as compensation for the small piece of land to be condemned is grossly excessive. We hesitate not to say that, whilst there are some arbitrary opinions which go to justify such finding, the evidence adduced by the defendant himself, when examined in detail, and considering the valuation of lands near by, and the per acre valuation of this tract, and other circumstances, show this valuation to be excessive. The tract in 1905 was assessed by the official assessor at \$8 per acre for the land, and \$11 an acre for land including improvements, making the total tract value \$1,584. Kress himself puts the total valuation at the time he gave his evidence at \$6,000 for the whole tract, and yet demands \$750 for an acre and one-fifth, for only an easement. Remember that only an easement for an underground pipe 127 rods long and a few telephone poles will exist under this condemnation. The corpus or body of the land is

not taken. The fee of the body or corpus of the land remains in Kress. He can use it for all purposes of agriculture, subject only to the right of repair in the company, which will likely not be often needed. I suppose the company could not fence off the strip of land. And I suppose that the company would have right only of repair, and such legitimate use as would be reasonable, considering the nature of such use, and that its power could not be arbitrarily used to the hurt of Kress. It would be the case of mutual rights by the two parties, and the law would say, I suppose, that each must exercise his rights reasonably and consistently with the rights of the other. The principles stated in the case of Cincinnati Gas Transp. Company v. Wilson, 73 S. E. 306 decided this term, apply to and rule this case.

Our conclusion is to reverse the judgment, set aside the verdict, grant a new trial, and remand the cause to the circuit court.

(70 W. Va. 146)

CARTY v. CARTY.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. DIVORCE (§ 63*)—GROUNDS—DESEPTION.

A wife, deserted by the husband without cause at the marital domicile in another state, may acquire in good faith a separate domicile in this state and under our laws obtain a divorce on the ground of desertion, though the husband is a non-resident and is only constructively served by publication.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 217; Dec. Dig. § 63.*]

2. DIVORCE (§ 63*)—GROUNDS.

Where the plaintiff in a suit for divorce has been actually and in good faith domiciled in this state for one year next preceding the bringing of the suit, it is no valid reason against granting the relief that the original marriage status was in another state, or that the cause for which the divorce is sought arose outside of the state, or that the defendant is a non-resident and only constructively notified.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 217; Dec. Dig. § 63.*]

Appeal from Circuit Court, Brooke County.
Bill by Nettle Carty against Hugh Carty.
Decree for defendant, and complainant appeals. Reversed.

R. L. Ramsey and J. A. Gist, for appellant.

ROBINSON, J. Plaintiff and defendant were married in this state. They took up a domicile in Ohio. After residing together there for a short time, plaintiff returned to this state for a holiday visit with her mother. While making this visit, she received a letter from defendant notifying her that he was forwarding her clothes and announcing his intention to desert her. She returned to the domicile in Ohio, but the house was empty. Defendant had sold the household

effects and departed. He had left no word as to his whereabouts. Plaintiff returned to the home of her mother in this state, where she has since resided continuously, supporting herself as a mill worker. In all that time, more than three years, plaintiff has never seen defendant. Plaintiff, in the county of her residence in this state, sought a divorce from the bonds of matrimony, on the ground of defendant's desertion, proceeding against defendant, a non-resident, by order of publication. The circuit court denied the relief prayed. The decree expressly states that relief is denied because it appears from the evidence "that the ground of action arose outside of the state"; that jurisdiction was obtained only by constructive service; that defendant is a non-resident; and "that the marriage status was outside the state."

Plaintiff sufficiently alleges and proves that she has resided in this state for more than one year next preceding the time of bringing her suit; that defendant wilfully deserted her, without justifiable cause; and that the desertion has continued for more than three years. Ordinarily the case would warrant a decree of absolute divorce. Do the reasons assigned by the court below justify its refusal of a decree?

[1] Plaintiff became a bona fide resident of this state after defendant deserted her. Through the necessity of her situation, she came here to live. It was natural that she should return to her old home when she found herself an abandoned wife. There is not a word of evidence from which it can be inferred that she merely came to this state to seek a divorce. The circumstances all negative any such intention on her part. She returned to this state, again to become one of its citizens, because the desertion of her husband enforced upon her the necessity of leaving strangers and seeking refuge in a native land among friends. Having in the best of faith become a resident of this state, plaintiff is entitled to the protection of the laws made for the good order and well being of its people.

To such a citizen as plaintiff has become, the statutes of the state vouchsafe right to the relief she asks. Any one who has in good faith resided in the state for more than a year is entitled to seek a divorce under its laws. Hear the statute: "The circuit court on the chancery side thereof shall have jurisdiction of suits for annulling or affirming marriages, or for divorces. No such suit shall be maintainable, unless the parties, or one of them, shall have resided in the state one year next preceding the time of bringing such suit. The suit shall be brought in the county in which the parties last cohabited, or (at the option of the plaintiff) in the county in which the defendant resides, if a resident of this state; but

If not, then in the county in which the plaintiff resides. Such suit may be brought and prosecuted by the wife in her own name, without a next friend, and a decree may be rendered in the case upon the publication of the summons and statement as provided in chapter one hundred and twenty-four of this Code." Code 1906, ch. 64, sec. 7. By another section, it is provided that a divorce from the bonds of matrimony may be decreed to the party abandoned "where either party wilfully abandons or deserts the other for three years." Code 1906, ch. 64, sec. 5. These statutes have been enacted for the protection and welfare of our people. Any one domiciled within the borders of the state for the time required may avail himself of the efficacy of these provisions of law. For the welfare of the society of which he has become a member, he may by these laws promote his status as such member of society. At least one of the parties to a divorce suit must have resided within the state for the period of one year next before the suit is brought. But, by the very terms of the statute, both parties need not reside in the state to justify the pendency of the suit. The statute plainly contemplates that a resident plaintiff may sue a non-resident defendant. It says a plaintiff may sue in the county of his own residence when the defendant is a non-resident. Provision is made for constructive service by publication.

Plaintiff returned to this state bringing with her the status of a married woman. When she acquired a new domicile here, that status pertained to the domicile. It is on that status that the suit for divorce, under the laws of the domicile, acts. When she sued for divorce, the marriage status was not outside the state, as the lower court held. As to plaintiff, that status was with her in this jurisdiction, subject to the operation and effect of our laws. "The right of any state to declare the status of its own domiciled subject is absolute. Without this right, no ruler could be a sovereign in his own dominions. And both in reason and by the highest judicial authority in our country, this doctrine applies as well to a husband or wife whose married partner is permanently abiding in another state, as to both parties when living together in the same state." 2 Bishop on Marriage, Divorce, and Separation, sec. 138.

But may the wife acquire a domicile distinct from that of the husband? Most assuredly so under the circumstances of this case. Would it not be preposterous to say that plaintiff must seek the unknown whereabouts of her neglectful husband and sue for divorce where he has established a domicile, or must sit down alone at the place of joint marital domicile—an empty house in a strange land—awaiting the return of the deserting husband for a long period fixed by law, and then sue for divorce there? When a wife is deserted without cause, she may

go where reason and necessity dictate and there establish a domicile distinct from the offending husband's domicile. In reason, she cannot be required to follow the offender or to remain always where he left her. Indeed our statutes make plain the right of a wife to have a domicile in this state separate from that of her husband for the purpose of jurisdiction in obtaining divorce. "If, when a statute authorizes a wife to bring an ordinary suit against her husband, it by interpretation includes the needful collateral rights, among which is the right to have a separate domicile therefor, the same reason applies also, and with added force, to a suit which a statute permits her to bring against him for divorce." 2 Bishop, sec. 116. "While the matrimonial domicile of the wife is usually that of the husband, yet if he is guilty of misconduct entitling her to a divorce, she may leave him and acquire a new residence in another state." 14 Cyc. 818. The principle enunciated in these texts is now generally recognized by text writers and adjudicated cases. *Nelson on Divorce and Separation*, sec. 46; *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604. In the celebrated case of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 887, the Supreme Court of the United States again clearly recognizes that a wife may have a separate domicile in a state other than that which is the domicile of her husband, and may there obtain a divorce if the case she presents justifies her maintenance of such separate domicile and her right to a severance of the marriage bond.

We have shown that our statutes provide for the granting of a divorce to one domiciled here, though the other party is a non-resident served only with constructive process by publication. It is not now pertinent to discuss the extraterritorial operation or validity of a divorce so granted. Plaintiff is entitled to a divorce so granted, and such divorce will avail her in this state. The fact that foreign jurisdictions may not credit the decree is no reason against granting it. In this state the decree will be valid, subject of course to the right of defendant to appear and re-open the case within the time fixed by law. "Where a court in one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution." *Keezer on Marriage and Divorce*, page 462; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *Haddock v. Haddock*, supra.

[2] Nor is the fact that the desertion took place in another state a valid reason against

decreeing a divorce to plaintiff. She has shown that she is a deserted wife. What matter where the desertion took place? Her status as a resident of this state is the same as it would have been had the desertion taken place here. We have seen that our laws may operate to effect that status, because plaintiff is a citizen of the state—a subject of our government. Besides, our divorce statutes make no distinction as to the place of the arising of the ground for which a divorce may be granted. The place of the marriage, the domicile at the time of the offense, and the place where the offense was committed, are all immaterial in a divorce suit under the existing laws of this state, so far as jurisdiction to maintain the suit is concerned. It is the domicile of one or both of the parties in this state, at the time of suit, that gives jurisdiction under our statutes. No other basis of jurisdiction is fixed. In this particular, our law is in accord with that generally recognized in the American states. Years ago, Justice Story announced: "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual bona fide domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offense for which the divorce is allowed was committed." Conflict of Laws, sec. 230 a. The following authorities are also in point: 2 Bishop, chapter 2, also sections 160, 164, 174; Nelson on Divorce and Separation, secs. 22, 23, 24, 25, 128; 14 Cyc. 589, 590, 591.

We must reverse the decree of the circuit court and enter here the decree that the circuit court should have entered—a decree annulling the bonds of matrimony between plaintiff and defendant.

(70 W. Va. 151)

SALINGER v. NORTH AMERICAN WOOLLEN MILLS CO. et al.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 393*)—PAROL EVIDENCE AFFECTING WRITINGS—LEASE.

As a general rule a written lease of land becomes the repository of the contract, all preceding negotiations becoming consummated in it, and in the absence of fraud or mistake, it is the controlling evidence of the terms and conditions upon which the property was demised.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1736-1744; Dec. Dig. § 393.*]

2. LICENSES (§ 58*)—REAL PROPERTY—REVOCABILITY OF LICENSE.

The knowledge of a landlord, or of one of his tenants, and his or their acquiescence in the use by another tenant, without consideration, of the outside walls of a portion of the building not enclosing the part occupied by or leased to him, but leased to and occupied by another ten-

ant, amounts simply to a revocable license, revocable at pleasure by the licensor, whether such licensor be the landlord or a tenant.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116-120; Dec. Dig. § 58.*]

3. LANDLORD AND TENANT (§ 123*)—USE OF PREMISES—SIGNS ON WALLS.

The lessee of a store room, unless restrained by the terms of his lease, has the exclusive right to the use of the outside walls of that portion of the building covered by his lease, for advertising signs, to the exclusion of a lessee of another part of the same building, but he has no right to occupy with such signs or for any purpose the outside walls not enclosing his part of the leased premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 435, 436; Dec. Dig. § 123.*]

4. LICENSES (§ 59*)—REAL PROPERTY—REVOCATION OF LICENSE—AUTHORITY OF LESSEE.

The rule giving right to the owner of a fee to revoke at pleasure a mere license to another to occupy his land, or any portion thereof, is equally applicable to his lessee, where such lessee is the licensor, unless the latter be restrained by the terms of his lease from granting such license.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 121, 122; Dec. Dig. § 59.*]

5. LICENSES (§ 62*)—REAL PROPERTY—REVOCATION OF LICENSE—ACTS CONSTITUTING.

As a general rule a mere license is terminated by any act of the licensor which evinces an intention to revoke it, such as a conveyance or contract inconsistent with the continued enjoyment of the license.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 125; Dec. Dig. § 62.*]

Appeal from Circuit Court, Wood County.

Bill in equity by Gus Salinger against the North American Woollen Mills Company and others. From a decree for defendants, plaintiff appeals. Affirmed.

John F. Laird, D. C. Casto, and Dorr Casto, for appellant. Thomas Coleman and Merrick & Smith, for appellees.

MILLER, J. Plaintiff, on bill filed, obtained an injunction restraining defendants and all other persons, from "destroying, removing, painting over, interfering with, or in any wise molesting, defacing, or changing the painted advertisement and signs" placed by him on the front outer walls of the upper stories of the store building occupied by him on Court Square in the city of Parkersburg.

On bill, answers of defendants, and affidavits filed on behalf of plaintiff the court, in vacation, on motion of defendants dissolved the injunction, and plaintiff has appealed.

Plaintiff is lessee under Strong, the owner of the building, of the store room occupied by him, while defendants, Kinney & Carroll, are lessees of the two upper stories of the same building. Plaintiff first entered in October, 1907, as assignee of Rauch, a prior lessee. Subsequently, on April 1, 1908, the date of the expiration of the Rauch lease, pursuant to agreement, Salinger obtained from Strong, a new lease for five years, on the terms of the old, with privilege of an additional term

of five years. Following this new lease, Strong, by agreement with plaintiff, built an addition in the rear, and on October 1, 1908, the prior lease of April 1, was surrendered, and a second lease, covering the new addition, on the terms of the first, except that the rent was increased from sixty to one hundred dollars per month, was executed.

The grounds of relief alleged are, not that plaintiff's lease, in terms, gave him any right to occupy the front walls of the upper stories of the building with his signs, but that prior to purchasing the lease from Rauch, and as an inducement thereto, Strong agreed that he might paint signs on said walls; and that Kinney & Carroll, tenants of the upper stories, and who had been such tenants for many years prior to plaintiff's purchase of the Rauch lease, had also consented thereto; and that before occupying said store room with his stock of goods, he had actually painted said signs on said upper walls, as they were at the time of filing his bill, and that he was so occupying said walls with his signs to the knowledge and acquiescence of Strong, and the knowledge and acquiescence of Kinney & Carroll, when Strong executed to him, the two leases of April 1, and October 1, 1908, and when in August, 1910, the North American Woolen Mills Co., or Boso its manager, claiming the right by contract with said Kinney & Carroll, and with Strong the landlord, undertook to enter and paint out said signs, and occupy said walls with signs advertising the business of said Woolen Mills Company, and for which he sought to enjoin them.

The answer of Strong denies the alleged agreement, and denies that the subject of so occupying said upper walls with signs was ever mentioned by plaintiff prior or subsequent to plaintiff's purchase of the Rauch lease. His only admission is that some time after he executed the lease of April 1, 1908, plaintiff said to him that he was going to paint the upper walls, but that no mention was then or at any time made about painting signs thereon. He admits knowledge that plaintiff had painted signs on these walls, but he disclaims the right, as against Kinney & Carroll, his upper tenants, to authorize plaintiff to so occupy said walls, and he denies that he ever undertook to do so. He says he had no objection, if Kinney & Carroll had none, to plaintiff's use of said walls; and the latter, while denying any agreement with plaintiff that he might so occupy said walls, say they were not disposed to annoy or interfere with plaintiff in such use, so long as they had no opportunity to otherwise occupy said walls; but that having had opportunity in August, 1910, to lease said walls at a profit they had executed the contract to Boso for his Woolen Mills Company, and they denied any right in plaintiff by contract, license or otherwise to longer occupy said walls with his signs.

While admitting said signs may be of value

to plaintiff, all the answers deny any alleged intention to injure him or his business, in making the contract with Boso, or that depriving him of the use of said walls for his signs will have that effect.

No evidence was offered in support of the bill, except the ex parte affidavit of plaintiff himself, to the effect that on August 20, 1910, M. Carroll, of the firm of Kinney & Carroll, had said to him that his firm had been compelled to sign the contract with Boso, for fear that if they did not do so Strong, the landlord, would require them to vacate the building, and that he, Carroll, personally did not then or at any time lay claim to any right to use said front walls for display signs or the right to lease the same to any body else, and that he would not have signed the contract with Boso, except for the threat of Strong and Boso to cancel their lease, a lease from month to month.

On this state of the pleadings and proofs, was the injunction properly dissolved? That a moral wrong may possibly be inflicted on plaintiff may be admitted. But the rights of plaintiff to longer occupy said walls with his signs, depend solely on the nature of that right.

[1] It is conceded that his lease does not in terms give him such right, and we must say from the record, that he had no contract resting in parol, either with Strong, the landlord, or with Kinney & Carroll, the upper tenants, to so occupy said upper walls with his signs, for the allegations of his bill, as to any such contract or agreement are denied by the answers, and there is no proof thereof. The rights of the plaintiff, therefore, rest solely upon the fact that Strong, and Kinney & Carroll knew of plaintiff's use of said walls, and for so long a time did not object thereto. We do not see how this knowledge of Strong, at the time he executed the leases to plaintiff can in any way affect the rights of the American Woolen Mills Company or Boso, under their contract with Kinney & Carroll, the upper tenants. The written lease from Strong to Salinger became the repository of plaintiff's contract, and all preceding negotiations were consummated in it, and it furnishes the controlling evidence, in the absence of fraud or mistake, of the terms and conditions upon which the property was demised. Jones on Landlord and Tenant, section 132. This is an elementary principle of contracts.

[2] It is contended by counsel for defendants that the acquiescence of Strong, and of Kinney & Carroll, in the use of said walls by plaintiff, amounted to a mere license, revocable at pleasure, and not to an easement. This proposition seems well founded in law. 2 Minor Inst. 22; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 68; Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422. The proposition is particularly applicable where the license appertains to the

occupancy of outside walls for advertising signs. Jones on Landlord and Tenant, section 40.

[3] The question then is, who had the right to give such license? If Kinney & Carroll, the upper tenants, had the right to control the use of the outer walls of that portion of the building occupied by them, they alone had the right to give the privilege or license to plaintiff, and no act of Strong could bind them, unless they had knowledge thereof and approved or acquiesced therein. Their answer is a denial of any knowledge of Strong's action or contract with plaintiff, and asserts their right to the use of said outer walls, and their legal right to contract the use thereof to the Woolen Mills Company. It is well settled also that a lessee has the exclusive right to the use of the outside walls of the portion of the building covered by his lease, to the exclusion of a lessee of another part of the same building, and has no right to use for any purpose, any portion of the outside walls not enclosing his part of the premises. 1 Underhill on Landlord and Tenant, section 277. And this rule applies to the use of such walls for signs. Jones on Landlord and Tenant, section 108; 24 Cyc. 1047; Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388. Our conclusion, therefore, is that Kinney & Carroll, and not Strong, had the right to control the outer walls of the upper stories of the building occupied by plaintiff. They were tenants thereof when plaintiff obtained his lease; he was charged with notice of their rights. He does not claim to have had any contract with them, and having undertaken to occupy these walls, without agreement with them, he did so at his peril.

[4] Was the license of Kinney & Carroll revocable by them? Mr. Minor, 2 Minor's Inst., 22, says: "A license is sometimes revocable, namely, where if it is countermanded, it leaves the party in statu quo." And Mr. Jones says: "A mere license, unaccompanied with any vested interest in the real estate, created by deed or other writing, and independent of any title acquired by grant, prescription or adverse possession and claim for a period of the statute of limitations, must be deemed to be, in its own nature, countermandable, and essentially revocable at the will of the owner of the fee." Jones on Landlord and Tenant, section 37. But when the owner of the fee is not the licensor, we think the rule is equally applicable to a tenant, unless restrained by the terms of his lease from granting such license. This latter proposition we think fully supported by Riddle v. Littlefield and Lowell v. Strahan, supra. The license of Kinney & Carroll, having been without consideration, they could revoke it at any time. Harris v. Brown, 202 Pa. 16, 51 Atl. 586, 90 Am. St. Rep. 612; Lawrence v. Springer, 49 N. J.

Eq. 289, 24 Atl. 933, 81 Am. St. Rep. 713; Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497.

[5] The remaining question is, did Kinney & Carroll revoke the license? The general rule is that a license is terminated by any act of the licensor which shows an intention to revoke it, such as a conveyance, or contract inconsistent with the continued enjoyment of the license. 18 Am. & Eng. Ency. Law, 1141; note to Pifer v. Brown, supra, 49 L. R. A. 497, and cases cited. The agreement in writing of Kinney & Carroll with the defendant Boso, giving to him the privilege of using said walls is sufficient evidence, according to these authorities, of their intention to revoke the license to plaintiff.

We are of opinion, therefore, that the injunction was properly dissolved. The material allegations of the bill having been fully, fairly, plainly, distinctly and positively denied in the sworn answers, and not proven, it was the duty of the court, on motion of the defendants, to dissolve the injunction. Cox v. Douglass, 20 W. Va. 175; Schoonover v. Bright, 24 W. Va. 698; Kester v. Alexander, 47 W. Va. 329, 34 S. E. 819; Crossland v. Crossland, 53 W. Va. 114, 44 S. E. 424. The decree below must, therefore, be affirmed.

(39 W. Va. 719)

COUCH v. EASTHAM.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. DOWER (§ 12*)—PROPERTY SUBJECT—"ESTATE OF INHERITANCE."

Where one is seized of an estate in land that is limited only on his dying without lawful children, the estate, being one that can pass to heirs if lawful children are born, is an "estate of inheritance" in which his widow is dowerable though it expire by failure of issue.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2490, 2491.]

2. DOWER (§ 12*)—ESTATES AND INTERESTS SUBJECT TO—RIGHTS OF WIDOW.

A widow is dowerable to the extent of one-third of the real estate whereof the husband, or any one to his use, at any time during the coverture, was seized of an inheritance, such as that issue of the marriage might inherit the same as heir to the husband, unless her right to dower therein has been lawfully barred or relinquished.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 36-43; Dec. Dig. § 12.*]

3. WILLS (§ 455*)—CONSTRUCTION—LANGUAGE OF INSTRUMENT.

A will that is clear and unambiguous in its terms must be interpreted by those terms. The true inquiry is not what the testator meant, but what the terms used by him express.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972-985; Dec. Dig. § 455.*]

Appeal from Circuit Court, Mason County. Bill by Mary Catharine Couch against Sarah F. Eastham. Decree for plaintiff, and defendant appeals. Affirmed.

Mollohan, McClintic & Mathews, Rankin Wiley, and Harry Couch Eastham, for appellant. J. S. Spencer and Somerville & Somerville, for appellee.

ROBINSON, J. By this suit the widow of Peter S. Couch prays that dower be assigned her in the lands devised to her husband by the will of his father, Samuel Couch. Her right to dower therein is denied by the defendant, Sarah F. Eastham. The case presents a single question: Is the plaintiff entitled to dower?

The answer to the question must be determined by a consideration of the following paragraph in the will of Samuel Couch: "I give and devise unto my son Peter S. Couch the farm on which I reside in Mason County, West Virginia containing about Nine Hundred and Fifty Acres, but it being my desire to divide my property as near equally as may be between my two children Peter S. Couch and Sarah Frances Eastham. I direct my said son Peter S. Couch to pay his sister Sarah F. Eastham the sum of Four Thousand Dollars and I hereby make the said sum of Four Thousand Dollars a lien and charge upon the real estate aforesaid devised to said Peter S. Couch, until the same is paid to said Sarah F. Eastham or her heirs, but in event the said Peter S. Couch shall die leaving no lawful children surviving him, but leaving his wife Mary Catharine Couch surviving him, it is my will and desire that the title to all my real estate aforesaid shall pass to and be vested in my daughter Sarah Frances Eastham or her children if she be not living upon the payment by her or her said children to said Mary Catharine Couch of the sum of Four Thousand Dollars, but in the event that said Mary Catharine Couch shall not then be living, it is my will and desire that said real estate shall pass to and vest in my said daughter, Sarah F. Eastham, or in case of her death to her children without the payment of anything in consideration therefor." A codicil to the will reduced the last named sum of four thousand dollars to two thousand dollars.

This same paragraph of the will of Samuel Couch, twice before, in the lifetime of Peter S. Couch, has been involved in suits in this court. Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23. But, of course, in neither of those cases was the character of the estate devised to Peter S. Couch viewed in relation to dower. Now that he has departed this life leaving no issue, and Sarah F. Eastham has paid to his widow the two thousand dollars pursuant to the terms of the will and the codicil thereto, this subsequent controversy about the right of dower arises.

[1, 2] The will gave Peter S. Couch a defeasible fee in the land. He held an estate in fee simple which would shift in the event of his dying without lawful children. The fee continued in him until he died without issue. If lawful children had been born to him, the estate was one which they could have inherited as his heirs. Since the estate of which he was seized was one that could pass to his heirs, it was an estate of inheritance. It is to estates of this character that dower attaches. Code 1906, ch. 65, sec. 1. "The widow is dowerable of all the real estate whereof the husband, or any one to his use, at any time during the coverture, was seized of an estate of inheritance, such as that issue born of the marriage may, by possibility, inherit the same as heir to the husband, unless her right to such dower has been lawfully barred or relinquished." 2 Minor's Inst. (4th Ed.) 147. Though the estate of Peter S. Couch in the land expired when he died without leaving children, still his previous seizin of the estate of inheritance therein during the coverture is a basis of dower in his widow. "If the consort's estate expires by the regular efflux of the period originally marked out for its duration, leaving the previous seizin of the consort unimpaired, dower (and curtesy) are prolongations of the consort's estate, annexed by force of law." 2 Minor's Inst. (4th Ed.) 153. So, we must observe, Samuel Couch by his will vested such a title in his son, gave him such a seizin of the land, that dower in the son's widow was annexed thereto, by force of law, as a prolongation of the son's estate. That Peter S. Couch held a defeasible fee and that his widow is dowerable therein, unless her right has been lawfully barred or relinquished, is clear. Tomlinson v. Nickell, 24 W. Va. 148; Nickell v. Tomlinson, 27 W. Va. 697.

[3] It is, however, insisted that Samuel Couch did not intend that the widow of his son should take dower in the land. What he did intend must be determined from the will itself. The will is clear and unambiguous. We cannot change it and thereby make a new will. The testator plainly gave his son an estate in which the widow of the latter was dowerable. This imports that the testator intended her to have dower, after the son's death. He must be presumed to have known the legal consequences of his will. Whether Samuel Couch could have so devised an estate of inheritance to his son by terms of the will as to cut off right of dower therein, we need not decide. The will does not undertake to cut off dower. It does not directly affirm that the son's widow shall have no dower. Nor does it say that the two thousand dollars to be paid by Sarah F. Eastham to the son's widow shall be in lieu of dower. We cannot assume or conjecture that the testator meant that sum in place of dower when he says nothing to that effect. The plain import of the will from the terms used is that the widow of his son may take

dower and receive the two thousand dollars also. We cannot hold that the will means that Sarah F. Eastham is to have the immediate possession of all the land at the death of Peter S. Couch, for none of the terms used warrant that meaning. The will does not say that the possession of the land is to pass to Sarah F. Eastham if Peter S. Couch dies without lawful children and leaves a widow. It says the "title" to the land is "to pass to and be vested in" Sarah F. Eastham in that event. The use of these words is consistent with the right of dower claimed. "Title" does not mean "possession." Dower is mere right to possession, not title. In short, Samuel Couch gave to his son an estate in which he must have known that the son's widow could take dower, and used no words promulgating an intention contrary to her taking dower. Why he gave a dowerable estate, and why he also provided that a sum of money should be paid to the widow, is not for us to inquire. It is enough that we see that he did so by the plain language of his will. It may be that he meant to return to the widow at least a portion of the four thousand dollars paid by her husband. Relative to this same will it was held in a former case: "In the interpretation of a will, the true enquiry is, not what the testator meant to express, but what do the words used express." *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

The decree is a proper one. It will be affirmed.

(70 W. Va. 178)

STOUT v. CLIFFORD.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. WILLS (§ 614*)—CONSTRUCTION—NATURE OF ESTATE DEVISED.

The will in this case gives Sarah Clifford only an estate for life, with remainder to testator's children vesting at his death.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 614.*]

(Additional Syllabus by Editorial Staff.)

2. REMAINDERS (§ 1*)—"VESTED REMAINDERS."

"Vested remainders" are those by which a present vested interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to go to a certain person after the particular estate is spent.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7305-7307; vol. 8, pp. 7828, 7829.]

Appeal from Circuit Court, Harrison County.

Bill by Clarence P. Stout against John H. Clifford and others. Decree for plaintiff,

and John H. Clifford and certain other defendants appeal. Affirmed.

John Bassel, Sperry & Sperry, Davis & Davis, and Geo. M. Hoffheimer, for appellants. Edward G. Smith and Stephen G. Jackson, for appellee Clarence P. Stout. Philip P. Steptoe, for appellees Clifford McManaway and Angela McManaway.

BRANNON, J. James Clifford made a will reading as follows, omitting formal opening: "I will and bequeath to my wife Sarah Clifford for and during her natural life all my real estate and *personal* property and also all my notes and bonds and bank stock of every description and kind and *after my wife is death* that the property if any is left shall be divided *exactly* among the children no bond or security shall be required of executor." He died in 1892 leaving his widow, Sarah Clifford, and seven children. One of these children, Agnes, married Clarence P. Stout in 1898. Agnes Stout died intestate in 1899, leaving an infant child, Benjamin Clarence Stout, and this child died in 1900, leaving his father as his heir. Sarah Clifford, the widow of James Clifford, died in 1909. Clarence P. Stout, claiming as father and heir of his deceased infant son, Benjamin Clarence Stout, that he was entitled to one-seventh of the real estate of James Clifford, brought a suit in the circuit court of Harrison county against the children of Clifford for a partition of the real estate left by Clifford. The case resulted in a decree holding that Stout was entitled to one-seventh interest in said real estate, and that certain grandchildren of James Clifford had also shares therein in right of their dead parents, who died after the death of James Clifford, and directing a partition of said real estate. From this decree John Clifford, Sarah E. Dolan, and Anna C. Brennan appealed.

[1] What estate did the widow Sarah Clifford take under the will of James Clifford? On the answer to that question depends the decision of this case. A number of able and elaborate briefs discuss this case in many views, and cite dozens of cases from all quarters more or less bearing upon it. I shall not discuss any large fraction of them, because to do so would make an opinion prolix and confusing, and becloud rather than enlighten. To the members of this court the case has not seemed difficult. The intent of Clifford in his will must control. It has been well said that, "in disputes upon wills cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will, and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case." So said President Pendleton, in 1794, in *Shermer v. Shermer*, 1 Wash. (Va.) 266, 1 Am. Dec. 460. He added that he generally observed

that cases more frequently disappoint than illustrate the intention, and that he was free to own that, where a testator's intention was apparent to him, cases must be strong, uniform, and apply pointedly, before they would prevail to frustrate that intention.

It is claimed for the appellants that Sarah Clifford, widow of James Clifford, under his will took an estate in fee, not a mere life estate, and only those who can claim as heirs under her can take any interest, which would shut out Stout, and that the decree giving him a share is erroneous. This contention that Sarah Clifford took a fee is based on the case of *May v. Joynes*, 20 Grat. (Va.) 692, decided in 1857, and cases following it. That case involved a will by which the testator gave to his wife "my whole estate real and personal, especially all real estate I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate and to convey absolute title to the purchasers, and use the purchase money for investment or any purpose that she pleases, with only this restriction, that what ever remains at her death shall, after paying any debts she may owe, or any legacies that she may leave, to be divided as follows"—then specifying limitations to his children and grandchildren. It was held that the wife took an absolute fee, and that the limitation over of whatever remained at her death was inconsistent with such fee simple and failed. This is based on the doctrine spoken in *Burwell v. Anderson*, 3 Leigh (Va.) 348, saying that from the earliest time it was received doctrine of common law that an absolute and unqualified power of disposing, conferred by will, and not controlled or explained by any other provision, should be construed as a gift of absolute property; that the power of absolute disposition is the eminent quality of absolute property; that he who has the absolute property and that he to whom is given the absolute power over an estate acquires thereby absolute property, unless there is something in the gift which negatives and overthrows this otherwise irresistible implication.

In *Milhollen v. Rice*, 13 W. Va. 510, Judge Green said this: "It is settled that if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure—that is, to consume or spend, sell or give away, at his pleasure—such devisee or legatee has the fee-simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will, whereby what may remain of the property at the death of the devisee or legatee is given to another person." It thus appears that a material, essential element of the rule just stated is that, where a life estate is expressly given, to convert it into a fee there must be clear power of disposition given to the devisee of the life estate. Without at all assailing the rule above stated, we say that the rule does not apply in this case—does not govern this case. Why? Because Clifford's

will does not contain such clear, distinct power in Sarah Clifford to sell or dispose of the land. That is the touchstone of this case. Look at the will. It contains no express power. It does not say, as did the will in *May v. Joynes*, that Sarah Clifford should have power to sell or to will or otherwise dispose of the property. There is no such express power found in it. As Judge Poffenbarger said, in *Behrens v. Baumann*, on page 59 of 86 W. Va., on page 6 of 86 S. E., 27 L. R. A. (N. S.) 1092: "No power of disposition or consumption is expressly given her. In express terms her estate is defined as one for life." But it is said there is such power given by *implication* by the words "after my wife is *death* that the property if any is left shall be divided *equally among the children*." Upon the four words, "if any is left," rests the contention that the life estate is elevated into a fee in the wife, and denying to the children all estate, though the testator has declared that they shall have the property after their mother's death. Thus what the words of the will declare to be a life estate is made a fee simple. Thus a remainder in fee written by the will is made nothing, and this by the magic force of those four words. We would think from the will, and from the relation of father to wife and child, and from our knowledge of the love of father for his children, that the father's intent was to give the use of the property to his wife for life and remainder, after she had done with it, to the children of his loins. Our knowledge of love of father to wife and child would tell us this. We have right to place this court in the place of Clifford, having wife and children to provide for. His duty to provide for all. The will does just what we would say he would do. The will, to conform to this natural instinct of love; but the construction contended for defeats all this, forgets the children, and vests in the wife who in her old age did not need it, a large property which she might lose by mismanagement or give away to a second husband or somebody else, and leave seven children penniless. Shall we work this result by implication, a dim one at that? And this construction runs counter to a rule of law found in *Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364, holding: "The heir will not be disinherited, unless it is done by the express terms of the will or by necessary implication. The heir being favored in law, there should be no strained construction to work a disinherison, where the words of the will are ambiguous." Those four words in this will are ambiguous, entirely impotent, and inconclusive to bring about the construction sought to be given this will. Again, I say the appellants rest their case on implication from the clause above quoted, and I repeat that it is not plain enough to work this result. The words of the will, to be conformable to what we would expect from a testator situated as was Clifford, give the widow only a life estate, plain-

ly do this; yet this remainder is to be defeated by those few words. "When implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible. In construing a will, conjecture must not be taken for implication. Necessary implication means so strong a probability of intention that an intention contrary to that imputed to the testator cannot be supposed. The whole will taken together must produce the conviction, that the testator's intention was to create the estate raised by implication." *Graham v. Graham*, 23 W. Va. 37, 48 Am. Rep. 364. See *Bartlett v. Patton*, 33 W. Va. 78, 10 S. E. 21, 5 L. R. A. 523, *Coberly v. Earle*, 60 W. Va. 295, 54 S. E. 336, and *Earle v. Coberly*, 65 W. Va. 163, 64 S. E. 628. "A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in another part." *Bell v. Humphrey*, 8 W. Va. 6, 11.

It was the general intent, the dominating intent, of Clifford to give only a life estate to his wife, the remainder to his children. The case last cited, same point, says that "when the general intent of the testator is clear, and it is impracticable to give effect to all the language expressive of some particular intent, the latter must yield to the former." So, under this rule, and being ambiguous if so, those four words would have to be eliminated and the provision for life estate and remainder prevail. But we can assign those words a reasonable office. We say that they must mean that Sarah Clifford could use personal property consumable in the use, and perhaps money or securities. Such uses as a life tenant could make. *Brant v. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523. In *Behrens v. Baumann*, 66 W. Va. 56, 66 S. E. 5, 27 L. R. A. (N. S.) 1092, the meaning given to such words is that they apply to personal estate in such use of life estate as a life tenant may make of it. Thus, we assign a meaning to those words consistent with the general intent of the will, plainly expressed by it; that is, to give a life estate to the wife, the remainder to the children. In the *Behrens* Case it is held that though a clause in a will clearly expressing a particular or special intent will prevail over such general intent, doubtful expressions, merely susceptible of a meaning inconsistent therewith, will not do so. It says that, if it is done by implication, it must be so plain that the contrary cannot be supposed. Our West Virginia cases uphold this construction of this will. Take the case of *Mihollen v. Rice*, 13 W. Va. 510. The will gave the wife personal property, "to use and dispose of at her discretion during her natural life, and also to have the right of disposal at her death." It was held, because of that power of disposal and use, that she took an absolute estate, though the will declared it to be a life estate; whereas, as to the land the will said that the wife during life might use it, but had only a life estate, the court saying that,

as there was no power of disposition given the wife as to the land, she had only a life estate. Take the case of *Behrens v. Baumann*. A life estate given wife to be administered for the benefit of herself and others was not enlarged into a fee simple by the following phrase, describing the property to go over, "whatsoever may be left." The case also says that such indefinite expressions cannot be allowed the widest signification of which they are capable, if, when so read, they conflict with the general intent expressed." The general intent in the will before us is to create a life estate for a wife and the remainder to children. That is what we would call, under the case of *Morgan v. Morgan*, 60 W. Va. 327, 55 S. E. 389, the dominant intent. This purpose, the dominant or primary intent, in the language of Judge Cox, in that case, although there was language prescribing a life estate, yet as there was plain intent to give complete power of disposition to the life tenant, she was held to have a fee simple; but in our case there is no such dominant intent in favor of the widow, and the case upholds our holding. I can, and do, cite even the case which is the fulcrum for the lever with which the appellants would lift the life estate to a fee (*May v. Joynes*) to support our position. Why so? Because the reason of decision in that case lies in the very broad and strong language found in the will in that case, giving the life devisee power of sale of land and to consume or give its proceeds by will. The want of such a clear clause repelled a fee in *McDonald v. Jarvis*, 64 W. Va. 62, 60 S. E. 990, 131 Am. St. Rep. 889. That case calls for such a clause. Our case does so.

These principles close the case, and it is not necessary to notice some of the very many cases cited by counsel for appellants. *Riddick v. Cohoon*, 4 Rand. (Va.) 547. An absolute legacy, with provision that, if legatee die without issue, then all that shall be left at death, over to others. Here was an absolute gift, not for life, and under the principle that, when an absolute estate is given and one inconsistent is given, the latter is repugnant and void. So in *Elcan v. Lancasterian*, 2 Pat. & H. (Va.) 53. *Shermer v. Shermer*, 1 Wash. (Va.) 266, 1 Am. Dec. 460, goes on a clear power of disposal; intent governed. *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664; *Robertson v. Hardy*, 23 S. E. 766, 2 Va. Dec. 275; *Carr v. Effinger*, 78 Va. 197; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Hunter v. Hicks*, 109 Va. 615, 64 S. E. 988; *Hansbrough v. Trustees*, 110 Va. 15, 65 S. E. 467; *Johnson v. Smith*, 108 Va. 725, 62 S. E. 958; *Randall v. Harrison*, 109 Va. 686, 64 S. E. 992. In these cases the wills give power of sale.

We admit that some late Virginia cases say that such words as "if any is left," in the Clifford will, give a fee to the life devisee by implication. *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Rolley v. Rolley*, 109 Va. 449, 63 S. E. 988, 21 L. R. A. (N. S.) 64. We regard them unsound, and cannot follow them.

Under decisions in almost all other states, and in the United States Supreme Court, even such words of power of disposal as in *May v. Joynes* give only a life estate. *Brant v. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927. If their rule is followed, of course, the widow in our case took only a life estate. *Brown v. Strother*, 102 Va. 145, 47 S. E. 238. No life estate, and court said legatee had power of disposal.

Some of the children died before their mother died, and to exclude them it is argued that even if we say that Clifford's will gives the widow only a life estate, with remainder to the children, that remainder would not vest until the death of the widow, and thus only those children then living would take. We do not accede to this position. The law favors the vesting of estates. *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705. That case would vest the remainder at testator's death. When Clifford said that upon his wife's death his estate should go to his children, did he not mean to at once give them an estate awaiting for possession and enjoyment only the end of the life estate? Why shall we say he intended to vest not until then? What purpose would he have for such postponement?

[2] "Vested remainders" are those by which a present vested interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to go to a certain person after the particular estate is spent. 11 Va. & W. Va. Encyclopedia Digest, 817. "The true criterion of a vested remainder is the existence in an ascertained person of a present fixed right of future enjoyment." 24 Am. & Eng. Ency. Law, 389. There stood Clifford's children ready to take possession on their mother's death. The case of *Diehl v. Cotts*, 48 W. Va. 255, 37 S. E. 546, will sustain this holding.

Thus we hold that Clifford's will gives his widow only a life estate, with remainder to his children, vested at his death, and affirm the decree.

NOTE.—Some time after the foregoing decision my attention is called to the case of *Herring v. Williams* (N. C.) 73 S. E. 218, where is found a full discussion of the construction of the will like the one in our case. It will decidedly sustain our holding. The first decision was the other way; but on rehearing it was reversed.

(69 W. Va. 621)

MYLIUS v. KOONTZ et al.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

ESTOPPEL (§ 52*)—By CONDUOT.

The principles of estoppel enunciated in *Railroad Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878, *Williamson v. Jones*, 39 W. Va. 231,

19 S. E. 436, 25 L. R. A. 222, 1d., 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, 4 Am. & Eng. Dec. in Eq. 258, 871, and note, *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788, *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536, and *Pomeroy Eq. Jur. § 807*, applied to the facts in this case.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 121-127; Dec. Dig. § 52.*]

Appeal from Circuit Court, Randolph County.

Bill by Charles E. Mylius against Jacob Koontz and others. Decree for plaintiff, and defendants appeal. Reversed, and bill dismissed.

C. H. Scott, H. G. Kump, S. T. Spears, and Mollohan, McClintic & Mathews, for appellants. W. B. Maxwell, for appellee.

MILLER, J. The injunction, which the court below, by its final decree, of August 5, 1909, refused to dissolve, in accordance with the prayer of the bill, enjoined defendants, Jacob Koontz, E. F. Phillips and John Stamm, their servants, agents and employees, from severing and removing any timber whatever from either lots number 14, 15 and 21, and especially from number 14 and 15, of the subdivision of the Phillips and Law survey, of nineteen thousand acres, as platted by David Goff, commissioner of forfeited and delinquent lands for Randolph County, in 1840.

The plaintiff's claim of title to these lands, particularly to lots 14 and 15, is the same as that relied on by him in *Mylius v. Raine-Andrew Lumber Company*, an action for damages for cutting timber, in which the judgment below in his favor was reversed by this court, and the case remanded for a new trial. — W. Va. —, 71 S. E. 404.

The defendants, Koontz, Phillips and Stamm, claim title to 411.8 acres, part of the land in controversy, by deed from their co-defendant, Thomas J. Arnold, and Eugenia H., his wife, dated November 12, 1906. Their title to the four other tracts involved they derived as follows; a half undivided interest therein, by deed from said Thomas J. Arnold and wife, and Elizabeth E. Arnold, executrix, etc., dated November 14, 1906; the other undivided half interest therein, they obtained from Charles R. Durbin and wife, by deed dated November 27, 1906. The object of the bill is not to try the legal title to these lands, but to maintain a status quo, until the legal title can be adjudicated in a suit in ejectment which the bill alleges plaintiff has brought and has pending against defendants.

As we view the case presented by the pleadings and proofs, it is wholly unnecessary to enter upon any consideration of the conflicting legal titles to these lands. The decree appealed from, though modifying the injunction in certain particulars, not necessary to notice, in effect, overrules the motion of defendants to dissolve the injunction as

modified. This, then, is simply an appeal from an order refusing to dissolve the injunction. The decree in terms specifically provides that: "Nothing in this order shall be construed as settling the rights of the parties as to matters in controversy relative to lots No. 14, No. 15 or No. 21, but all rights of the parties relative to said lots are reserved for the future order of the court."

The real and only question presented for decision, therefore, is not whether the plaintiff, as against Thomas J. Arnold, has the better legal title to the lands in controversy, but whether, as defendants allege in their answers, he is stopped by his contract, or his conduct, or by both, from denying their title to these lands, and from intervening by injunction to stop them from cutting the timber thereon.

The facts pleaded by respondents are not denied, but admitted by plaintiff; that in the spring of 1907, some months after Koontz, Phillips and Stamm had obtained their deeds for these lands, and had begun building their mills and houses, preparatory to cutting the timber, Mylius notified them of his claim, and not to cut or remove the timber. This interference of Mylius was at once brought to the attention of Arnold, who a day or two afterwards met Mylius in the law office of Arnold's son at Elkins, Stamm being present, where Mylius and Arnold, as they both admit, verbally agreed on a settlement of their differences, as Arnold claims, on the terms of a prior agreement in writing between them, made in 1904. Stamm, though present, or nearby, claims not to have heard the full terms of this agreement; but he says, as both Mylius and Arnold admit, that they then notified him that they had settled, and that he and his co-partners were free to go ahead with their operations. Arnold's testimony in reference to this agreement in substance is, that Mylius and he had a previous written agreement about this 411.8 acres, and that he supposed it was settled; that when Mylius made objection to the operations of Koontz, Phillips and Stamm they came to him about it, and that he and Mylius talked the matter over again and had a further understanding, satisfactory to him, namely, using his language, that "in event any of this land was determined to be his, I was to pay Mr. Mylius the price per acre for that that was uncut, and for that part of the land that Mr. Mylius had cut over, I was to give him other land of equal value in place of it. That was about the agreement between us, and that's what they came to see me about. The agreement was satisfactory between Mr. Mylius and myself."

The agreement in writing of 1904, referred to by the witness and exhibited with his evidence provides, in substance, that if in the suits of Arnold against the Raine-Andrew Lumber Co., and Mylius against the same company it should be found that the

northern line of lot No. 14, of the Phillips and Law survey, is the same as what is known as the Kupfer line; or wherever the northern line of said lot No. 14, and the northeastern corner of lot No. 15, should be located in said suits, then, in consideration of one dollar, in hand paid, and the covenants thereafter set forth, Mylius agreed to release to Arnold all his claim to the land north of the Kupfer line, and east of three beeches, or east of wherever said corner of lot No. 15, might be located, and north of a line extending from where said corner might be located by said suits, south 76° east, with variation south 73° east; also to the owners of lot No. 21 of said survey, his claim, as owner of said lot No. 15, to all that portion thereof north of a line run north 76°, with variation 73° west, from said three beeches, or wherever said northeastern corner of said lot might be located by said suits, to the intersection of a line run from two hemlocks and a service, north 14° east, with variation north 17° east. And in consideration of the premises, and the sum of one dollar by Mylius to Arnold in hand paid, Arnold thereby agreed to release to Mylius all his right, title and interest acquired by deed from Yocum, commissioner, to 848 acres, a portion of lot No. 22 of said survey, south of a said line run from the northeastern corner of said lot No. 15 (three beeches as claimed by said Raine), or from wherever said corner might be established by said suits, S. 76° east, with variation south 73° east; and also to release to Mylius his interest in lot No. 21, the Hare lot, south of a line run from said three beeches, or from wherever said northeastern corner of lot No. 15 should be located and established by said suits, north 76° west, with variation north 73° west, to the intersection of a line run from said southwest corner of lot No. 15, north 14° east, with variation north 17° east. By the last paragraph thereof it is said that this agreement is to obviate any further difficulties which may arise between the parties, as to where the line between said lots may be, and to thus locate and determine them, as they may be located in said suits.

That this written agreement is in full force and binding on the parties is not seriously controverted. It is charged by Arnold in a general way, that Mylius has violated the terms of the agreement, but we do not understand Arnold to claim that the agreement is thereby abrogated or nullified.

As we interpret the evidence of Arnold, relating to the verbal agreement, we understand him to say, not, as might be inferred from his language perhaps, that this agreement was on the same terms as the written one, but that the terms of the written agreement were again talked over and were satisfactory to both parties, and that because of the controversy with Koontz, Phillips and Stamm, the written agreement was sup-

plemented by the verbal agreement, providing, how, as already recited, the parties should account to each other for the land in the events contemplated by the written contract.

Both Arnold and Mylius agree, moreover, that in concluding this verbal agreement they notified Stamm, for Koontz, Phillips and Stamm, that they had settled their differences, and that they, Koontz, Phillips and Stamm were free to go on with their contract, and cut the timber, unaffected by the claims of Mylius. Mylius concedes, also, as testified by Stamm, that he confirmed the agreement afterwards in subsequent conversations, and that it was not until about the time of the bringing of this suit and obtaining the injunction in March, 1909, nearly two years intervening, and after said firm had completed the building of its mills and houses, and made contracts for lumber to be cut, rendering them liable for damages, and had paid all, or nearly all, the purchase money for the land, that Mylius set up a contrary claim.

These facts are pleaded and proven by appellants, Koontz, Phillips and Stamm, in estoppel of Mylius' right to maintain and prosecute the present suit against them. The question before us then, is, do these facts constitute a good defense? We are of opinion that they do, and that as to said firm, the injunction should have been wholly dissolved, and the bill dismissed. We reach this conclusion readily on the legal principles enunciated and elaborated by this court in *Norfolk & Western R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Id.*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, 4 Am. & Eng. Dec. in Eq. 258, 371, and note; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Pomeroy*, Eq. Jur. section 807.

It is objected by Mylius to this defense, that Stamm was present and knew that the contract, then verbal, was to be reduced to writing on the back of the agreement of 1904, and that being a contract relating to land, he was charged with knowledge of the law, that it was not enforceable, and not binding on the parties until reduced to writing.

The answer to this contention is that Koontz, Phillips and Stamm are not seeking in this suit enforcement of the contract between Arnold and Mylius, and no one, not even Arnold, has pleaded the statute of frauds. The statute of frauds, to be available, must be pleaded. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998; *Howell v. Harvey*, 65 W. Va. 310, 64 S. E. 249, 22

L. R. A. (N. S.) 1077; 20 Cyc. 311, 312, and notes.

It is conceded on all hands that Arnold and Mylius made an agreement, and notified Stamm for his firm that they had settled their differences, and to go on with their timber operations. This agreement was reaffirmed afterward by Mylius, who stood by for nearly two years, knowing that that firm was relying on those representations, and were continually changing their condition for the worse before, by this suit, he again set up, against them, his claim of title to these lands. The authorities already cited, and many others in Virginia and in this state concur in holding the general proposition, applicable here, that "Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to him, to the prejudice of the other party." See 5 Ency. Dig. Va. & W. Va. Reports, 230 et seq. Equitable estoppel under such circumstances will operate to vest or divest the title to real estate, in spite of the statute of frauds. See note to *Williamson v. Jones*, 4 Am. & Eng. Dec. in Eq. 258, 371.

Our opinion is that as to Koontz, Phillips and Stamm, the decree below should be reversed, the injunction wholly dissolved and the bill dismissed, and it will be so ordered.

(40 W. Va. 189)

VARNEY & EVANS v. HUTCHINSON LUMBER & MFG. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 406*)—POWERS AND LIABILITIES—REPRESENTATION BY OFFICERS—AUTHORITY OF PRESIDENT.

The president of a corporation has no inherent power to make contracts on its behalf.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1612; Dec. Dig. § 406.*]

2. CORPORATIONS (§ 410*)—POWERS AND LIABILITIES—REPRESENTATION BY OFFICERS—AUTHORITY OF PRESIDENT.

Authority in the president of a corporation, engaged in the manufacture and sale of lumber, to purchase expensive machinery for use in its business cannot be inferred from his management and control of its ordinary business.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1629-1632; Dec. Dig. § 410.*]

3. CORPORATIONS (§ 432*)—POWERS AND LIABILITIES—REPRESENTATION BY OFFICERS—EVIDENCE.

The authority of the president of a corporation to make a certain contract on its behalf being in issue in a trial, it is error to

exclude his offered testimony denying such authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1733; Dec. Dig. § 432.*]

4. CORPORATIONS (§ 432*)—POWERS AND LIABILITIES—REPRESENTATION BY OFFICERS—EVIDENCE.

Evidence of management of the ordinary business of a corporation, engaged in the manufacture and sale of lumber, by its president is insufficient to sustain a verdict against it for purchase money of expensive machinery for use in its business, on the theory of a contract made by the president, in the absence of evidence of ratification of the alleged contract by the defendant or reception of the benefit of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1737; Dec. Dig. § 432.*]

Error to Circuit Court, Mingo County.

Action by S. M. Varney and another, partners under the firm name of Varney & Evans, against the Hutchinson Lumber & Manufacturing Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded for new trial.

Wyatt & Graham and Sheppard, Goodykootz & Scherr, for plaintiff in error. Stokes & Bronson, for defendants in error.

POFFENBARGER, J. After this case was remanded to the circuit court of Mingo county, in obedience to the decision of this court, as reported in 64 W. Va. 417, 63 S. E. 203, a trial was had which resulted in a verdict for the plaintiffs for the sum of \$1,230, a portion of which was released to prevent the court from setting it aside, and judgment was rendered for the residue thereof, \$558.40.

Insufficiency of the evidence to sustain the verdict and the exclusion of certain testimony are the only assignments of error we deem it necessary to pass upon. The defendant is a corporation, and the verbal contract sued upon is alleged to have been made with its president. This was a contract for the purchase of a portable engine and a sawmill at the price of \$1,230. As stated in the evidence for the plaintiff, it was very informal, and whether it was made or not seems to depend largely upon the credibility of two men, the agent of the alleged vendors and the president of the defendant company, who explicitly denies the purchase and almost every fact and circumstance relied upon as indicating it. There was no proof of any express authority in the president of the corporation to make the purchase, and no conduct on his part, or on the part of the corporation, tending to show such authority is in evidence, except his alleged purchase of the engine and sawmill, and his admission that he had charge of the business of his company, "to a certain extent," in Mingo county, and of its "operation" in a certain place, "so far as the manufacture was concerned, and shipments, etc." The court re-

fused to allow the defendant to prove by him that his company had not in any way authorized him to purchase this property. It is also conclusively shown that the company never accepted the property, nor had it in its possession at any time.

The defendant was not a dealer in engines and sawmills. It was engaged in the lumber business. Though machinery of the kind alleged to have been sold may have been owned and used by it, its general purpose was not the purchase of such machinery for resale. In other words, it was not a dealer in machinery. The disposition of the two assignments of error, therefore, must depend largely upon the legal inquiry as to whether the president of such a corporation has inherent authority to purchase expensive machinery to be used by it in its business, or to constitute what may be called its plant or a substantial part thereof.

[1] Of the power of the president of a corporation, Cook on Corporations, at section 716, says: "His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize. This is a rule established by the great weight of authority. The board of directors may, of course, expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director." Morawetz on Corporations, at sections 537, 538, substantially agrees with Cook's statement of the law. It says: "The implied powers of the president of a corporation depend upon the nature of the company's business and the measure of authority delegated to him by the board of directors. It seems that a president has no greater powers, by virtue of his office merely, than any other director of the company, except that he is the presiding officer at the meetings of the board."

* * * However, the presidents of corporations, by general custom, exercise much wider powers than those accorded to them by the authorities cited in the preceding section; and this custom has been judicially recognized." The power exercised by general custom, judicially recognized, has its limitations, however, as shown by the authorities cited in support of the text. Cook, at section 716 of his work, also refers to it in these terms: "The fact, however, that he is almost always the corporate officer who is directed to sign the corporate contracts that have been authorized by the board of directors has led to an enlargement of his

importance as a corporate officer. Hence the rule has arisen in New York that a contract, which apparently is a corporate contract, being signed by the president, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation." He then shows that a few courts have gone further. Proceeding, Morawetz says, at section 538: "There can be no doubt that the board of directors may invest the president with authority to act as chief executive officer of the company. This may be done, either by an express resolution, or by acquiescence, in a course of dealing. A person dealing with the president of a corporation in the usual manner, and within the powers which the president has been accustomed to exercise without the dissent of the directors, would be entitled to assume that the president had actually been invested with those powers." A few cases may go beyond this doctrine, but it undoubtedly states the limits of the powers of the president of a corporation as recognized generally throughout the country. It accords with the principles declared and applied by this court. *Bank v. Kimberlands*, 16 W. Va. 555; *Bank v. Manufacturing Co.*, 56 W. Va. 446, 49 S. E. 544; *Thompson v. Manufacturing Co.*, 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311.

[3] The admissions of the president as a witness in the case show conduct or a course of dealing indicating some authority in him to represent his company. To anticipate such evidence and show he had no authority to purchase this property, he offered to testify that his company had not conferred it upon him. The extent of his authority was a fact for the jury, unless it was so plainly established by the evidence that the court could declare it as matter of law. As his admissions were obviously not conclusive, and there was no other evidence tending to show his authority, the question was one for jury determination, upon which the court should have admitted all relevant and material evidence offered. Hence we think the rejection of the offered testimony to prove want of authority was plainly erroneous.

[2, 4] Moreover, we are of the opinion that the evidence relied upon to prove authority to make the contract is wholly insufficient. As we have said, the corporation was not a dealer in machinery. Authority in the president to buy it could not be inferred from his management of the company's business, if his admissions can be regarded as sufficient to prove his character as manager. There is no proof of any course of dealing sufficient to justify such an inference. It does not appear that he had ever before bought, for or on behalf of his company, an engine or sawmill, or any other machinery, appar-

ently designed for use as a part of its plant. All that he said is that he has, or had had, charge of its business in Mingo county "to a certain extent," and charge of a certain "operation" in that county. There is no evidence of any established course of business, or conduct on the part of the president, relating to transactions of the kind involved here, and acquiescence of the company therein, nor of ratification of the alleged contract, nor of the reception of benefit thereof in any sense or degree. The company never accepted the property, or any part of it. Hence the court should have directed a verdict for the defendant as requested, and, not having done so, should have sustained the motion to set aside the verdict.

The erroneous judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(89 W. Va. 606)

WHITE v. TOWN OF ROMNEY et al.

(Supreme Court of Appeals of West Virginia.
Oct. 24, 1911.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 9*)—AUTHORITY TO EXERCISE POWER—WATER SUPPLY.

A municipal corporation, when necessary to do so to obtain a water supply for the use of the town or city, may condemn land, though situated outside the corporate limits.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*] Poffenbarger, J., dissenting.

Petition of John Baker White for a writ of prohibition against R. W. Dailey, Judge, and the Town of Romney. Writ denied.

J. E. Chilton and John Baker White, for petitioner. J. S. Zimmerman and J. Sloan Kuykendall, for respondent Town of Romney.

BRANNON, J. The town of Romney is a municipal corporation holding its charter under chapter 47 of the Code. In June, 1911, the town filed in the circuit court of Hampshire county a petition seeking to condemn a small parcel of land having upon it a spring of water, for the purpose of supplying the town with an adequate supply of water for the public use, which land is the property of John Baker White. The said White seeks a writ of prohibition from this court to prohibit the said circuit court and town of Romney from entertaining and prosecuting the said condemnation proceeding. The ground on which White rests his claim for the prohibition is that, as the land to be condemned lies outside the corporate limits of the town, therefore the town has no power or right to condemn the land. He claims that, whilst the town can construct and operate water-works within its limits, it cannot condemn land outside the corporate limits for supply

of water. He cites the case of *City of Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336, and other cases, holding that: "A municipal corporation can exercise the following powers and no others: First, those granted by express words in its charter or the general statute under which it is incorporated; second, those necessarily or fairly implied in or incident to the powers thus expressly granted; and, third, those essential to the declared purpose of the corporation, not simply convenient, but indispensable." White claims that no statute gives the town power to go outside its limits to thus acquire land for water purposes.

The Code, in chapter 47, § 14, says that the mayor, recorder, and councilmen of a city, town or village shall be a body politic and corporate and have perpetual succession, sue and be sued, "purchase and hold real estate necessary to enable them the better to discharge their duties, and needful for the good order, government and welfare of said city, town or village." Section 28 says: "The council of such city, town or village shall have plenary power and authority therein * * * to erect or authorize or prohibit the erection of gas works, electric works or water works in the city, town or village." White lays special emphasis upon the presence of the word "therein" and the words "in the city, town or village" found in section 28. He says those words show an intent on the part of the Legislature to limit waterworks and all their appliances to the town boundary. We do not think that such was the intent of the use of those words. They were used merely as descriptive of the territory of operation of waterworks. It cannot be possible that those words were meant to prohibit a town or city, when necessary, to go outside its limits to get a necessary supply of water; they were intended as descriptive of the use or purpose of the waterworks. Thus we see from those sections that a town is a corporation given power to establish waterworks and to acquire real estate necessary to enable it to discharge their functions and needful for the welfare of the town. Can we not say that land is highly necessary for the construction of waterworks? Can we not say that land for waterworks is necessary for the welfare of a town? Thus the town has power to acquire land for such purposes by purchase by the letter of section 14. The Legislature has there declared that land is needful for a town in some cases where necessary to perform its functions. A town may so acquire by purchase.

It may acquire land by condemnation. Chapter 13, Acts of the Extraordinary Session of the Legislature of 1907 (Code Supplement of 1909, c. 42, § 2, cl. 8), amending chapter 42 of the Code, in section 2, cl. 8, says that land may be condemned "by any city, town or village or company, now incorporated or hereafter incorporated for the purpose of establishing waterworks for the public use,

to acquire any land necessary for the construction of reservoirs, dams, cisterns, and other waterworks which may be necessary for its purposes and land and right of way for pipes, conduits for the conveyance of water and so much water from any springs, rivers and creeks as may be necessary for its purposes." Here is a very broad, wide power of condemnation given municipal corporations for water purposes. It contains no language limiting the power of condemnation to lands within the municipal limits. It says "any land," "any springs, rivers and creeks." It gives right to condemn lands necessary for waterworks purposes without any limitation to municipal limits. We may reasonably say that, if such a restraint on the power of the town was intended, it would be found in the statute. We know that a supply of water for a town or city is highly useful, and essential, in many instances indispensable. The Legislature knew that in many instances it would be impossible to secure a sufficient supply of water within the municipal limits. It knew that in many of the towns and cities of the state water is obtained from beyond their boundaries. It intended to confer this indispensable power without restraint to the corporate limits. In most cases the power of condemnation, if so limited, would be worthless. It does seem unreasonable to say that these statutes taken together must be construed to limit the power of the municipality in the maintenance of waterworks to the municipal boundary. We have to insert such a limitation into the statute by judicial construction, and that too against public utility, and thus cramp the powers of municipalities in the discharge of essential functions. Such a construction would be against public policy. It would be ruinous to towns and cities. In 28 Cyc. 605, we find it stated that as a rule municipal corporations may not acquire property without their limits, but that "the Legislature, however, may confer such power, either in express terms or by necessary implication; and there are cases in which, without any special grant of such power, it has been implied as necessary to carry out powers granted." A number of cases are cited for this proposition. *Keller v. Riverton*, 161 Pa. 422, 29 Atl. 82, so holds. Our Legislature gives the towns power to have waterworks, and the power can be implied to get water beyond their limits. We find it stated in 28 Cyc. 954, that, "although a municipality has usually no authority outside its limits, yet authority to act beyond its bounds is sometimes implied on ground of special necessity." In 28 Cyc. 917, it is laid down that, if a municipal corporation is "authorized to construct such a system, they have implied authority, when necessary, to go beyond their limit and acquire property to obtain an outlet so as to make it effective." This relates to sewerage. Why is not the same power implied for waterworks?

It is abundantly established, and indeed virtually conceded in the brief for White, that a city or town may extend its sewer outlet beyond its limits. Elliott on Roads and Streets, in the last edition, section 559, says: "The right to provide for the drainage of streets and to construct and repair sewers is generally granted to cities in express terms by their charters or by the statute governing their incorporation; but, without any express grant of such authority, the right to exercise it is regarded as incident to the general power to maintain and control streets. The authority of the municipality as to such matters may extend even beyond the city limits; and, unless prohibited by charter or statute, the city has inherent power to contract for and construct works beyond the corporate limits for the discharge of sewage where the same is necessary." In the case of the City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877, it is held that a municipal corporation may maintain necessary sewers outside its bounds as incident to its general powers to maintain and control its streets, without any express grant of authority for that purpose. This is sustained by much authority as to sewerage. McQuillin, Municipal Ordinances, § 513. See Langely v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 134, holding this power in municipalities, and citing many authorities in its support, including the leading case of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601. I quote the following from 10 A. & E. Ency. of Law, 238: "The authority vested in a municipal corporation to construct sewers carries with it all subsidiary power necessary to make it effective, and hence if, in the construction of sewers, it becomes necessary to make use of private property, the municipality has an implied power to acquire such property by lawful means." This would include similar power as to waterworks. The power to have sewer outlets, pesthouses, and cemeteries is unquestionable and comes from necessity for the public weal. Why not as to waterworks? Water is essential and indispensable for the comfort and health of the people of the town, necessary in draining streets, for household purposes, for carrying off sewerage. Sewers cannot be operated without water. Why does not necessity give to towns an implied power to seek a source of supply outside of town by fair implication? For myself I would not appeal to power by implication, because I think our statute of 1907, giving broad power of condemnation, without limitation to town boundary, may be said to be an express grant of power to condemn for water supply outside the town. But if wrong in this, I do assert such power by implication. Here is a town given power to maintain waterworks and the power of condemnation for waterworks, and when it is necessary it has implied power to get water

outside its limits. The authority cited for White—*Charleston v. Reed*, and many other cases—lays down the legal proposition that towns have powers "necessarily or fairly implied in or incident to expressly granted powers and those essential to the declared purpose of the corporation." *Christie v. Malden*, 23 W. Va. 667; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774, and other cases. When, under such authority, it is necessary for a town to go outside its limits for water, it has the clear implied power to do so to carry out the duties imposed upon it.

We therefore discharge the rule and refuse the writ of prohibition.

POFFENBARGER, J., dissents.

(70 W. Va. 104)

TRIUMPH ELECTRIC CO. v. EMPIRE FURNITURE CO.

(Supreme Court of Appeals of West Virginia.
Dec. 19, 1911.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§§ 130, 138*)—PROPERTY SUBJECT—RECORDING ACTS.

A deed of trust upon personal property, to be acquired by the grantor after the delivery of the trust deed, does not pass the legal title to the property, but creates an equitable lien in favor of the creditor, and is protected, by section 3 of chapter 74 of the Code, against an unrecorded reservation of title to such after-acquired property in favor of the vendor in the sale to the grantor in the deed of trust.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 217, 223-236; Dec. Dig. §§ 130, 138.*]

2. CHATTEL MORTGAGES (§ 18*)—PROPERTY SUBJECT—AFTER-ACQUIRED PROPERTY.

Such a deed of trust is a contract to give a lien on the property when acquired, which a court of equity will enforce.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 61-66; Dec. Dig. § 18.*]

3. JUDICIAL SALES (§ 50*)—TITLE AND RIGHTS OF PURCHASER.

A sale of such property under a decree in an equity suit, to which the vendor is not a party, to have the deed of trust declared fraudulent or preferential in violation of the statute against preferences, passes to the purchaser the superior right of the trust deed creditors.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 90-96; Dec. Dig. § 50.*]

4. CHATTEL MORTGAGES (§ 138*)—PRIORITY OF LIEN—CONDITIONAL SALES—RECORDING ACTS—"PURCHASER."

Such a creditor is regarded in equity as a "purchaser," within the meaning of the recording statutes, and the decree of sale, treating the equitable lien as having been perfected in equity by specific execution of the contract to give a lien, evidenced by the deed of trust, passes the legal title to the property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 138.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5858-5860; vol. 8, p. 7775.]

Error to Circuit Court, Cabell County.

Action by the Triumph Electric Company against the Empire Furniture Company.

Judgment for plaintiff, and defendant brings error. Reversed and rendered.

Williams, Scott & Lovett, for plaintiff in error. Campbell, Brown & Davis, for defendant in error.

POFFENBARGER, J. This case presents a question of title to personal property; the plaintiff claiming under a reservation thereof in a contract of sale, and the defendant under a purchase at a judicial sale, founded upon the theory of a lien upon the property by a deed of trust, subsequent in date to the contract reserving title. To a judgment in favor of the plaintiff, the defendant has obtained a writ of error.

From an agreed statement, made part of the record, the following material facts are obtained: On the 16th day of October, 1907, the Probst Furniture Company executed a deed of trust to E. E. Williams and H. T. Lovett, trustees, to secure the payment of certain negotiable promissory notes in favor of Geo. N. Biggs and others. It conveyed all the property then owned by the company and such property as it should thereafter acquire and install or place in, upon, or about the real estate, buildings, structures, and appliances of the grantor, and was recorded on the day of execution thereof. On the 14th day of October, the grantor in that deed of trust purchased from the Triumph Electric Company, another corporation, an electric belted generator and a belted vertical engine for the sum of \$498, of which \$98 was paid in cash. Three notes were executed for the balance, payable in 30, 60, and 90 days, and, as stated, there was a reservation of title to the property, by a written contract of sale, until payment of the notes. This contract gave the vendor the right, in the case of default in payment thereof at maturity, to repossess itself of the property and take possession of it wherever found. About one month after the purchase of this property, delivery thereof was made, and it was installed in the plant of the purchaser. The contract reserving title was not recorded until the 15th day of April, 1908, about five months after delivery of the property. In April, 1908, a suit was instituted against the Probst Furniture Company to have the deed of trust in favor of Biggs and others declared fraudulent and preferential, and incidentally to have a receiver appointed, and, on April 27, 1908, Rufus Switzer and Paul W. Scott were appointed special receivers, and took charge of the property. On the 18th day of July, 1908, an order was entered in that suit for the sale of all of the property of the Probst Furniture Company, and such sale was made on the 7th day of October, 1908; C. R. Comer, trustee, becoming the purchaser. Comer was personally notified, at the time of the sale, of the plaintiff's claim of title and its intention to demand the possession of the property.

Later he conveyed the machines here in controversy to the Empire Furniture Company, the defendant, in whose possession they were at the date of the institution of this action. It is admitted that the balance of \$400 due on the purchase money has not been paid, and also that the notes secured by the deed of trust were assigned to Comer, trustee, and by him to the Empire Furniture Company, prior to the institution of this action.

Had the Probst Furniture Company been the owner of the machines at the date of the execution of the deed of trust, superior title in the defendant would be clear, since it is a purchaser under a decree, ordering a sale of the property to satisfy liens. But it is rightly contended that the instrument created no legal lien upon the machines, since the grantor therein did not then own the property. It can be regarded as having done no more than create an agreement to give a lien upon that property to secure a debt. Such an agreement constitutes an equitable lien, but not a legal one. Upon these settled propositions, the defendant in error relies in support of its claim that the purchaser under the deed of trust obtained no right that a court of law can recognize or respect.

[1] That a mortgage or deed of trust upon personal property, to be obtained by the grantor after the execution thereof, passes no legal title is well settled. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869; *Jones, Chat. Mort.* § 138; 5 A. & E. Enc. L. 979. That it gives an equitable lien is equally well settled. *Horner-Gaylord Co. v. Fawcett*, supra; *Jones, Chat. Mort.* § 170; 5 A. & E. Enc. L. 982. This principle agrees with the interpretation and effect of imperfect mortgages and deeds of trust upon real estate. A defective deed of trust on land is good as against creditors and subsequent purchasers (*Atkinson v. Miller*, 84 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544), since it is justly regarded as a recordable contract to give a lien, and equity treats that as done which ought to have been done. Assuming these two machines to have remained personal property, agreeably to the contention of the defendant in error, and the deed of trust, in so far as it relates to them, to be unrecordable, the result must be the same, by force of section 3 of chapter 74 of the Code, making the buyer of personal property in possession thereof the owner for the protection of the rights of his creditors and subsequent purchasers from him without notice. As to them, the unrecorded reservation is nullified by the statute, and, though the deed of trust did not pass legal title to the trustee, nor make the cestui que trust legally a creditor or purchaser, the latter nevertheless acquired an equitable interest therein.

[2] Treated as a contract to give a lien, the instrument conferred a right in equity to charge the property with the debt, which

the statute protected against the unrecorded reservation of title, just as the recordation of the defective deed on real estate saved the benefit of the contract in *Atkinson v. Miller*. The two species of property differ. To ascertain who is the owner of real estate, we must ordinarily go to the record; but to ascertain the ownership of personal property we look to the possession, unless there is a recorded reservation of title. When these machines came into the possession of the buyer, they at once became subject, in the view of a court of equity, to the operation of the deed of trust, and such court necessarily had the power to protect and vindicate the equitable right. The situation, relation, and effect were analogous to those in *Huffard v. Akers*, 52 W. Va. 21, 43 S. E. 124, in which an unrecorded reservation of title was postponed to the statutory lien for rent. Differing only in respect to the character of the lien, one being legal and the other equitable, the result must be the same, else a court of equity is powerless to enforce a right it recognizes. Besides, a mere equitable mortgage prevailed over creditors in *Atkinson v. Miller*, cited.

This conclusion harmonizes with the great weight of authority in this country, as will be seen by reference to *Jones, Chat. Mort.* § 173. Judge Story first elucidated and applied the principle in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, and it has since been adopted in most of the states. In Massachusetts, a contrary rule was applied in *Moody v. Wright*, 13 Metc. (54 Mass.) 17, 46 Am. Dec. 706, but now mortgages of personal property to be acquired in the future are, in that state, upheld against creditors of the mortgagor. *Bennett v. Bailey*, 150 Mass. 257, 22 N. E. 916; *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 969. In England, Lord Campbell held the right of an execution creditor superior to that of the mortgagee of after-acquired personal property, in *Holroyd v. Marshall*, 2 De G. F. & J. 596; but, in this, he was reversed by the House of Lords in 10 H. L. Cas. 191 (1862). In that case the doctrine was limited to property in respect to which courts of equity will specifically enforce contracts; but the American cases do not seem so to limit the application of the principle, and we perceive no basis for such a limitation, since there is no legal remedy by which the right can be enforced. The contract gives a mere equitable lien, enforceable only in a court of equity. It gives right to charge certain property with a debt, and that confers equity jurisdiction, founded upon lack or inadequacy of legal remedies.

The argument for defendant in error denies to the person for whose benefit the trust deed was made the status of purchaser or creditor, and the authorities here cited

show this position to be true in a legal sense; but equity nevertheless accords him a right, and protects it. That right is described as an equitable lien, and remains so until it has been enforced; but it arises out of a legal agreement to give a lien. Since equity regards that as done which the party executing the contract was bound to do or ought to have done, the beneficiary is, no doubt, considered a purchaser. The decree treats him as having the status of a creditor secured by a valid deed of trust, who is a purchaser, within the meaning of the registry statutes. His right is of the same nature as that of an equitable mortgagee of real estate, who is regarded as a purchaser.

If the two machines, by annexation to the real estate, became part thereof, the right of the plaintiff in error is much clearer, for equity jurisdiction specifically to enforce contracts for rights in real estate is undoubted; but, as we think equity had jurisdiction to charge them as personal property, we deem it unnecessary to say whether they became real property.

[3,4] The purchaser at the judicial sale obtained this superior right of the creditor in the deed of trust. Hence he was not bound nor affected by either actual or constructive notice. The defendant in error waived or lost what would have been a superior right by its failure to record the contract. As it was not a party to the suit in equity, nor under any duty to go into that suit for adjudication of its claim, the question of title here depends, not upon the adjudication therein, as one against the defendant in error, except in so far as the decree became the basis of the transfer to the purchaser of a superior contractual right. Nor is the date of the institution of the equity suit, nor the stage of the proceedings at which the sale was ordered therein, nor the conditions under which it was ordered, material. If the property was sold to satisfy the equitable lien created by the deed of trust, the decree passed to the purchaser the superior right of the creditor, as perfected by the decree. If the bill to impeach the deed of trust for fraud was sustained, it avoided that instrument in favor of such parties only as attacked it upon the ground of fraud, and the plaintiff here was not one of them. If the deed of trust was adjudged to have created a preference in violation of the statute, that adjudication treated it as having been executed for the benefit of all the creditors. It was not, in any event, declared wholly void, so as to let in the reservation of title relied upon here.

For these reasons, the judgment complained of will be reversed, and judgment rendered here for the defendant, with costs in the court below, as in a case upon a demurrer to evidence.

(69 W. Va. 734)

FRANTZ et al. v. WYOMING COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1911.)

*(Syllabus by the Court.)***1. MANDAMUS (§ 23*)—PERSONS ENTITLED TO RELIEF—INTEREST IN SUBJECT-MATTER—CITIZENS OR TAXPAYERS.**

A citizen, taxpayer, or voter in any proper case may maintain mandamus to compel a public tribunal to perform a ministerial duty, imposed upon it by law in favor of the public without showing any special or pecuniary interest in the performance thereof.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 56; Dec. Dig. § 23.*]

2. MANDAMUS (§ 23*)—PERSONS ENTITLED TO RELIEF—PETITIONERS.

If such duty arises upon the filing of a petition bearing the signatures of a large number of persons, and performance is refused, mandamus lies, at the instance of one or more of such petitioners, to compel performance.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 55; Dec. Dig. § 23.*]

3. COUNTIES (§ 34*)—COUNTY SEAT—RELOCATION—SUBMISSION OF QUESTION TO VOTE—BOND.

The statutory bond, conditioned to pay the legal costs of a special election on the question of relocation of the county seat of a county, need not be tendered or filed with the petition for submission of such question. It suffices to give the bond at the term at which the petition is filed.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 34-37; Dec. Dig. § 34.*]

4. COUNTIES (§ 35*)—COUNTY SEAT—RELOCATION—SUBMISSION OF QUESTION TO VOTE—TIME FOR HOLDING.

The filing of a proper petition, in a year in which no general election is to be held, for submission of such question, requires submission thereof at a special election, even though, by reason of delay in filing the petition, the special election must occur in a year in which a general election will be held.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 38-45; Dec. Dig. § 35.*]

5. COUNTIES (§ 34*)—COUNTY SEAT—RELOCATION—SUBMISSION OF QUESTION TO VOTE—PROCEEDINGS.

Prevention of the filing of a petition for such an election at a regular session of a county court by a clandestine meeting and immediate adjournment of the term, with intent to prevent it, excuses failure to present or file the petition at such meeting, and also lack of a formal demand, and amounts to a refusal on the part of the court to receive and act upon the petition.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 34-37; Dec. Dig. § 34.*]

6. MANDAMUS (§ 81*)—SUBJECTS OF RELIEF—ACTS OF PUBLIC OFFICERS.

If a county court in regular session adjourn without performance of a ministerial duty it was bound by law to perform at such session, on behalf of the public, and with intent to avoid performance thereof, a citizen, desiring performance of such duty, may, by mandamus, compel such court to reconvene and perform it. Quoad the omitted duty, the term of court is deemed to continue until it has been performed.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 138, 139; Dec. Dig. § 81.*]

Original proceeding by L. N. Frantz and others for mandamus to the County Court of Wyoming County and others. Peremptory writ granted.

M. F. Matheny, R. D. Bailey, and Farley, Sutphin & Ward, for petitioners. George P. Stewart, Pros. Atty., and Howard & Worrell, for respondents.

POFFENBARGER, J. [1] On this application for a peremptory writ of mandamus, to compel the county court of Wyoming county to reconvene, as in regular session, and permit the filing of a petition for an election on the question of relocation of the county seat of said county, and enter an order providing for such election, lack of pecuniary interest in the relators is relied upon as barring right to relief. Occasionally it is said in the text-books and decisions that pecuniary interest in the relator is essential (19 A. & E. Enc. L. 884; *People v. Masonic Lodge*, 98 Ill. 635; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927); but this generally occurs in those cases in which the relator seeks some alleged right in a corporation or a benefit society by mandamus. There are numerous instances in which we have granted the writ at the instance of relators having no pecuniary interest in the subject-matter. *Doolittle v. County Court*, 28 W. Va. 158; *Brown v. County Court*, 45 W. Va. 827, 32 S. E. 165; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182; *Mann v. County Court*, 58 W. Va. 651, 52 S. E. 776. Some of these cases were of the class to which this one belongs—applications by citizens for writs of mandamus to compel county courts to perform public functions concerning elections to relocate county seats. Any substantial interest, whether pecuniary or not, suffices in all cases in which the purpose of the writ is to compel performance of a public duty. Citizens, taxpayers, and voters in all proper cases may invoke the remedy to compel performance of a duty which a public officer or tribunal owes them, without showing any interest, other than that they are citizens, taxpayers, or voters, as the case may be. 26 Cyc. 404; *Merrill on Mand.* § 230. In some jurisdictions, private individuals are not allowed the aid of this writ to enforce performance of public duty, but that is not our rule. Where the courts do so hold, a special or pecuniary interest must be shown to enable a private individual to sue in mandamus. Failure to notice the two distinctions here noted may result in the invocation of inapplicable precedents and judicial expressions.

[2] The right of only 5 of the 987 petitioners to apply for this writ is also denied by the respondents. It is usual for one of the petitioners to ask for the writ on behalf of himself and all the others; but we do not

regard this as essential. Equity principles require all persons interested in the subject-matter of an equity suit to be made parties; but those principles seem not to apply in mandamus. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

[3] Failure to tender with the petitions a bond, conditioned to pay all legal costs of holding the election, is relied upon as matter of defense. This bond must be given at the term of the court at which the election is ordered, but it is no part of the petition, nor need it be tendered therewith. Full compliance with the terms and spirit of the statute is effected by giving the bond at that term of court. Nothing more can be required.

[4] Right of the county court to postpone the election for four months, and so place it in the year 1912, in which a general election will occur, is invoked as a bar to the relief sought, in reliance upon the statutory requirement for submission of such question at a general election, if one is to be held in the year in which the petition is presented. This position is likewise clearly untenable, for the statute says, if the petition is filed in any year in which no general election is to be held, the question shall be submitted at a special election, to be called by the court and held not less than 60 days nor more than 4 months from the date of the order. The date of the filing of the petition, not of the election, determines the character and time of the election.

[5] Alleged refusal of the county court to permit tender, presentation, or filing of the petition and denial of the charge raise the main issue. It was circulated and completed for filing at the regular term of the court, commencing on the 4th day of September, 1911. As that was a holiday, the statute authorized postponement of the sitting until the next day, and no meeting was held until after dark and under circumstances strongly indicating intentional secrecy. No business was transacted. No opportunity was allowed any person to be heard. Though many citizens had come to the county seat on business with the court, it did not convene until all, or practically all of them, had returned to their homes, and such as remained, if any, were not advised of the secret meeting. Adjournment "until the first day of the next term" was the sum total of the court's action, and the only ground or cause shown therefor was notice of an application for an injunction against the court, to prevent the issuance of certain orders for work, to be made at Beckley, in Raleigh county, on September 7, 1911, a journey to which place required one day. This notice, together with necessity for appearance to resist the application, was recited in the adjourning order. Had the court remained in session over Tuesday, September 5th, the members would have had the 6th for the journey. An adjourn-

ment could have been taken until Friday or the following Monday. *Mann v. County Court*, 58 W. Va. 651, 52 S. E. 776. No necessity for adjournment *sine die* or justification thereof is shown, but such adjournment, if acquiesced in, would have defeated the election. Intent to bring about this result is fairly inferable from the adjournment, followed by a special term for transaction of certain business which ought to have been disposed of at the regular term, but allowing no opportunity for the filing of the petitions. The conduct of the court is hardly reconcilable to any other hypothesis. Having considered all the evidence respecting the intent and motive of the adjournment, we have no doubt that its purpose was to prevent the filing of the petition.

Upon this state of facts, lack of demand by the petitioners and refusal by the court to comply therewith are insisted upon. Of course, there was no formal demand. The court prevented it by its clandestine meeting and adjournment. The petitioners were upon the ground ready to make the demand at the time appointed therefor by law, and would have made it, had not their attempt to do so been frustrated in the manner shown. While this was not a technical, formal demand, it was, under the circumstances, an obvious equivalent thereof. The law does not require an impossibility on the part of an applicant for performance of public duty. Indeed, many authorities hold that no demand therefor need be made. 26 Cyc. 181; 19 A. & E. Enc. L. 759, 760. Whether this is the correct principle, we deem it unnecessary to say, inasmuch as an effort to make it is beyond question. The filing of the petition was a requisite precedent act on the part of the petitioners. Likely that would have been a sufficient demand, since the statute makes it the duty of the court, upon the filing of the petition, to order an election. Prevention of performance of this precedent condition excused it, just as an actual tender of money is excused, if the party to whom the tender should have been made signified his intention not to receive it. No reason is perceived why this principle, so generally recognized and enforced in other proceedings and relations, should not apply here. It is a salutary and necessary one. But for it, parties would be put to the trouble of vain and useless acts, and rights defeated by pretexts, subterfuges, and technicalities. That a formal demand is not necessary, and is often excused by the conduct of the party or tribunal upon whom it would otherwise have been necessary to make it, is asserted by the following authorities: *Attorney General v. Boston*, 123 Mass. 460; *Railroad Co. v. Commissioners*, 49 Kan. 399, 30 Pac. 456; *People v. Mahoney*, 30 Mich. 100; *Morton, Bliss & Co. v. Comptroller General*, 4 S. C. 430; *State v. Baushausen*, 49 Neb. 558, 68 N. W. 950; *United States v. Auditors*

(C. O.) 8 Fed. 473; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

The clandestine meeting and adjournment of the term also amounted to a refusal to perform the duty imposed upon the court by the statute in behalf of the petitioners. A formal and express refusal to act is not necessary. Any conduct on the part of the officer or tribunal, under a duty to perform, signifying unequivocal intention not to do so, amounts to a refusal. *Merrill on Mand.* § 225; *State v. Trustees*, 4 Nev. 400; *State v. Wrightson*, 56 N. J. Law, 126, 28 Atl. 56, 22 L. R. A. 548; *State v. Rotwitt*, 15 Mont. 29, 37 Pac. 845; *Brandt v. Murphy*, 68 Miss. 84, 8 South. 296; *State v. Board*, 38 N. J. Law, 259; *Goodwin v. Railway Co.*, 13 U. O. C. P. 254; *People v. Supervisors*, 20 N. Y. 252. It has been held that refusal or conduct amounting thereto, in advance of the time of performance, justifies the awarding of the writ in advance of such time (*Brandt v. Murphy*, supra; *State v. Wrightson*, supra; *State v. Rotwitt*, supra); and also that unreasonable delay, with the manifest intention not to perform, will sustain an application for the writ. Mandamus, though an extraordinary writ, cannot be averted or denied upon unsubstantial and pretextual grounds. It is a highly remedial writ. Though extraordinary in the sense that it is designed to give relief under conditions which make the delay of ordinary remedies highly prejudicial or such remedies wholly inapplicable, when such a case arises, the remedy is not to be barred by shifts, devices, or subterfuges. If it could be, it would prove ineffectual, in many instances, to accomplish its obvious purpose.

In opposition to the inference of intent to prevent the filing of the petitions, and so avoid the sequential duty imposed upon the court, lack of evidence of knowledge on the part of the court of the purpose of the petitioners to file the same is insisted upon. Ignorance of the circulation thereof, on the part of the members of the court, is hardly probable. They must have gone all over the county, and the fact of their circulation been notorious. Besides, the uselessness of an adjournment of a regular term of the court without the transaction of any business whatever, imports purpose and design to prevent the transaction of some sort of business. However, we need not rest our conclusion upon mere inference. There is positive testimony to the admission of knowledge on the part of one or more of the commissioners of the existence of the petitions, and also of purpose and intent on their part to prevent the filing thereof in the manner in which it was done, namely, by a clandestine meeting and adjournment of the term.

[8] In response to the argument against the power of this court to reconvene the

county court, for the purpose of permitting the filing of the petition and action thereon, it suffices to quote the following declaration of law in *Mann v. County Court*, 58 W. Va. 651, 52 S. E. 776: "A court or other tribunal, charged with the performance of a mandatory duty at a given term or session, which adjourns without having performed such duty, may be reconvened and compelled to perform such duty, by mandamus, and the act, when so done, will be deemed to have been performed at the term or session at which the law required it to be done." In that case, we held that, as to the matter of action upon a petition for an election on the question of relocation of a county seat, there had been no adjournment of the regular term. The court was still in session for the purposes of that petition, provided proper steps were promptly taken to compel it to act upon the same. The county court and parties in that case presumably had no difficulty in following our direction, since this court heard no more of the controversy; and, if the parties interested in this one, are disposed to obey the mandate of this court in good faith, they will have no difficulty in complying therewith. It is only necessary for them to agree upon as early a date as may be practicable, and meet and allow the petition to be filed, and act upon it in accordance with law. How they shall proceed is very clearly indicated in *Doolittle v. County Court*, 28 W. Va. 158, and *Mann v. County Court*, 58 W. Va. 651, 52 S. E. 776. These directions need not be repeated here.

For the reasons stated, a peremptory writ of mandamus will be awarded, commanding the county court of Wyoming county and the commissioners thereof forthwith to reconvene and permit the petitions, mentioned and described in these proceedings, to be filed and act upon the same in accordance with law.

(63 W. Va. 602)

RYAN v. PINEY COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 130*)—COMPUTATION—COMMENCEMENT OF ACTION—NEW ACTION AFTER DISMISSAL.

One whose action, commenced within the time allowed by law, has been erroneously dismissed on a plea in abatement for variance between the writ and the declaration, after refusal to permit an amendment of the writ, may bring a new action, having the same purpose as the one dismissed, within a year after the date of dismissal, though after his right of action would have been barred by limitation, had the dismissed action not been instituted.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 553-566; Dec. Dig. § 130.*]

Error to Circuit Court, Raleigh County.

Action by C. C. Ryan against the Piney Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

T. N. Read and A. A. Lilly, for plaintiff in error. Watts, Davis & Davis, for defendant in error.

POFFENBARGER, J. For a variance between the writ and declaration the plaintiff's action for damages for a personal injury was dismissed, the court having refused leave to amend the writ, which was in assumpsit, so as to make it correspond with the declaration, which was in trespass on the case.

Soon after the dismissal, but more than a year after the date of the injury, the plaintiff instituted a new action in trespass on the case. In the declaration, he averred the dismissal of his first action and the cause thereof, and relies upon section 19 of chapter 104 (section 3512) of the Code of 1906, allowing an additional one year in which to bring a new action in case of dismissal of one commenced within due time on a ground which does not preclude a new action for the same cause, or by reason of any other cause, which could not be pleaded in bar of an action. To this new action, the defendant interposed another plea, founded upon the dismissal and denying the application of the statute relied upon as excepting the case from the application of the general statute of limitations. It also plead the statute of limitations. To the plea of the statute of limitations, there was a replication. Having overruled an objection to the plea designated as plea No. 2, the court determined the issue on said plea in favor of the defendant and dismissed said second action.

The construction of the statute involved has been fairly well settled in *Lawrence v. Coal Co.*, 48 W. Va. 139, 35 S. E. 925, denying the benefit thereof to a party who has taken a voluntary nonsuit or the equivalent thereof, *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683, allowing it in a case of dismissal for a fatal defect in the summons, and *Tompkins v. Life Ins. Co.*, 53 W. Va. 479, 44 S. E. 439, 62 L. R. A. 489, 97 Am. St. Rep. 1006, granting it to a party whose action, commenced in the wrong court, had been dismissed for want of jurisdiction. In the first and last of these three cases, several decisions of other courts, construing similar statutes, are reviewed and analyzed. Our interpretation of the statute, based upon its terms and the general principle and object of statutes of its class, as defined by the courts and text-writers, makes its application depend largely upon the good faith and diligence of the party invoking it.

We are of the opinion that the plaintiff in error is within the spirit, as well as the letter, of the statute. As the dismissal was the

result of court action, and not abandonment by the plaintiff, it was involuntary, even though it may have been erroneous, by reason of refusal of the court to permit amendment of the writ to make it correspond with the declaration, as authorized by section 15 of chapter 125 (section 3835) of the Code (*Barnes v. Grafton*, 61 W. Va. 408, 410, 56 S. E. 608), and the error acquiesced in. Every dismissal not purely voluntary, nor attributable solely to the negligence of the plaintiff, makes a case within the excepting statute. Here we have the elements of court action over the protest of the plaintiff, and fault on the part of the court alone, the plaintiff having offered to amend.

Liberality in the construction of this statute is warranted by its remedial character and also by the nature of its subject-matter. A party whose action has once been commenced and then dismissed occupies naturally a position radically different from one who never sued within the period allowed for action by the statute of limitations. There can be no presumption of abandonment of claim, on which the statute is founded, in his case. His dismissed action negatives that presumption. This is the obvious basis of the differentiation made by the Legislature. Naturally, therefore, only voluntary dismissals, or equivalents thereof, are excluded from the benefit of the saving section of the statute. To a limited extent, the common law, unaided by statute, made an exception on this ground. 25 Cyc. 1313.

We reverse the judgment, sustain the objection to defendant's special plea No. 2 and strike it out, and remand the case for further proceedings.

(70 W. Va. 14)

DUTY v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1911. Rehearing Denied
Jan. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—RULING ON PLEADINGS.

If the good count or counts of a declaration, and the evidence thereunder be sufficient to support the verdict, the judgment thereon will not be vitiated by the error of the trial court, if any, in overruling the demurrer to a bad count, when it clearly appears that the defendant has not been prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—PLEADING.

The first count of the declaration in this case, though omitting to allege, as did the second, that defendant failed to stop its train at the station where plaintiff offered herself as a passenger, and was injured, for a sufficient length of time to enable her to get aboard, and to a place of safety, held good on demurrer.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

3. PARTIES (§ 95*)—AMENDMENT—STATUTORY PROVISION.

Where there are two corporations of the same name, one created under the laws of one state, the other of another, but the corporation intended to be sued, has in fact been sued, and duly served with process, but on the trial plaintiff discovers that in one count of his declaration he has erroneously alleged the wrong state under the laws of which defendant was incorporated, it is not error for the trial court, after non-suit suffered, and set aside, on his motion, to permit plaintiff to amend his declaration by striking out the erroneous allegation. Such an amendment is authorized by section 14, chapter 125, Code 1906.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160-166; Dec. Dig. § 95.*]

4. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

Such an amendment is not the introduction of new cause of action against the defendant actually sued.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

5. LIMITATION OF ACTIONS (§ 130*)—COMPUTATION OF LIMITATIONS—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADING.

Nor will a non-suit thus suffered and set aside, amount to a voluntary abandonment or discontinuance of the old suit, and the beginning of a new action, so as to entitle defendant to have its plea of the statute of limitations applied to the date of the amendment, and not to the date of the writ commencing the suit. Section 12, chapter 127, and section 19, chapter 104, Code 1906, are decisive of this point.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.*]

6. TRIAL (§ 139*)—OPINION EVIDENCE—EFFECT.

The verdict for the plaintiff is not contrary to the overwhelming weight and preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

7. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—QUESTIONS FOR JURY.

The questions of the manner in which plaintiff sustained her injuries; the reasonableness of the stop made at defendant's railway station; whether plaintiff was attempting to board a moving train at the time of her injuries, and whether defendant was guilty of negligence in not seeing her and seeing that she got on the train, and to a place of safety, before giving the signals to go ahead, all depended on conflicting evidence and attendant circumstances, and were properly submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

8. CARRIERS (§§ 287, 303*)—INJURIES TO PASSENGERS—TAKING UP PASSENGERS.

It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on it, or alighting therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1166, 1224-1243; Dec. Dig. §§ 287, 303.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

It is not error to reject instructions the subject of which has been substantially covered by other instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. NEW TRIAL (§ 99*)—APPEAL AND ERROR (§ 981*)—NEWLY DISCOVERED EVIDENCE—DISCRETION OF TRIAL COURT.

If the affidavits on which a motion for a new trial for after discovered evidence is based, are rebutted by counter affidavits, it is for the court below exercising a sound judicial discretion to say whether a new trial should be granted, and its judgment should not be disturbed, except for plain abuse of that discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201-207; Dec. Dig. § 99.* Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

(Additional Syllabus by Editorial Staff.)

11. DISMISSAL AND NONSUIT (§ 81*)—REINSTATEMENT—"IN THE SAME MANNER."

In Code 1906, c. 127, § 12, providing that all causes in which orders of dismissal or orders of nonsuit have been set aside and the cause reinstated shall remain on the docket and be proceeded with "in the same manner" as if the order had never been made, the quoted phrase means with all the rights preserved, the same as if a nonsuit had never been suffered.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182-192; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 7, p. 6323.]

Error to Circuit Court, Cabell County.

Action by Amanda S. Duty against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Simms, Enslow, Fitzpatrick & Baker, for plaintiff in error. Marcum & Marcum, for defendant in error.

MILLER, J. Defendant by writ of error seeks reversal of the judgment below against it for five thousand dollars, damages for injuries alleged to have been sustained by plaintiff while a passenger, at West Hamlin, in Lincoln county, on the night of September 24, 1907.

[1] The first point of error is the overruling of the demurrer to the amended declaration and to each count thereof. This declaration contains two counts. The second count, among other things, avers the duty and the breach thereof by defendant to stop its train at its said station, on the night in question, a reasonable length of time to enable plaintiff to get aboard and to reach a place of safety. This count is concededly good, but it is insisted that the first count, which omits this averment, but which avers other duties of defendant to plaintiff, and the willful, wanton, reckless, and negligent disregard thereof, resulting in the injuries complained of, is nevertheless fatally bad, demanding reversal of the judgment and that a new trial should be awarded.

The law on this subject, however, is that if the good count and the evidence thereunder, be sufficient to sustain the verdict and judgment, the error, if any, in not, on demurrer, suppressing the bad count, will be disregarded by an appellate court, if it clear-

ly appears that the action of the court on the bad count and the evidence, if any, admitted thereunder, has not resulted in an excessive verdict, or that the defendant has not been otherwise prejudiced thereby, this upon the same principle that where there is but one count, which contains good and bad matter, and a general demurrer thereto is properly overruled, the bad will not after verdict vitiate the good, unless prejudice due to the bad matter and evidence thereunder has resulted to the defendant. *Robrecht v. Marling*, 29 W. Va. 765, 773, 2 S. E. 827, and cases cited; 6 Ency. Pl. & Prac. 367, citing, at page 368, numerous Alabama and Indiana decisions, sustaining the proposition.

[2] But is the first count bad for omitting the alleged primary and paramount averment? It avers facts sufficient to establish the relationship of passenger and carrier; the duty of defendant thereafter to use all due and proper care, caution, skill and diligence in and about the operation and movement of its locomotives, engines, cars, coaches and trains and so forth, so as to prevent and avoid all hurts, injuries, accidents, and dangers to plaintiff, and to carry her safely and securely to destination; the disregard of those duties, in that while at the instance and request of defendant, she was attempting to board the defendant's regular passenger train and the car or coach thereof at said station, to be carried safely to destination, and while said train was standing motionless, and while she in the exercise of all due and proper care and diligence for her own safety and security, the defendant, its officers, agents and servants, without ring of bell, blow of whistle, or giving the usual and customary warnings and signals, or warning or signal of any kind, whatsoever, wantonly, recklessly, carelessly, and negligently caused said train and the car or coach whereon plaintiff was then and there in the act of boarding, to be suddenly and quickly and without warning started and jerked forward and whereby she was then and there hurled and thrown with great force and violence from the platform and from the step of the car or coach which she was then and there in the act of boarding, as aforesaid, resulting in the injuries of which she complains. Does this state a good cause of action? It is insisted that it does not, for the reason noted.

To sustain this proposition *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, is mainly relied on. We do not think this case supports the contention of counsel; quite the contrary. If in disregard of its alleged duties defendant, as this count avers, while plaintiff was in the act of boarding the train, without notice as alleged, wantonly, recklessly, carelessly and negligently caused its train and coach in which, in the exercise of due and proper care and diligence, she was so attempting to enter, to be suddenly

started and jerked forward, causing her injuries, it was guilty of actionable negligence. The count states with reasonable certainty the main or primary acts of omission and commission doing the damage, within the rule of the case cited, namely the duty of defendant, while plaintiff was so in the act of boarding its train not to so wantonly, recklessly and carelessly and negligently move its train as to injure her. Whether or not defendant did so offend might, on the trial, depend on whether a stop of sufficient length was made, and whether defendant's servants saw or reasonably ought to have seen plaintiff in her place of danger when giving the signal to go ahead, but the want of averment of that fact did not in our judgment render the count bad on demurrer.

But even if the count be bad, we can plainly see, the second count being concededly good, that defendant was not prejudiced by the action of the court on the first count, and that the judgment ought not to be reversed for any error therein. No evidence was admitted under the first count, not admissible under the second, and nothing could have been added by way of damages under the first count not provable under the second count, wherefore defendant could not have been prejudiced.

[3] The next point is that the court erroneously permitted plaintiff to withdraw a juror, and on a non-suit suffered, but set aside the same day on her motion, to amend her declaration by striking out of the first count the words, "State of West Virginia," descriptive of the corporation sued, leaving the corporate name as described in the writ executed upon the defendant company, and as described in the second count, *Chesapeake and Ohio Railway Company*, a corporation. It is insisted that although the *Chesapeake & Ohio Railway Company*, a corporation under the laws of the State of Virginia, was in fact the corporation sued, and intended to be sued, and the one served with process, the error of description in the first count, committed plaintiff to the *West Virginia* corporation, and that she could not of right amend her declaration, as she was permitted to do, without suffering the consequences of a new suit brought as of the date of the filing of the amended declaration, and to which the statute of limitations interposed by the defendant, the *Virginia* corporation, could be properly pleaded; also that the amendment permitted was equivalent to stating a new cause of action to which the statute of limitation might also be properly applied. The evidence relied on by defendant in the court below in support of its motion to strike out the amended declaration, shows, we think, that neither the words "State of West Virginia," stricken out, nor the words "State of Virginia" constitute any part or parts of the corporate names of either of these corporations. Each corporation has the same corporate name, the one sued being or-

ganized under the laws of Virginia, the other under the laws of West Virginia, the latter not being the owner or operator of the railroad at the time plaintiff is alleged to have sustained her injuries. If we should treat the words "State of West Virginia" as part of the corporate name, and a misnomer, the right corporation having been sued and served with process, the variance would not be fatal; nor, by section 14, chapter 125, Code 1906, the proper subject of a plea in abatement. Under that section the declaration would be amendable on mere motion of either party. *Bank v. Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; *Grocery Co. v. Brewing Co.*, 60 W. Va. 281, 54 S. E. 349; *Stout v. B. & O. R. Co.*, 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940.

[4] The other argument based on the theory of a new cause of action introduced by the amendment is, in our opinion, wholly untenable. The cause of action is the same in both pleadings. Defendant knew it was the corporation sued, intended to be sued, and described in the writ, and that it was properly served with this writ. It is true perhaps, as a general rule, as decided in the cases cited, that the introduction by way of amendment of a new and distinct cause of action, will not prevent the running of the statute of limitations, except from the date of such amendment; but we have no such case here. This is not a case where by amendment a different party has been substituted for the defendant actually sued; but one in which the name of the party actually sued and served with process has been corrected. Such a case is clearly within our statute, and the decisions cited, and within the rule of *Mill Co. v. Hobdy*, 165 Ala. 411, 51 South. 871, 138 Am. St. Rep. 73, one of the cases relied on by defendant.

[5] But was a new cause of action begun by the amendment and non-suit suffered and set aside, to which the statute of limitations could properly be replied? In affirmance of this proposition, counsel rely on the Virginia cases of *Manuel v. N. & W. Ry. Co.*, 99 Va. 188, 87 S. E. 957, and *Wickham v. Green*, 111 Va. 199, 68 S. E. 259, construing the statute of that state, the first, a new suit, brought after a non-suit voluntarily suffered, but not set aside; the second a suit dismissed by the clerk at rules for want of pleadings, and reinstated on motion at the subsequent term of the court. In both cases the actions were held to be barred. These decisions were rested on the statute of Virginia, corresponding to section 19, chapter 104, Code 1906, of this state. In *Tompkins v. Insurance Co.*, 53 W. Va. 479, 484, 44 S. E. 439, 62 L. R. A. 489, 97 Am. St. Rep. 1006, the difference between our broader and more comprehensive statute, and the statute of Virginia, and the statutes of some other states, is distinctly noted, and the Virginia decisions cited are regarded as uncontrolling. *Lawrence v. Coal*

Co., 48 W. Va. 139, 35 S. E. 925, distinguished in *Tompkins v. Insurance Co.*, supra, involved a voluntary abandonment of the first suit, after dismissal at rules, and new suit subsequently brought. In the recent case of *Ryan v. Piney Coal & Coke Co.*, 73 S. E. 330, decided at the present term, and not yet officially reported, we had occasion, in construing our statute, to review our former decisions on the subject. We held the statute broad enough in its application to cover the case of a new suit brought after a former one dismissed for variance between the writ and declaration, and refusal of the court to allow an amendment.

[11] But why need we further pursue this question? Our statute, section 12, chapter 127, Code 1906, originating with chapter 132, Acts 1868, unlike any statute of Virginia, specifically provides, that all causes in which orders of dismissal or orders of non-suit have been set aside, and the same reinstated, "shall remain upon the docket, and be proceeded with in the same manner as if the order had never been made." True this statute says "in the same manner"; but rightly interpreted it clearly means with all the rights preserved the same as if a non-suit had never been suffered. The statute is remedial, and is entitled, under well known canons, to liberal construction, and read in the light of section 19, c. 104, Code 1906, another remedial statute, it should be given the construction indicated.

The next point is that over the defendant's objection, the court below admitted improper evidence. This point is made with respect to the whole of the evidence of *Doctors Solter and Turner*, motion to exclude which it is claimed was overruled. If such motion was ever made we have been unable to find it in the record. Attention is not directed to any particular portion or portions of this evidence which in the judgment of counsel ought to have been excluded. The generality of the objection does not require us to give it consideration. But counsel say that the motion to exclude, which we fail to find in the record, should have been sustained on the rules and principles of *C. & O. Ry. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402; *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148, and *Comstock v. Township of Georgetown*, 137 Mich. 541, 100 N. W. 788. The particular rules of these cases supposed to have been violated by the alleged action of the court, are not pointed out. We are left in the dark, as the court below evidently was, if such motion was made, justifying it in denying the motion. We have read the evidence of these witnesses with reference to the authorities cited, and we can see no substantial infraction of the rules of evidence enunciated in those cases. The evidence relates mainly to the treatment of the plaintiff by these witnesses, from the time of her supposed injuries, the history, symptoms,

and progress of her disease and their opinions based thereon, as to its cause. One rule of *McKormick v. West Bay City*, which may possibly have been in the mind of counsel, is that where a physician is called to examine a plaintiff in an action for personal injuries, for the express purpose of giving testimony, his voluntary exclamations of pain and the like are incompetent evidence; but no such case is presented by the evidence of these witnesses. Much of the evidence went in without objection by defendant's counsel. We perceive no substantial error in its admission.

[8] Next, it is said that the evidence of the plaintiff is overborne and buried under the preponderating evidence of the defendant, and that on this ground, notwithstanding the conflict, the court below, as proposed by defendant's instruction number 1, should have directed a verdict for it, and after verdict should have set the same aside on its motion to award a new trial. This point is directed to two distinct portions of the evidence: First, it is claimed that the evidence of plaintiff's witnesses, doctors Turner and Solter, relating to the nature of plaintiff's injuries, the causes, and results, and particularly their opinion, at the time of the trial, that she was suffering from locomotor ataxia, was completely demolished and overriden by the evidence of some six other physicians, most, if not all, of them employees of the defendant, and who had never treated plaintiff, or made any physical examination of her or her injuries, but gave it as their opinion, based on the evidence of the plaintiff's witnesses, and what they had seen of plaintiff at the trial, that she was not then suffering from locomotor ataxia. We are unable to agree with counsel. True there is conflict, but it was for the jury, and not for the court to judge of its weight and credibility; the number of witnesses is not controlling. Defendant's witnesses, as they admit, had never had the opportunity to examine or treat plaintiff, as plaintiff's witnesses had done, and they did not attempt to speak with the same personal knowledge or accuracy as Doctors Turner and Solter.

[7] The other class of evidence to which counsel would apply their theory of overwhelming preponderance is: (a) that relating to the manner in which plaintiff's alleged injuries were received; (b) that relating to the reasonableness of stop made at West Hamlin on the night in question, and (c) that relating to defendant's claim that plaintiff attempted to get aboard the train while it was in motion, and thereby contributed to her injuries, depriving her of right of recovery. It is conceded that the (a) class of evidence is conflicting. It might reasonably be said to be one-sided, for defendant's witnesses profess not to have seen plaintiff as she was attempting to board the train. Plaintiff, her husband and another

witness all agree, that these injuries were sustained substantially as alleged in the declaration. We need not further consider this point.

Next, as to the evidence relating to the reasonableness of the stop, and that relating to contributory negligence. It is insisted that this case is clearly controlled by *Hoylman v. Kanawha & Michigan Ry. Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, and the rules and principles of *Louisville, H. & St. L. Ry. Co. v. Coons*, 76 S. W. 45, 25 Ky. Law Rep. 509; *C. B. & Q. R. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976; *C. B. & Q. R. Co. v. Lampman* (Wyo.) 104 Pac. 533, 25 L. R. A. (N. S.) 217; *Hurt v. St. L. & I. M. & S. Ry. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; *Raben v. Central Iowa Ry. Co.*, 73 Iowa, 579, 35 N. W. 645, 5 Am. St. Rep. 708; *Pa. R. R. Co. v. Kilgore*, 32 Pa. 292, 72 Am. Dec. 787, and *Shealey v. S. C. & G. Ry. Co.*, 67 S. C. 61, 45 S. E. 119. We do not think the *Hoylman* Case controls this one. In that case there was no conflict in the evidence as to the reasonableness of the stop, or as to the negligence of Porter who was killed. In this case there is conflicting evidence; the witnesses for the defendant do not agree as to the exact length of the stop, except in saying that it was longer than usual. But the train was about two hours late at West Hamlin; it was of unusual length, being composed of some eight coaches, including the baggage coach, and heavily loaded with passengers returning from a circus at Huntington that day, and an unusual number got off at West Hamlin. Plaintiff and her husband with six small children were destined for Big Creek, a station east of West Hamlin. Both testify, and they are not contradicted, that they had been waiting for a long time for the belated train, and that as soon as the train whistled for the station, they went out promptly, and on its arrival at the station presented themselves at the place between the smoking car and the coach immediately in the rear of it, where passengers for that station were alighting, near the lower end of the platform, each carrying one of the smaller children, and directing the others; that as soon as the passengers for that station had alighted, they proceeded at once to get aboard, the husband with one child in his arms, and one or two of the other children going in first, and who succeeded in getting up on the platform and into the coach, the wife and plaintiff with the child in her arms, and the other children following closely behind. Plaintiff testifies and she is corroborated by her husband and her witness Wilkinson, present, that while she was in the act of getting on the train with her right foot on the lower step, and holding on to the hand rail with her released hand, the train and the car on which she was then standing, without warning or signal, gave a lurch forward, jerking her loose and backwards against the car, throwing her to

the ground. These witnesses distinctly say that the train was not in motion when Mrs. Duty thus attempted to get on the train, and that she and her husband started right on the train, as soon as the passengers for West Hamlin got off. The evidence of defendant relied on is that of the two conductors and the brakeman in charge of the train. Conductor Cowherd in charge of the three front coaches, was standing up on the front platform of the smoking car, between it and the baggage car, and concededly was not in a position to see plaintiff with her husband and children attempting to board the train. The brakeman claims to have been standing on the station platform, about opposite Conductor Cowherd, or about midway of the smoking car, as to which the evidence is not very clear; but he does not appear to have been giving attention to the passengers getting off and on the train where plaintiff was attempting to get on. Armstrong the conductor in charge of the rear coaches testifies that after he got the passengers off his coaches, which stood far back from the station, opposite freight cars on another track, he walked forward; that he could see Walker, the brakeman, but did not see plaintiff and her children attempting to get aboard the train; and Walker the brakeman professes to have seen Armstrong, and both profess to have had a full view along the entire length of the train; yet both say they did not see plaintiff and her husband with their large family in the act of getting aboard when giving the signals to go ahead. It was dark and the trainmen had their lanterns; but if Armstrong and Walker could see each other it seems almost incredible that they did not see or could not while looking along the train, as they profess to have been, have plainly seen this family in the act of getting on the train. Whether they could or did, and whether a sufficient stop was made, and whether plaintiff attempted to get on the train after it started, were, we think, under all the evidence in the case, peculiarly questions of fact for jury decision.

[8] Most, if not all, the cases cited and relied on by counsel for defendant, were actions for damages sustained by passengers while alighting from trains in motion, after reasonable stops made, where, as in our case of *Hoylman v. Railway Co.*, supra, the rule is, that the carrier will not be liable unless the circumstances indicate or cause the trainmen to suspect, in the exercise of reasonable diligence, that a passenger has not reached a place of safety, so as to be in danger if the train is started. The rule perhaps would not be different, as indicated in the *Hoylman* case, in actions for damages for injuries sustained while attempting to get on moving trains. The rule is clearly stated in 5 Am. & Eng. Ency. Law, 578, one of the authorities cited and relied upon by defendant's counsel, as follows: "It is universally held to be negligence for the conductor or

other servant of a railroad company to start a train while passengers are obviously in the act of getting on the train or alighting therefrom." The numerous decisions cited in the footnotes fully support the text. One of them, *Texas & P. Ry. Co. v. Gardner*, 114 Fed. 186, 52 C. C. A. 142, holds, that it is negligence to start a railroad train from a station, while a passenger is actually getting on board, regardless of the length of the stop. And in *Kulman v. Erie R. Co.*, 65 N. J. Law, 241, 47 Atl. 497, it is held, that where the evidence, as in the case at bar, is conflicting, the question of the reasonableness of the stop; or whether the train was in motion when the plaintiff stepped upon the lowest step; and whether the circumstances were such as called for the exercise of reasonable diligence upon the part of defendant's servants, to see that the plaintiff had reached a place of safety, are all questions of fact to be determined by the jury, and that a motion for an involuntary non-suit was properly refused. Our own case of *Normille v. Wheeling Traction Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901, is also authority in support of this proposition. Our conclusion is that the court below did not err in refusing to set aside the verdict for want of sufficient evidence to support it.

[9] Another point is that the court improperly rejected defendant's instructions number 5 and 8. These instructions are based upon the theory that the plaintiff attempted to board the train while it was in motion. There is little evidence to support this theory. The evidence clearly shows that the entire family of the plaintiff was in the act of boarding the train at one and the same time, the husband preceding the wife, she following him in close succession. But conceding that defendant was entitled to instructions upon this theory, the law applicable to the facts in the case was fully covered by other instructions given on its behalf and there is no error.

[10] Lastly, it is claimed that the court erred in refusing to set aside the verdict on the ground of newly discovered evidence. The motion of the defendant to set aside the verdict on this ground, was supported by the affidavits of two women to the effect, that in December, 1907, following the accident, plaintiff had admitted to them, that she had not been seriously injured, but that upon the advice of counsel she had concluded to simulate injuries, for the purposes of this suit. These witnesses are directly contradicted by affidavits of the plaintiff and her husband, corroborated by the affidavit of her counsel. The court below overruled the motion. We are only called upon here to say whether the court below abused its discretion. We cannot say so; and not being able to see that there was it is our duty to overrule the point. 29 Cyc. 904; *Trimble v. Tantlinger*, 104 Iowa, 665, 69 N. W. 1045, 74 N. W. 25; *Thompson v. Thompson*, 88 Cal. 110, 25 Pac. 962; *Good-*

ell v. Hall, 112 Ga. 435, 37 S. E. 725; Grace v. McKinney, 112 Ga. 425, 37 S. E. 737.

Finding no substantial error the judgment must be affirmed.

(70 W. Va. 66)

ROBINSON v. BOARD OF EDUCATION OF DISTRICT OF CABIN CREEK.

(Supreme Court of Appeals of West Virginia. Dec. 5, 1911.)

(Syllabus by the Court.)

1. ASSUMPSIT, ACTION OF (§ 19*)—PLEADING—DECLARATION.

Common counts in assumpsit, otherwise good on demurrer, are not rendered bad and subject to demurrer, because it may appear from a special count of the declaration that the contract, pleaded and relied on therein, is executory and not provable under the common counts.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. § 19.*]

2. ASSUMPSIT, ACTION OF (§ 19*)—PLEADING—DECLARATION.

Nor will such common counts be rendered demurrable, because by reference to the bill of particulars filed with the declaration, it appears that the same is for services contracted for, but not yet rendered, under an executory contract, pleaded in the special count. A bill of particulars is no part of the declaration. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Clarke v. O. R. R. Co.*, 39 W. Va. 732, 20 S. E. 696.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. § 19.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—OFFICERS—DISTRICT SUPERINTENDENT—DISCHARGE—REMEDIES.

A teacher employed as district superintendent, by the board of education thereof, as provided by section 163, c. 45, Code Supp. 1909 (section 163, c. 27, Acts 1908), may immediately upon his discharge without good cause, or the repudiation of the contract by such board, sue for damages for a breach of the contract by defendant. *Rhoades v. C. & O. Ry. Co.*, 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010; *Davis v. Grand Rapids Furn. Co.*, 41 W. Va. 717, 24 S. E. 630; *Pancake v. Campbell Co.*, 44 W. Va. 82, 23 S. E. 719; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Mutual Reserve Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854; *King & Graham v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 152; Dec. Dig. § 63.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—OFFICERS—DISTRICT SUPERINTENDENT—EMPLOYMENT.

The special count of the declaration in this case, otherwise good, charging among other things, that the board of education of the district "at a regular meeting thereof" held therein on a day specified, "according to law," "entered into a certain verbal contract" with plaintiff, whereby it employed him as district superintendent for the time and for the price stipulated, is not rendered bad on demurrer by the charge that such contract was a verbal one. A board of education, by proper action at a regular meeting, may by verbal contract, le-

gally employ a district superintendent, the statute authorizing such employment not requiring the contract to be in writing. 28 Oyc. 666, and cases cited in notes; 2 Dillon Mun. Corp. (5th Ed.) section 783.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 149; Dec. Dig. § 63.*]

5. ASSUMPSIT, ACTION OF (§ 19*)—PLEADING—SPECIAL COUNTS.

If a special count contains matter sufficient to entitle plaintiff to a recovery, the fact that it also contains other matter not constituting good ground of action will not render the count bad on demurrer. The good is not vitiated by the bad. This point is applicable to the item of \$75.00, alleged expenses incurred by plaintiff in attending school preparatory to the execution of his contract for service. *Duty v. C. & O. Ry. Co.*, 73 S. E. 331, decided this term, and cases cited.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. § 19.*]

Error from Circuit Court, Kanawha County.

Action by O. K. Robinson against the Board of Education of the District of Cabin Creek in the County of Kanawha. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Jones, Murphy & Ballard, for plaintiff in error. Mollohan, McClintic & Mathews, for defendant in error.

MILLER, J. The court below having in disregard of these well grounded rules sustained defendant's demurrer to the declaration and to each count thereof, and dismissed plaintiff's action, the judgment below must be reversed and the case remanded to that court to be there further proceeded with in accordance with these principles, and further according to the rules and practices governing courts of law. Judgment reversed and case remanded.

(157 N. C. 551)

THERMAL BELT SANITORIUM CO. v. ROYAL INS. CO. et al.

(Supreme Court of North Carolina. Dec. 23, 1911.)

1. EVIDENCE (§ 450*)—PAROL EVIDENCE—FIRE INSURANCE—DESCRIPTION.

The description of the insured property was as follows: "\$2,000.00—on the two-story frame metal-roof building with adjoining and communicating additions including foundations, piping and plumbing, fixed heating and lighting apparatus and all permanent fixtures as a part of such building while occupied as a sanatorium, situate detached in the town of T." Held, that the description of the property insured was sufficiently ambiguous to admit parol evidence as to whether it was meant to include certain cottages about 10 feet from the two-story building described and forming a semicircle around it, and connected thereby with an electric bell and water supply system, though a former policy had insured the main building and the cottages separately in different amounts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082; Dec. Dig. § 450.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSIONS OF EVIDENCE.

Since title in insured is presumed from his possession and control of the insured property and the issuance of a policy thereon, it was not reversible error in an action on the policy to permit a witness to say that plaintiff owned the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4169; Dec. Dig. § 1051.*]

3. INSURANCE (§ 646*)—FIRE INSURANCE—OWNERSHIP OF PROPERTY—EVIDENCE.

Title in insured to the insured property is presumed prima facie from his possession and control thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1646; Dec. Dig. § 646.*]

4. INSURANCE (§ 646*)—FIRE INSURANCE—OWNERSHIP OF PROPERTY—EVIDENCE.

The issuance of a policy to insured on certain property is presumptive evidence of title in him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1646; Dec. Dig. § 646.*]

Appeal from Superior Court, Polk County; Lane, Judge.

Action by the Thermal Belt Sanatorium Company against the Royal Insurance Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The evidence tended to show that plaintiff corporation held two concurrent fire insurance policies alleged to cover its main building and four cottages situate near the same, and "that on May 5, 1909, a fire occurred which destroyed one of the cottages and also damaged the main building. Defendant resisted recovery for destruction of the cottage, claiming that same was not covered by the descriptive terms of the policy. The following is the description, which it seems was typewritten, and annexed to each of the policies: "\$2,000.00—on the two story frame metal-roof building, with adjoining and communicating additions, including foundations, piping and plumbing, fixed heating and lighting apparatus and all permanent fixtures as a part of said building while occupied as a sanatorium, situate detached in the town of Tryon." And in reference thereto, and over defendant's objection, this, with other evidence, was admitted, being the relevant part of a conversation between the general manager of plaintiff company and the insurance agent in reference to the acceptance of the policies and at the time same were delivered: "Q. Did you have any conversation with Mr. Engle about the policies? A. Yes. Q. What was it? (Objection by defendant. Overruled and exception). A. I read over the typewritten portion of the contract, and said: 'I don't like this adjoining and communicating. It is not right, because the buildings are not adjoining.' Mr. Engle said the insurance companies considered buildings as close together as those were adjoining and communicating when used for the same purpose. (Defendant's objection to this answer overruled, and defendant excepts.) Q. How many build-

ings were there in the plant? A. Five. Q. What did they consist of? (Defendant's objection overruled, and defendant excepts.) A. Consisted of a main building, or administration building, and four cottages. These cottages were used for the sick patients' rooms, and the main building for the nurses and doctors, housekeeper, dining room, kitchen, and office room. Q. Were there any kitchens in the cottages? (Defendant's objection overruled. Defendant excepts.) A. No. Q. What was in the cottages? (Defendant's objection overruled. Defendant excepts.) A. First a sun room on the outside, a hall, four bedrooms, bathroom, and trunkroom. Q. How far were they from the main building? (Defendant's objection overruled. Defendant excepts.) A. About 15 or 20 feet. Q. Was there any communication with the main building? A. An annunciator system running to the main building. (Defendant's objection overruled. Defendant excepts.) These were for the patients to summon the nurses from the nurses' rooms. There was a button in each room, with an electric wire communicating with the bell in the main building. Q. Were there any laundries in the cottages? A. No. Q. Was it possible for anybody to use the cottages independent of the main building, as a separate establishment? A. No. (To all of the foregoing evidence the defendant in apt time objected. Objection overruled, and defendant excepted.) Q. Going back to the main building, describe that. A. The main building was a two-story building, the first floor consisting of a porch running around three sides, a hall and writing room, or office, reception room, dining room, pantry, and the housekeeper's room. Q. What was the shape of this building apart from the porches? A. It was an oblong building. Q. Were there any additions to that building? A. No; there were no additions to the main building proper. It was one building, oblong in shape. Q. Do you recollect a fire occurring in your property there? A. Yes. Q. About when was that fire? A. It occurred about the 5th of May, 1909. Q. What was destroyed in that fire, if anything? A. One of the cottages and the main building and another cottage was damaged."

There was other testimony more fully describing the physical placing of the cottages and their purpose and uses in relation to the plant. On the trial a witness, E. Brownlee, having an interest in the property and its management, was allowed, over defendant's objection, to say that the property was owned by plaintiff, the Thermal Belt Sanatorium Company. In this connection it appeared that plaintiff was in possession and control and management of the property when same was insured and at the time of trial. There was verdict for plaintiff for amount of loss.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Judgment, and defendant excepted and appealed.

A. S. Barnard, for appellants. Harkins & Van Winkle, for appellee.

HOKE, J. (after stating the facts as above). The descriptive words of this policy and the physical placing of the cottages and their use and purpose in connection with the plant and its operation are made to appear further as follows: "The location of the buildings is on top of the hill above the town, consisting of one administration building, which is a two-story, frame, metal-roof building, longer than wide, with nothing in the way of a lean-to nailed to the building. The rest of the sanatorium property consisted of four cottages, one-story, metal-roof, consisting of four rooms, bath and trunk room, located in a semicircle, two cottages, No. 1 and No. 4, about 20 feet from each corner of the main building, the other cottages about 20 feet distant from each other, making a half circle around the front of the main building. They have an electric bell system. There was a series of wires running from each room of each cottage to the hall of the administration building, and there was also a water supply system, extending from a tank on the upper part of the grounds to the main building, and from the main building to all the cottages, one continuous system. Also a sewerage system accommodating all four cottages, one line going from the main building to a cesspool, and a line going from each of the cottages to the main line. There was a push button in each room so that when the patients needed assistance they could ring the bell in the main building. Q. What were those cottages used for? A. Sleeping rooms for the patients. Q. Used for any other purpose? A. No. Q. Were there any kitchens, dining rooms, or laundry in these cottages? A. No. Q. How were they used in connection with the main building? (Defendant's objection overruled. Defendant excepts.) A. Used as sleeping rooms for patients. The patients used those for bedrooms, and went to the main building for meals if well enough. (Defendant's objection overruled. Defendant excepts.) And for the consultation with physicians, but, if not well enough, the meals were sent out from the main building, and, if in their bed, the doctors and nurses visited them in their rooms." On this or similar facts there is authority tending to support the position that the cottages would come within the descriptive terms of the policies as a matter of law. *Massey v. Belisle*, 24 N. C. 170; *Marsh v. Insurance Co.*, 71 N. H. 253, 51 Atl. 898; *Mat-*

thews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547.

[1] But in any event and this, in our opinion, is the more correct view, the words are so far ambiguous as to permit the parol testimony in aid of the description and so as to carry out the true intent and agreement of the parties. *Railroad v. Railroad*, 147 N. C. 382, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550; *Ward v. Gay*, 137 N. C. 400, 49 S. E. 884; *Merriam v. U. S.*, 107 U. S. 441, 2 Sup. Ct. 536, 27 L. Ed. 531; *Sargent v. Adams*, 3 Gray (Mass.) 72, 63 Am. Dec. 718; *Robinson v. Insurance Co.*, 87 Me. 399, 32 Atl. 996; *Lumber Co. v. Insurance Co.*, 145 Mich. 558, 108 N. W. 1088. *Insurance Co. v. Tye*, 1 Ga. App. 380, 58 S. E. 110, an authority much relied upon by defendant, could well be distinguished from the case presented here. The decision proceeds upon the supposition that, under certain conditions, parol evidence could be received with the view and purpose of changing the conclusion reached. "When we consider the relevant facts in evidence, the position of the cottages, only twenty feet away, the physical connections between these and the main building in reference to water, light, sewerage," etc., the inseparable identity of use and with nothing to fill the descriptive words, "adjoining and communicating additions," except the cottages, there is assuredly no error to defendant's prejudice in referring the question to the jury as to whether the policy did and was intended to cover and protect the cottages. The position is not affected by the fact that a former policy had insured the main building and the cottages in separate and different amounts. This is an opposing fact, bearing on the weight of the testimony objected to, and did not affect its competency. It was this fact which called forth the protest of plaintiff's officials as to the insufficiency of the descriptions, and which was quieted by the assurances of the company's agent that the description as written would include the cottages.

[2] There was no reversible error in permitting the witness to say that plaintiff was the owner of the property.

[3, 4] This is a case where title is presumed prima facie from the possession and control of the property, and, further, the issuance of the policy to the insured was itself prima facie evidence of title—conclusive for the purposes of such an action as this unless in some way questioned or impeached. 19 Cyc. p. 941.

There is no error, and the judgment for plaintiff is affirmed.

No error.

(90 S. C. 329)

MEANS v. McPHAIL†

(Supreme Court of South Carolina. Aug. 10, 1911.)

APPEAL AND ERROR (§ 1010*)—QUESTIONS REVIEWABLE—FINDINGS OF FACT.

Where there is some evidence in support of the conclusions of fact in a law case, the appeal will be dismissed, because presenting only questions of fact, though exceptions raised questions of law, on the ground that there was no evidence to sustain the findings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1010.*]

On petition for rehearing. Dismissed.

For former opinion, see 71 S. E. 1009.

PER CURIAM. The court dismissed the appeal herein on the ground that the exceptions present only questions of fact in a law case, which this court had no power to review. The petition for rehearing points out that two of the exceptions raise questions of law, to wit, that there was no evidence to sustain certain findings material to plaintiffs' case. While this is true, the court did not overlook that fact, but duly considered the point made by the exceptions. Finding, however, that the record did contain some evidence in support of the conclusions of the circuit court, the court, without stating the intermediate step, announced merely the result.

There is, therefore, no ground for a rehearing, and the petition is dismissed, and the stay of remittitur revoked.

(90 S. C. 308)

BENNETT v. CHARLESTON UNION STATION CO. et al.

(Supreme Court of South Carolina. Jan. 8, 1912.)

1. DAMAGES (§ 91*)—PERSONAL INJURIES—PUNITIVE DAMAGES—"RECKLESS DISREGARD."

Where an engine, running at an unusually high speed in a railroad yard, struck coaches on a side track, injuring a car cleaner therein, and the engine came so fast that it knocked the coaches from a stationary position a car and a half in length, and damaged the engine and the coaches, punitive damages were authorized, within the rule permitting punitive damages where the wrongdoer acts in a "reckless disregard" of another's rights.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5999-6001; vol. 8, p. 7781.]

2. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a car cleaner sustained a serious and permanent injury to her head, right hip, right shoulder, and left leg, and the jury were authorized to award punitive damages, a verdict for \$1,750 would not be set aside as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372-385; Dec. Dig. § 132.*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge.

Action by Alice Bennett against the

Charleston Union Station Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. Huger Fitzsimons, for appellants. Logan & Grace, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendants.

The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That on or about the 10th day of May, 1910, the plaintiff above named, Alice Bennett, was in the employ of said Charleston Union Station Company, one of the defendants herein, as a car cleaner. That on or about said 10th day of May, 1910, and at or about the hour of 9 o'clock p. m., the said Alice Bennett was at work as a car cleaner, scrubbing out a car which had just come in from the city of Augusta. That while the said plaintiff was about her duties scrubbing out said car an engine and tender suddenly came down and upon said car, in which the said plaintiff was at work, struck said car with great force and violence, and threw the plaintiff to the floor of the car, causing her serious and permanent injuries to her head, right hip, right shoulder, and left leg. That the injuries to the plaintiff, as aforesaid, as she is informed and believes, were caused by the joint and concurrent negligence, carelessness, recklessness, and wantonness of said defendant corporation, their agents and servants, in the following particulars, to wit: (a) In causing and allowing an engine and tender to come down and upon the said car in which plaintiff was at work, without notice or warning to the said plaintiff. (b) By causing and allowing a switch to be wrongfully turned, so that an engine and tender could come down and upon the car in which said plaintiff was working, without notice or warning to said plaintiff of the approach of said engine and tender. (c) By failing and omitting to take any precautions, by setting out lights, or otherwise, to prevent said engine and tender from coming down and upon the car in which said plaintiff was at work." The defendants denied the allegations of negligence and recklessness.

At the close of the plaintiff's testimony, the defendants' attorney made a motion for a nonsuit, "so far as the cause of action for punitive damages is concerned, certainly so far as the Union Station is concerned, on the ground that there is a total absence of testimony to sustain the cause of action for punitive damages." The motion was refused. At the close of all the testimony, the defendants' attorney made a motion for the direction of a verdict on the same ground, which was also refused. The jury rendered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† Rehearing denied January 8, 1912.

a verdict in favor of the plaintiff for \$1,750. A motion for a new trial was made, on the grounds "that the damages were excessive, that there was no evidence to support the verdict, and that it was contrary to the charge of the judge." This motion was likewise refused, and the defendants appealed.

[1] The first proposition argued by the appellants' attorney is that there was no testimony as to punitive damages.

H. B. Tant, as witness for the plaintiff, testified as follows: "Q. What was your position on May 10, 1910? A. I was a telegraph operator at Vardels for the Coast Line. Q. Is that the entrance for the switch that controls tracks No. 7 and No. 10? A. Yes, sir. Q. Will you tell the jury what you know about this accident? A. I was working there, controlling the switches from the tower, governing the movement of trains, and an engine came in that wanted to go to the roundhouse, and I lined up the switches for it to go, and was under the impression they were right; but I found I had left one wrong, and the engine went through it at a very high rate of speed, and hit some coaches in the side track. Q. What engine was that? A. I am not positive, but I think it was a C. & W. C. engine. Q. Was that engine running at a high rate of speed? A. Yes, sir; it was running at an unusually high rate of speed. Q. Would you say at reckless rate of speed for the yard? A. It looked that way to me. Q. When you saw this accident was unavoidable, what did you do? A. I could not do anything; I was powerless to do anything. If the engine had been running at the speed that the rules of the company require. I could have changed my switches and avoided it, but it was running at such a high rate of speed it made it dangerous for me to interfere with the switches. Q. What did you do? A. Just as soon as it struck, I went down; I thought there was terrible damage done, and went down there to see. Q. Did it make any noise when it struck? A. Made a terrible noise. Q. Was there any damage done to the engine and cars? A. Yes, sir. Q. How far did it knock this train? A. I think it knocked it pretty near the length of a coach and a half. Q. There were five or six cars? A. I think six or eight. Q. And this engine came on them so fast that it knocked them from a stationary position a car and a half? A. Yes, sir. Q. Was the engine smashed? A. Pretty badly. Q. And so were the cars? A. Yes, sir."

In the case of Tolleson v. Railway, 88 S. C. 7, 70 S. E. 311, the principle was announced that, "not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but that the same result follows when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a

manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights."

The exceptions raising this question are overruled.

[2] The appellants' second proposition is that there was no testimony to support the verdict, at least the verdict was so grossly excessive as to show plainly it was not founded on testimony. There was testimony tending to show that the plaintiff sustained the injuries alleged in the complaint, and, as it has been determined that there was testimony tending to show recklessness on the part of the defendants, we see no reason for disturbing the verdict on the ground of caprice or passion on the part of the jury. Judgment affirmed.

JONES, C. J., and WOODS, J., concur. HYDRICK, J., did not sit in this case.

(137 Ga. 262)

MONROE v. MARTIN.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 134*)—CONTRACTS (§ 76*)—CONSIDERATION.

A written agreement, made by the payee of a promissory note with the maker thereof, evidencing a part of the contract between them, stipulating that the maker is never to be sued on the note, relieves the maker from all liability upon the note; and a subsequent voluntary promise of the maker to pay the note, made without consideration, to the executor of the payee, is a nudum pactum, and not enforceable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 325-329½; Dec. Dig. § 134; Contracts, Cent. Dig. §§ 357-381; Dec. Dig. § 76.*]

2. EXCEPTIONS, BILL OF (§ 12*)—REVIEW—BRIEF OF EVIDENCE.

Where a bill of exceptions is sued out to the overruling of a motion for new trial, only the evidence as contained in the approved brief of the evidence can be brought to this court, and a new and distinct compendium of the evidence cannot be legally incorporated in the bill of exceptions. Whether the brief of evidence, which was approved and filed as part of the motion for new trial and duly certified to this court, was in strict conformity with the rule upon the subject of preparation of briefs of evidence, is unnecessary to be decided, as a consideration of the evidence is not necessary for the consideration of the point of law ruled in the previous headnote.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 12.*]

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by R. B. Martin, executor, against L. D. Mouroe. Judgment for plaintiff, and defendant brings error. Reversed.

J. L. Boynton and Calhoun & Rambo, for plaintiff in error. W. D. Sheffield and J. R. Pottle, for defendant in error.

EVANS, P. J. The nature of this action and the pleadings are amply stated in the

opinion of the court rendered when the case was formerly before this court. *Martin v. Monroe*, 107 Ga. 330, 33 S. E. 62. The suit was on a promissory note, brought by the executor of the payee against the maker, who pleaded a contemporaneous written agreement between himself and the payee, containing a covenant never to sue the note. This court held, on the occasion referred to, that "a written agreement made by the payee of a promissory note with the maker thereof, contemporaneously with the execution and delivery of the note to the former, and evidencing a part of the contract then entered into between the parties, stipulating that the maker 'is not to be sued on said note, and it is entirely discretionary with him whether he ever pays said note or not,' in effect relieves the maker from all liability upon the note as to the payee thereof or his legal representative."

[1] 1. On a later trial the plaintiff amended his petition by alleging that on three stated occasions the defendant "recognized the validity of said note and promised your petitioner to pay the same to him." With respect to such amendment the court charged the jury: "If the jury believe from a preponderance of the evidence that J. J. Monroe did agree, in an instrument signed at the same time the note sued on was signed, that L. D. Monroe should never be sued on said note, still if, after the death of J. J. Monroe, the defendant L. D. Monroe did expressly agree to pay said note to the executor of J. J. Monroe, the moral obligation resting on the defendant to pay the debt would be sufficient to sustain the new contract and promise to pay said note, and the defendant would be liable to pay said note, notwithstanding the previous contemporaneous agreement referred to before." This instruction was erroneous. The effect of the instrument pleaded by the defendant was to relieve him of all liability on the note; and if this instrument evidenced a part of the contract by which the note was given, then there never existed any liability by virtue of the note. Every contract must rest upon a good or a valuable consideration. "A good consideration is such as is founded on natural duty and affection or on a stronger moral obligation." Civil Code 1910, § 4243. In *Davis v. Morgan*, 117 Ga. 507, 43 S. E. 733 (61 L. R. A. 148, 97 Am. St. Rep. 171), it was held that the strong moral obligation referred to in the Code section is one supported either by some antecedent legal obligation, though unenforceable at the time, or by some present equitable duty. A promise to pay a debt barred by the statute of limitations or discharged by bankruptcy are instances of an unenforceable antecedent

obligation; and the Code declares, with respect to such promises, that the "new promise revives or extends the original liability; it does not create a new one." Civil Code 1910, § 4386. As was said by Cobb, J., in *Davis v. Morgan*, supra: "When one receives a naked promise, and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damages cognizable by the court. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law." The court's instruction was that the facts set up in the defendant's plea would be availed by his voluntary promise to pay the note, although the only consideration of the alleged new promise was the strong moral obligation to pay the note. If the defendant's plea be true, there never was any obligation on the part of the maker to pay the note, and the court's instruction was harmful.

[2] 2. A motion for a new trial was made, and an approved brief of evidence was filed. In the bill of exceptions the brief of evidence was greatly condensed. Counsel moved to disregard the evidence as contained in the bill of exceptions, because it had no legal place therein. We agree with counsel that, where a motion for new trial is made, a brief of the evidence in the case is an indispensable part of the motion, and such brief, when approved and filed, becomes a part of the record; and in reviewing the rulings made on the trial, as complained of in the motion, the reviewing court cannot look to any other source as to what evidence was adduced on the trial. The brief of evidence as approved was duly certified to this court, and counsel moved to disregard it also, because it was not made up as required by the statute; it containing the stenographic report of the trial of the case. This court has frequently pointed out the necessity of a compliance with the act of the General Assembly in the preparation of briefs of evidence. Only relevant and material evidence should be included, and repetitions should be avoided. But we do not find it necessary to examine the brief of evidence in ruling upon the controlling points in this case. Where points of law are made in the record, and they can be passed on without reference to the evidence, this court will decide them. The instruction, which we hold to be erroneous, does not require a consideration of the evidence to demonstrate the necessity of another trial.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 185)

HARDMAN v. STATE.

(Supreme Court of Georgia. Dec. 12, 1911.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

Counsel for the plaintiff in error says in his brief filed in this court that the only point insisted on for a reversal of the judgment overruling the motion for a new trial is that the verdict is without evidence to support it. After a careful study of the evidence, we are of the opinion that it was sufficient to support the verdict.

Error from Superior Court, Madison County; Jas. B. Park, Judge.

Jesse Hardman was convicted of crime, and brings error. Affirmed.

R. R. Arnold, R. L. J. Smith, Geo. C. Thomas, and B. T. Mosely, for plaintiff in error. Thos. J. Brown, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(137 Ga. 170)

HARRIS et al. v. HUSON ICE & MACHINE WORKS.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***1. SALES (§ 355*)—REMEDIES OF SELLER—ACTION FOR PRICE—EVIDENCE.**

Where A. sold to B. "one Columbus Iron Works ice plant, complete, secondhand, with a guaranteed capacity of six tons of ice per day of 24 hours, said ice machinery being now located on cars at Ocilla, Ga.," and the purchaser defended an action on notes given for the purchase money upon the ground, *inter alia*, that the machinery delivered was not a Columbus Iron Works plant, but consisted of various parts of machinery of other manufacturers assembled together, it was competent for the plaintiff to prove that, though some of the minor parts of the machinery were not manufactured by the Columbus Iron Works, yet the substituted parts correlated with the whole, and were not of such character as to alter the distinctive character of the machinery as a "Columbus Iron Works plant," and were equal in efficiency in all respects to the parts for which they were substituted.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 355.*]

2. CONTENTION OF PARTIES FAIRLY SUBMITTED—INSTRUCTIONS—EVIDENCE.

The contentions of the defendants, as made by the pleadings and evidence, were fairly submitted, the charge was adjusted to the case, and the evidence is sufficient to support the verdict.

Error from Superior Court, Irwin County; U. P. Whipple, Judge.

Action by the Huson Ice & Machine Works against W. M. Harris and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Eason & Bull and R. M. Bryson, for plaintiffs in error. H. J. Quincey and Fulwood & Murray, for defendant in error.

EVANS, P. J. The plaintiff sold to the defendants a secondhand ice plant, which was to be delivered to them f. o. b. Abbeville, Ala. The machinery was shipped by the plaintiff to the defendants at Ocilla, Ga., in accordance with the contract of sale. When it arrived in Ocilla a dispute arose between the defendants and the railroad company over the freight charges, and the machinery was allowed to remain on the cars for several months and until after the first payment under the contract of sale fell due. The plaintiff then entered into a second agreement with the defendants, which was reduced to writing, wherein the first contract of sale was abrogated, and the plaintiff contracted to sell to the defendants "one Columbus Iron Works ice plant, complete, secondhand, with a guaranteed capacity of six tons of ice per day of 24 hours, said ice machinery being now located on cars at Ocilla, Ga.," and the defendants contracted to pay \$3,000, evidenced by three promissory notes, and also agreed to pay \$120.50 in consideration of being relieved of liability on their former contract, which last-named sum was also evidenced by their note. The defendants having defaulted in the payment of their several notes, suit was instituted thereon, and they pleaded that the plaintiff agreed to superintend the construction of the ice plant, and to demonstrate that its capacity to make ice came up to the warranty; that the machinery was installed under the superintendence of the plaintiff, and after several tests it was found incapable of making six tons of ice per day; that several important parts of the machinery were never supplied; that in the course of the installation they discovered that the machinery was not a Columbus Iron Works plant, but was made up of several parts of machinery of different manufacturers to such an extent that the aggregate plant did not possess the distinctive character of a Columbus Iron Works plant; that upon discovering that the machinery was not a Columbus Iron Works plant, and upon the failure of the plaintiff to demonstrate the guaranteed capacity of the ice plant, they tendered it back to the plaintiff and demanded a rescission of the contract; that upon the refusal of the plaintiff to rescind the contract and take back the machinery they operated it at a loss, and were never able to produce ice in excess of four tons per day; that they had sustained damage connected with the purchase and operation of the machinery in sundry amounts; and judgment against the plaintiff for these sums was prayed.

[1] 1. The evidence was conflicting as to whether or not there had been an acceptance of the machinery by the plaintiff, as to whether there was a failure of the warranty as to the capacity of the machinery, and as

to whether the machinery was of the character described in the contract of sale. Upon the latter feature the plaintiff offered proof tending to show that the main machinery was that manufactured by the Columbus Iron Works, and that, though certain minor parts were manufactured by other manufacturers, these parts were equal in every respect in quality and adaptability to those for which they were substituted, and that the plant which they delivered was a Columbus Iron Works plant. Objection was made to testimony tending to show that there was no difference in efficiency between a certain part of the machinery which had been supplied and the part which it substituted; the objection being that the written contract of sale described the subject-matter of the sale as a Columbus Iron Works plant, and this testimony tended to vary the terms of the written contract. Specific goods may be sold by description, and if the specific existing chattel is sold by description, and does not correspond with that description, the seller fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent. And the question is whether the descriptive statement is an identification of the chattel or whether it amounts to a collateral warranty. *Benjamin on Sales*, §15.

The subject-matter of this sale was a secondhand ice plant on the cars at a place where the purchaser had ordered it under a previous contract. The purchasers contracted to buy that particular machinery, and the description that it was of a particular manufacture was probably intended more as a collateral warranty of the character of the chattel than for purposes of identification. If the specific name of the ice plant be treated as matter of description, then it becomes a question of identifying the article as that described, and parol adminicular proof is admissible for that purpose. This inquiry is broad enough to include an investigation as to what constitutes the article as described. In the sale of secondhand machinery of a particular manufacture, it is competent to show that a minor part is an adequate substitute for the original, and that, notwithstanding such substitution, the machinery still preserves the distinctive characteristic of its original manufacture. If a secondhand Baldwin locomotive is sold, a delivery of a Baldwin locomotive would satisfy the description, although it may be equipped with a bell or whistle of a different manufacture. If we treat the words "Columbus Iron Works plant" as words of collateral warranty, then it is competent to inquire whether the substituted parts were of such character as to change the distinctive character of the chattel, so as to amount to a breach of the war-

ranty. The English case of *Weller v. Schilizzi*, 25 L. J. O. P. 89, is clear authority on this point. There A. undertook to supply B. with certain parcels of linseed, which he warranted should be "Calcutta linseed," and supplied him with linseed containing 15 per cent. of other seeds. It was proved that Calcutta linseed, at the time the contract was made, contained usually from 2 to 3 per cent. of other seeds, and it was held that it was proper to inquire whether the mixture of 15 per cent. of other seeds was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article and prevent its being salable as "Calcutta linseed." The testimony to which objection was made was clearly relevant.

[2] 2. Several assignments of error complain that the court failed to properly submit the various contentions of the defendants, and that the evidence did not authorize an instruction on the legal effect of an acceptance of the machinery. We do not think these criticisms are meritorious. The charge was fair, full, and adjusted to the various issues made by the pleadings and evidence, and has the indorsement of the trial judge, and no sufficient reason is made to vacate it.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 196)

MADISON SUPPLY & HARDWARE CO. v. BROWN CARRIAGE CO.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

SALES (§ 176*)—PERFORMANCE OF CONTRACT—WAIVER OF OBJECTIONS.

A promissory note was given for certain personal property, which was paid voluntarily by the maker thereof (it not appearing that the note had been transferred before maturity), who subsequently purchased personal property from the same vendor, for the avowed purpose of refusing to pay therefor, and of pleading a set-off and partial failure of consideration to the first purchase, because of alleged defects in the property first purchased, which were known to the buyer at the time he paid the note given for the purchase price thereof. *Held*, that the buyer waived any defects in the property first purchased, and could not set up same as a defense in an action on open account brought by the seller against him for the recovery of the purchase price of the personalty last bought. *Edison General Electric Co. v. Blount*, 96 Ga. 272, 23 S. E. 806; *Atlanta, etc., Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124; *Tuttle v. Stovall*, 134 Ga. 331, 67 S. E. 806.

(a) In addition to the general grounds, the only assignments of error relate to the giving or failure to give certain charges to the jury. We find no error in these assignments; and, besides, in this case the verdict in favor of the defendant in error was demanded.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Action by the Brown Carriage Company against the Madison Supply & Hardware Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. C. Few and Percy Middlebrooks, for plaintiff in error. E. H. George and K. S. Anderson, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 159)

LUKE et al. v. HILL.

(Supreme Court of Georgia. Dec. 12, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 632*)—CONCLUSIVENESS—PERSONS CONCLUDED—STRANGERS.

A decree in a suit for annulment of marriage, based on the nonage of one of the parties, in so far as it establishes the status or marital relation, is to be regarded as a judgment quasi in rem; but, beyond the adjudication of the status, the decree is binding only on parties and privies. In a cause of action between the defendant in the annulment suit and strangers, arising before the decree of annulment, and based on the legality of his marriage, he is not estopped from contesting with them the truth of the ground on which the decree was prayed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1148; Dec. Dig. § 632.*]

2. EVIDENCE (§ 288*)—HEARSAY—EVIDENCE FOUNDED ON HEARSAY.

Birth may be proved by general repute in the family.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1147, 1148; Dec. Dig. § 288.*]

3. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The rejection of a certain part of a witness' testimony will not require a new trial, where it appears from the brief of evidence that in another part of his testimony the same witness delivered substantially the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In a suit for malicious prosecution, where the defendants offer testimony that they acted under advice of counsel, it is not error for the court to charge, in the language of Civil Code 1910, § 4958, that clients are not relieved from liability for damages on the ground that they acted under the advice of counsel, but are entitled to redress from them for unskillful advice; the court further charging that advice of counsel may be considered in mitigation of damages.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

5. MALICIOUS PROSECUTION (§ 64*)—PROBABLE CAUSE—EVIDENCE.

The committal of a defendant by a magistrate is prima facie, but not conclusive, evidence of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.*]

6. TRIAL (§ 236*)—INSTRUCTIONS—IMPEACHMENT OF WITNESS.

Where a witness is sought to be impeached because of a previous contradictory statement, the primary question for the jury is to ascertain whether the witness attacked made the alleged contradictory statement; and, if he did so, the next question is its effect on his testimony. The excerpt from the charge was not subject to the criticism made upon it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 236.*]

7. INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

The other charges complained of were not subject to the exceptions made against them. The evidence supported the verdict, and no sufficient reason appears for the grant of a new trial.

Error from Superior Court, Turner County; Frank Park, Judge.

Action by E. Lewis Hill against M. D. Luke and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Perry, Foy & Monk and Claude Payton, for plaintiffs in error. J. H. Tipton and L. D. Passmore, for defendant in error.

EVANS, P. J. The action was by E. Lewis Hill against M. D. Luke, Mrs. Ellen Luke, Warren J. Luke, W. Z. Luke, and Jim Johnson, to recover of them damages for a malicious prosecution and for abduction and alienation of the affections of his wife, Nora Hill, née Luke, the daughter of the defendants M. D. and Mrs. Ellen Luke. According to the evidence of the plaintiff he married Nora Luke on the night of the 6th or 7th of December, 1907. Agreeably to a previous arrangement she met the plaintiff at an appointed place near the home of her father, got in the buggy with him, and they drove off and were married by a minister. After the marriage they went to the home of a relative of plaintiff to spend the night. After they had been there two or three hours, and had retired, some of the defendants came, entered the house, struck matches, and looked over the house. They came to the bed where plaintiff and his wife were, pulled the cover, and, upon remonstrance from the plaintiff and demand to desist, made threats against him; one of them pretending to be the sheriff. They then began to entreat his wife to return home. The plaintiff remonstrated, telling them (one of whom was the brother of plaintiff's wife) that they were married, that she was his wife, and to let her alone. They replied that they had come to take her, dead or alive. The plaintiff was detained by some of the defendants, while others procured a warrant against him for kidnapping, and all of the defendants were acting in concert. The sheriff and one of the defendants then carried the plaintiff to the railroad station, from where he was carried by the sheriff and lodged in jail. His wife was taken in charge by the other defendants. She went away with

them, and has never returned to him. He was given a commitment trial and bound over to await the action of the grand jury, who acquitted him by the return of a "no bill." The father and mother of plaintiff's wife had both told plaintiff that his wife was over 14 years of age at the time of his marriage to her, and it was "common talk in the family" that she was near 16 years of age. He introduced other evidence also tending to establish his contention that she was beyond the age of 14 years at the time of the marriage. The defendants denied liability, and also denied that they were actuated by any other motive than to find the minor daughter of Mr. and Mrs. Luke and restore her to her parents. They asserted that in the suing out of the warrant they acted under the advice of counsel, that the alleged marriage of Nora Luke to the plaintiff was illegal, because at the time the marriage ceremony was performed she was less than 14 years of age, and that the marriage had subsequently been annulled by a decree of court. There was a verdict for the plaintiff. The defendants made a motion for a new trial, which was overruled by the court, and they excepted.

[1] 1. Shortly after the marriage ceremony was performed between E. L. Hill and Nora Luke, the latter, by *prochein ami*, brought suit against the former to annul the marriage on the ground that she was under 14 years of age and incompetent in law to contract marriage. The suit eventuated in a decree of annulment of the marriage. The entire proceedings were introduced in evidence in this case, and the court ruled that the plaintiff was not concluded in the present action, by the decree of annulment, from showing that Nora Luke at the time of her alleged marriage was over the age of 14 years. The defendants excepted to this ruling, on the ground that the decree was conclusive on the plaintiff in the present suit that Nora Luke was under the age of 14 at the time of her alleged marriage to him. It is a general universal rule that estoppels must be mutual. Strangers can neither take advantage of, nor be bound by, an estoppel. *Harris v. Amoskeag Lumber Co.*, 101 Ga. 643, 29 S. E. 302. A decree in a matrimonial suit fixing the status of the parties, in distinction from the specific findings therein, is to be regarded as a judgment quasi in rem. So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers; but, beyond the adjudication of the status, the decree does not conclude strangers. *Bigelow on Estoppel*, 227. Our statute fixes the age of consent to marry in the female at 14 years; and while the ceremonial marriage performed between the female who has not reached this age and the man competent to contract marriage may be said to be void, yet the female, after reaching the consentable age, may affirm

the marriage, and it is thereafter binding, and no new marriage is required. 1 Bishop on Marriage and Divorce, 577. Such marriages partake more of the nature of voidable than void marriages. They are imperfect marriages, which the party may affirm or disaffirm after reaching the age of consent. Hence, upon reason, a decree in a nullity suit because of the nonage of one of the parties should be treated as a decree of dissolution of a voidable marriage, so far as it affects strangers. The adjudication of the status is conclusive upon strangers but does not bind them upon causes of action springing from the marital relation prior to the decree. A divorce decree will not estop a party thereto from contesting with a stranger the truth of the grounds as affecting his liability in another suit upon a cause of action arising pending the divorce suit, but before the decree. In *Corry v. Lackey*, 105 Mich. 363, 63 N. W. 418, it was held that the fact that the defendant's wife procured a divorce from him on the ground of extreme cruelty will not conclude him from denying that he was guilty of cruelty, on an issue as to her justification for leaving him, raised in an action against him by a third person for necessities furnished the wife after she had left her husband and before getting her divorce. To the same effect is *Burlen v. Shannon*, 3 Gray (Mass.) 387, and *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73. Beyond the legal effect of determining the status of the parties, the law applies as in other judicial proceedings, that a judgment is not conclusive in another suit, except in cases in which the same parties or their privies are litigating in regard to the same subject of controversy. The plaintiff in error is estopped by the decree of annulment from denying his matrimonial status; but in a cause of action against strangers, arising before the decree of annulment, based on the legality of his marriage, he is not estopped by the decree from contesting with them the truth of the grounds upon which the decree was prayed.

[2] 2. The court permitted the plaintiff to testify that it was common talk in the family that Nora Luke, at the time of his marriage to her, was nearly 16 years of age. Pedigree, including birth, may be proved by general repute in the family. Civil Code 1910, § 5764.

[3] 3. Exception is taken to the exclusion of the testimony of one of the defendants, to the effect that he acted on the advice of counsel in taking the course which he pursued. The testimony was relevant; but the error was harmless, because it appears from the brief of evidence that the same witness gave substantially the same testimony in another part of his evidence. *Bertody v. Ison*, 69 Ga. 317.

[4] 4. In charging on the subject of the effect of the advice of counsel, the court read Civil Code 1910, § 4958: "Clients shall

not be relieved from their liability to damages and penalties imposed by law, on the ground that they acted under the advice of their counsel, but are entitled to redress from them for unskillful advice." The defendants introduced evidence that they acted on the advice of counsel, and the charge was not inappropriate to the case.

[8] 5. Complaint is made that the court failed to instruct the jury that a committal by the magistrate was an adjudication of the existence of probable cause for the prosecution of the plaintiff. The binding over of a defendant by a magistrate is *prima facie*, but not conclusive, evidence of probable cause. *Lindsay v. West*, 6 Ga. App. 284, 64 S. E. 1005. It was not error to fail to charge as contended, because an instruction that the committal of a defendant is an adjudication of probable cause is in effect a charge that it is conclusive on that subject.

[8] 6. The following excerpt from the court's charge to the jury on the subject of the impeachment of witnesses by proof of previous contradictory statements is criticised: "It is for you to say whether or not you believe the witnesses sought to be impeached or the witnesses introduced for the purpose of impeachment." It is contended that the charge amounted to an instruction that the jury had a right to arbitrarily disregard the testimony of a witness introduced for the purpose of impeachment. We do not think this criticism of the charge is merited. The impeachment of a witness by proof of contradictory statements involves the ascertainment by the jury if the witness attacked really made the statement, and, if he did make the alleged contradictory statement, its effect on his testimony. The excerpt related to the first of these propositions and was not erroneous. *Price v. State*, 137 Ga. —, 72 S. E. 908, decided November 14, 1911.

[7] 7. The charges on the subject of conspiracy and the measure of damages were neither inaccurate nor inapplicable. The authenticity of the letters were sufficiently identified to authorize their reception in evidence. The evidence warranted the verdict, and no error appears.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 317)

MANBECK v. HOLTZENDORF. (No. 3,461.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

On the trial of the claim case in the justice court, the evidence demanded the verdict in favor of the claimant as rendered, and there was no error by the judge of the superior court in overruling the certiorari brought by plaintiff.

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Claim case between C. A. Holtzendorf and J. W. Manbeck. Judgment for claimant was affirmed on certiorari, and defendant brings error. Affirmed.

L. Kennedy, for plaintiff in error. Clayton Jay, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 294)

CHICAGO CRAYON CO. v. BAKER et al.

(No. 3,405.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict, and no material error of law in the instructions to the jury appears.

Error from City Court of Tifton; R. Eve, Judge.

Action between the Chicago Crayon Company and J. J. Baker and others. From the judgment, the Crayon Company brings error. Affirmed.

Fulwood & Murray, J. B. Murrow, and J. J. Murray, for plaintiff in error. Ridgill & Griner and L. P. Skeen, for defendants in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 261)

PACE v. VIRGINIA-CAROLINA CHEMICAL CO. (No. 3,301.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

INSUFFICIENCY OF PLEADING.

The petition did not show a case of liability, and the court did not err in dismissing it on demurrer.

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Hannibal Pace against the Virginia-Carolina Chemical Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. J. Bacon and Ben T. Burson, for plaintiff in error. C. E. Battle and Howell Hollis, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 240)

CARLSBAD MFG. CO. v. FLETCHER.

(No. 3,213.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

TRIAL (§ 143*) — PLEADING — EVIDENCE — DIRECTING VERDICT.

There being conflict as to the very vitals of the case, the plaintiff having proved his

case as laid, and the evidence in behalf of the defendant being squarely in conflict therewith, it was error to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by the Carlsbad Manufacturing Company against John G. Fletcher. Judgment for defendant, and plaintiff brings error. Reversed.

R. M. Bryson and Philip Newbern, for plaintiff in error. H. J. Quincey and W. M. Rogers, for defendant in error.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 380)

FLETCHER GUANO CO. et al. v. VORUS et al. (No. 3,592.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

LANDLORD AND TENANT (§ 246*)—ADVANCES—LIEN ON CROP.

The special lien of a landlord for supplies furnished to make the crop exists only against the particular crop which the supplies were furnished to make; but where the landlord at the beginning of a year advances to his tenant corn and similar products, and at the end of the year the tenant has on the place an adequacy of like products with which to repay the advancement, but needs them in order to make the next year's crop (the relation of landlord and tenant continuing for another year), and it is agreed between the landlord and the tenant that the latter, instead of delivering the products to his landlord, shall keep them and use them to make the second year's crop, and the tenant does so, the landlord has a lien as to them upon that year's crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 993; Dec. Dig. § 246.*]

Error from City Court of Lumpkin; M. T. Hickey, Judge.

Money rule between the Fletcher Guano Company and others and L. E. Vorus and others. From the judgment determining the validity of certain liens, the Fletcher Guano Company and others bring error. Affirmed.

G. Y. Harrell, for plaintiffs in error. T. T. James, for defendants in error.

POWELL, J. The case arises on money rule to determine the rank and validity of certain liens claimed by various creditors upon the proceeds arising from judicial sale of the crops raised in the year 1910 by a tenant upon a plantation of Miss Vorus, the defendant in error. The case, as presented in this court, narrows to a single question: Did Miss Vorus have a valid landlord's lien for supplies? The facts are as follows: At the beginning of the year 1909 she furnished to this tenant corn, fodder, cotton seed, and cane, as crop supplies for that year. These

articles were consumed, of course, during the year; but at the end of the year the tenant had enough corn, etc., to have replaced them. However, he was to remain on the place as a tenant for the year 1910, and would need these articles to make that year's crop. So it was agreed that he should keep them and repay out of his crop for 1910. For these things Miss Vorus claims the landlord's lien, and the other creditors say that she has no lien as to them, because the supplies were furnished for the crop of 1909, and not for the crop of 1910.

The ordinary rule among creditors is that equality is equity. Hence laws giving special liens are strictly construed, and the person claiming a special lien must show that he is plainly within the law under which he asserts it. Nevertheless, common sense must prevail as to this as well as to other propositions of law and of equity. The law gives a landlord a special lien on the crops of his tenant for such necessities as the landlord may furnish in order to make that crop. Back debts due from the tenant to the landlord cannot, by any agreement between the parties, be counted as advances to make any new crop. No tacking is to be allowed. No estoppel can raise the lien. *Parks v. Simpson*, 124 Ga. 523, 52 S. E. 616. Cf. *Fountain v. Fountain*, 7 Ga. App. 361, 66 S. E. 1020. And under the decision in *Parks v. Simpson*, supra, if the tenant at the end of the year 1909 had simply said to his landlord, "I can pay you now, but let the indebtedness go over, to be paid out of next year's crop," and the landlord had acquiesced, no lien would have arisen. But law and common sense both differentiate that case from the case at bar.

In this case the corn, etc., furnished the tenant in 1909 were to be repaid in kind (though, perhaps, that makes no great difference), and at the end of the year there was in the crib and other places of storage, ready to be delivered, if called for, more than enough corn, etc., to make the repayment. The landlord's agent went to the place to arrange this matter and to make contracts for the coming year. The rent for the year 1910 was agreed on. The landlord's agent said to the tenant, "I suppose you will need that corn, fodder, hay, cotton seed, and sugar cane in making another crop." The tenant replied in the affirmative. The agent then told him to go ahead and use it, and to repay it out of the 1910 crop. This transaction amounted to constructive delivery of the corn, etc., from the tenant to the landlord, and redelivery from the landlord to the tenant. If there had not been enough of these articles on hand to repay the landlord, the case would be entirely different. There could be no constructive delivery of a shortage; nor could there be a delivery of supplies to

make the 1910 crop, by construction or otherwise, through counting a failure to pay for 1909 supplies, or the debt arising from the failure to pay as if it were supplies for 1910. But here the supplies, the things necessary to make the 1910 crop, were on hand at the very place where the tenant could most expediently use them.

It was not necessary, in order to satisfy the law and to create a lien, that the tenant should put the corn out of the crib, move the fodder stack, tear up the cane bed, and go through some form of trying to put them into the landlord's hands, and then have the landlord turn them back into his hands, whereupon he would have to put the corn back into the crib, move the fodder stack back, and bed the cane again. This would be nonsense. People would laugh at the law if it required any such thing. The law recognizes constructive delivery in such cases, just as people do. The trial judge held correctly.

Judgment affirmed.

(10 Ga. App. 315)

WILKINS v. BARNES. (No. 3,451.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—GRANT OF NEW TRIAL.

This case is controlled by the repeated rulings of this court and of the Supreme Court, following section 5585 of the Civil Code of 1895 (section 6204 of the Civil Code of 1910), that, unless the verdict was demanded by the law and the evidence, the first grant of a new trial will not be disturbed. *Holland v. Wilkams*, 3 Ga. App. 636, 60 S. E. 831, and cases there cited; *Smith v. Maddox-Rucker Banking Co.*, 185 Ga. 151, 68 S. E. 1081.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Walton County; C. H. Brand, Judge.

Action between J. W. Wilkins and A. O. Barnes. From an order granting a new trial, Wilkins brings error. Affirmed.

W. O. Dean, for plaintiff in error. O. Roberts, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 316)

FREEMAN v. T. R. MAXWELL FURNITURE CO. (No. 3,452.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURT.

The discretion of the trial judge in the first grant of a new trial upon certiorari will not be controlled unless it is manifest that there was an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Certiorari by the T. R. Maxwell Furniture Company against A. D. Freeman. Judgment sustaining the certiorari, and defendant brings error. Affirmed.

I. S. Peebles, Jr., and T. F. Harrison, for plaintiff in error. B. B. McCowen, for defendant in error.

RUSSELL, J. Upon the hearing the judge of the superior court entered a judgment sustaining the certiorari, with cost against the defendant in certiorari. No final direction was given to the case, and though the judge of the superior court, in his discretion, might have instructed the lower court upon the principles which should govern another trial, this duty was not mandatory. The sustaining of a certiorari, without the entry of a final disposition of the case, has the same effect as the granting of a new trial upon motion therefor.

There were several errors in the trial in the justice's court, any one of which would have authorized the judge to sustain the certiorari. Nothing is better settled than the principle announced in *Fair v. Metropolitan Life Insurance Company*, 2 Ga. App. 376, 58 S. E. 492: "Unless the judgment rendered is absolutely demanded by the evidence, the first grant of a new trial on certiorari will not be interfered with." The case at bar seems to be controlled by the ruling in *Rhodes Furniture Company v. Jenkins*, 2 Ga. App. 475, 58 S. E. 897; but from the testimony in the record there is some question as to which party rescinded the contract. Another trial may more satisfactorily resolve this doubt in favor of one party or the other.

Judgment affirmed.

(10 Ga. App. 399)

LANDRETH v. STATE. (No. 3,827.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§§ 139, 236*)—KEEPING LIQUORS ON HAND—"PLACE OF BUSINESS."

No error of law is complained of, and the verdict is strongly supported by the evidence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. §§ 139, 236.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5390-5392.]

Error from City Court of La Grange; Frank Harwell, Judge.

T. G. Landreth was convicted of a violation of the prohibitory law and brings error. Affirmed.

M. U. Mooty, for plaintiff in error. Henry Reeves, Sol., for the State.

HILL, C. J. Plaintiff in error was convicted of a violation of the prohibition law in keeping on hand at his place of business intoxicating liquor, and, his motion for a new trial being overruled, he brings the case here solely on the general grounds.

On Sunday morning a policeman of the city of La Grange saw the accused enter his place of business, and in a few minutes thereafter a negro also entered. The officer went into the store and told the accused that he had a search warrant for whisky that he believed was in the store, and the accused thereupon took from a thread case four pints of whisky, two of rye and two of corn, and handed them to the officer. The policeman testified that the accused appeared to be coming out of the store just as he (the policeman) entered. The accused explained the possession of the whisky by stating that his wife was sick and that he had gotten the whisky that morning from two negroes, and that he had come by the store for the purpose of getting some money to pay for medicine which he intended to procure for his wife. The ingenious counsel for plaintiff in error suggests to this court two reasons why he thinks the verdict in this case was contrary to law. First, he says that there was no keeping on hand of the whisky at the defendant's place of business, and the whisky was temporarily in the place of business while in transit to the sick wife of the accused; and, second, that the storehouse was not the place of business of the defendant on Sunday as on that day it was closed to public access.

The first point assumes that the accused told the truth in his statement in accounting for the presence of the whisky at his storehouse. The jury probably did not give the same faith to this statement, and in view of the circumstances there was some ground for this incredulity. If the whisky was simply in transit, only waiting for a few minutes for the accused to get the money, it is somewhat singular that he should have placed it in the thread case, and should have been leaving the store when the officer entered. It is more reasonable to believe that, if his statement was the truth, he would have made some temporary deposit while he got the money, and would have taken the whisky with him when he left the store. In other words, there was no evidence that the whisky was simply in transit, but there were circumstances that justified the jury in believing that the whisky was kept on hand at the place of business. The majority of this court in *Cohen v. Sate*, 7 Ga. App. 6, 85 S. E. 1096, held that a mere temporary keeping of whisky at a place of business was a violation of this part of the statute.

2. The second point urged by counsel also depends upon the statement of the accused. The jury under the evidence could very well

have found that the whisky, although found in the store on Sunday, was probably there on Saturday, and would probably be there on Monday. Irrespective, however, of this question, we do not subscribe to the logic of the proposition that a man's place of business ceases to be a place of business on Sunday. We are inclined to the opinion that it remains his place of business on Sunday, although the law prohibits him from transacting his business there on that day. We are clear that the evidence fully supports the verdict, and that the judgment should be affirmed.

Judgment affirmed.

(10 Ga. App. 278)

NIX v. BRUTON. (No. 3,351.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

PLEADING (§ 292*)—VERIFICATION—ACCOUNT.

Whenever a suit is brought on an open account, verified by the plaintiff as provided by law, the plea filed in the case must either deny that the defendant is indebted in any sum, or specify the amount in which the defendant admits he is indebted, and the plea must be verified. Acts 1901, p. 55. The plaintiff having verified his account, and the defendant's answer not being verified, it was not error to strike the answer and enter judgment for the plaintiff, the defendant not offering to amend by verifying.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 880; Dec. Dig. § 292.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by H. J. Bruton against Mattie Nix. Judgment for plaintiff, and defendant brings error. Affirmed.

L. W. Nelson, for plaintiff in error. Jno. R. Wilson, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 415)

FARMERS' OIL & GUANO CO. v. SOUTHERN REFINING CO. (No. 3,268.)

(Court of Appeals of Georgia. Dec. 19, 1911. Rehearing Denied Jan. 15, 1912.)

(Syllabus by the Court.)

1. SALES (§ 418*)—REMEDIES OF BUYER—DAMAGES FOR BREACH OF CONTRACT.

A. made an express written contract with B. to furnish him, within a definite time and at a specified price, three tanks of crude cotton seed oil. In part performance of the contract A. did furnish to B. one tank of the oil, and then neglected and refused to furnish the other two. B. thereupon went into the open market and bought the two tanks of oil, and sued A. for the difference between the contract price and the market price. Held, on proof of the contract and its breach, and the resultant damage, in the absence of defense, B. was entitled to recover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

2. CONTINUANCE (§ 48*)—GROUNDS—ABSENCE OF WITNESSES.

Where a motion is made to continue the trial of a case because of the absence of a witness, the judge may consider the evidence expected to be given by the absent witness, in connection with the pleadings, for the purpose of determining the materiality of the evidence, and if he finds that the evidence of the absent witness would be either immaterial or inadmissible, he should refuse the motion. The plea in this case made the evidence of the absent witness immaterial as to some part of it, and inadmissible as to the other part, and there was no error in refusing the continuance. *Richter v. State*, 4 Ga. App. 274, 61 S. E. 147; *Butler v. Ambrose*, 51 Ga. 152.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 142; Dec. Dig. § 48.*]

3. APPEAL AND ERROR (§ 267*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—NECESSITY.

Where exceptions pendente lite were not duly preserved, and no timely exception was made in the final bill of exceptions, as to a judgment overruling a demurrer to a petition, an assignment of error to this judgment in the motion for a new trial will not be considered by this court. *Connor v. Hodges*, 7 Ga. App. 153, 66 S. E. 546; *White Sewing Machine Co. v. Horkan*, 7 Ga. App. 283, 66 S. E. 811; *American Insurance Co. v. Bailey & Musgrove*, 6 Ga. App. 424 (1), 65 S. E. 180.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1572-1581; Dec. Dig. § 267.*]

4. CONTINUANCE (§ 14*)—APPEAL AND ERROR (§ 959*)—SURPRISE—AMENDMENT OF PLEADING—DISCRETION OF TRIAL COURT.

The original petition having set out in substance the contract sued on, it was not a cause for surprise that an amendment to the petition set out in exact terms the contract; and especially is this true where the answer also set out the contract, and a copy thereof was in the possession of the defendant. Besides, the refusal to continue because of alleged surprise caused by amendment is not ground of reversal, unless the refusal was a manifest abuse of discretion. *Mayor and Council of Cordele v. Williams*, 7 Ga. App. 445 (2), 67 S. E. 116.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 90-112; Dec. Dig. § 14;* *Appeal and Error*, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

5. SALES (§ 406*)—REMEDY OF SELLER—ACTION FOR BREACH OF CONTRACT—CONDITIONS PRECEDENT.

A stipulation, in a contract to sell cotton seed oil, that any difference between the parties shall be settled by arbitration according to the rules of the Cotton Seed Crushers' Association, will not prevent a suit in the first instance to recover damages for a breach of contract, unless it is clearly provided in the contract that this mode of arbitration or settlement shall either be a condition precedent to the right of recovery, or constitute the only method for the assessment of the damages arising from the breach. *Adams v. Haigler*, 123 Ga. 635 (3), 51 S. E. 638.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1156-1158; Dec. Dig. § 406.*]

6. REFUSAL OF NEW TRIAL—SUFFICIENCY OF EVIDENCE—NO ERROR.

No merit appears in any of the grounds of the original or amended motions for a new trial, and the evidence fully supports the verdict.

Error from City Court of Sandersville; K. J. Hawkins, Judge.

Action by the Southern Refining Company against the Farmers' Oil & Guano Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John R. Cooper and A. R. Wright, for plaintiff in error. Evans & Evans, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 322)

WASHINGTON COUNTY v. HOLLIMAN.
(No. 2,476.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1099*)—SECOND TRIAL—LAW OF THE CASE.

Where this court, upon exception to nonsuit, passes on the legal sufficiency of the evidence, and it is held sufficient to support a verdict in the plaintiff's favor, and upon a retrial of the case on substantially the same evidence a verdict for the plaintiff is rendered, and the case is brought to this court again with no new question presented, but on the sole assignment of error that the verdict is without evidence to support it, it is the duty of this court to affirm the judgment, with damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by H. A. Holliman against Washington County. Judgment for plaintiff, and defendant brings error. Affirmed.

T. W. Evans and Hardwick & Wright, for plaintiff in error. Evans & Evans, for defendant in error.

POWELL, J. When this case was here before (8 Ga. App. 718, 70 S. E. 100) on exception to nonsuit, we held that whether the defendant was guilty of negligence and whether the plaintiff was guilty of contributory negligence were jury questions, under the evidence as then presented. The evidence in the present record is substantially the same, though, perhaps, a little stronger in the plaintiff's favor. The retrial of the case resulted in a verdict for the plaintiff. The only exception is that the verdict is contrary to the evidence. Even if it were likely that this court would change its views so soon on the questions presented alike by the former and the present records, it has not the right or legal power to do so, so far as affects this case. The plaintiff in error certainly could not have hoped for any benefit, other than delay, from bringing the case to this court. As we cannot escape the conclusion that the case is brought for delay only, it is our duty to award damages.

Judgment affirmed, with damages.

(10 Ga. App. 236)

HORKAN v. EASON. (No. 3,200.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. BANKRUPTCY (§ 268*)—SALE OF MORTGAGED PERSONALTY—RIGHTS OF MORTGAGOR.**

Where the seller of personal property takes from the purchaser a mortgage on it to secure the balance of the purchase money, and the mortgage is duly recorded, and subsequently the purchaser, without having paid the mortgage, is adjudged a bankrupt, and his trustee in bankruptcy seizes and sells the property covered by the mortgage, *held* that the purchaser at the bankruptcy sale takes the property subject to the purchase-money mortgage unless the bankruptcy court, after hearing on due notice, ordered a sale of the property divested of liens.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

2. EXECUTION (§ 258*)—COLLATERAL ATTACK—IRREGULARITIES.

Mere irregularities do not expose an execution sale to collateral attack.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736-739; Dec. Dig. § 258.*]

3. AGREED STATEMENT.

Under the agreed statement of facts, the court properly found in favor of the defendant.

Error from City Court of Tifton; R. Eve, Judge.

Action by G. A. Horkan against A. J. Eason. From the judgment, Horkan brings error. Affirmed.

Shipp & Kline and L. L. Moore, for plaintiff in error. R. D. Smith, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 303)

THOMPSON v. MARSH CYPRESS CO.**MARSH CYPRESS CO. v. THOMPSON.**

(Nos. 3,426, 3,427.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—CONTRIBUTORY NEGLIGENCE.**

The evidence for the plaintiff did not prove the allegations of negligence as laid in the petition. Admitting all the facts proved and all reasonable deductions therefrom, the negligence alleged against the master as the basis of liability, not only was not shown, but it affirmatively appeared that the injury was caused by the negligence of a fellow servant and the concurring negligence of the plaintiff himself. The nonsuit was properly awarded. Civ. Code, 1910, § 5942.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

Error from City Court of Waycross; W. C. Lankford, Judge.

Action by D. L. Thompson against the Marsh Cypress Company. Judgment for defendant, and plaintiff brings error, and defendant assigns cross-error. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

Myers & Edwards and Hendricks & Christian, for plaintiff in error. Wilson, Bennett & Lambdin, Shepard Bryan, and G. C. Middlebrooks, for defendant in error.

HILL, C. J. Judgment on main bill of exceptions affirmed. Cross-bill dismissed.

(10 Ga. App. 305)

EARLY COUNTY v. BAKER COUNTY.

(No. 3,431.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 1097*)—CERTIFIED QUESTIONS—EFFECT OF DECISION—LAW OF THE CASE.**

The Supreme Court, upon the constitutional question certified, having held that the Secretary of State, acting under sections 473, 474, and 475, Pol. Code 1910, was exercising a function of a political and not of a judicial nature, it follows that the judgment of the lower court must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4353-4368; Dec. Dig. § 1097.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Controversy between Early County and Baker County as to the location of a boundary line. From the judgment, Early County brought error. Questions certified to the Supreme Court, and statute held constitutional. 72 S. E. 905. Judgment of superior court affirmed.

Pope & Bennet and R. H. Sheffield, for plaintiff in error. A. S. Johnson and Benton Odum, for defendant in error.

CONYERS, J. Judgment affirmed.

CONYERS, J., of the Brunswick circuit, was designated by the Governor, and presided in this case in place of POWELL, J., who was disqualified.

(90 S. C. 246)

CITY OF GEORGETOWN v. SCURRY.
(Supreme Court of South Carolina. Jan. 24, 1912.)

1. DISORDERLY CONDUCT (§ 9*)—EVIDENCE.

In a prosecution for disorderly conduct in a public street, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Disorderly Conduct, Dec. Dig. § 9.*]

2. DISORDERLY CONDUCT (§ 1*)—"PROFANE LANGUAGE."

Since "profane language" means language irreverent toward God or holy things, proof that defendant called another a liar in a public street did not show disorderly conduct in the public use of profane language.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 3, 4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, p. 5656; vol. 8, p. 7766.]

3. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—CURING ERROR.

Where, in a prosecution for disorderly conduct, the evidence only showed that defendant, in a public street, called another a liar, precipitating a difficulty, an instruction, making defendant's conviction depend on whether his language was disorderly conduct or the use of profane language to the annoyance of a citizen, was cured by another charge that the only question was the manner in which defendant addressed complainant when he called him a liar, and that if he approached complainant in an insulting manner defendant was guilty, and should be punished, etc., but that if he called complainant a liar in a cool and reserved way he was not guilty; which was too favorable to defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

4. DISORDERLY CONDUCT (§ 12*)—DEFENSES—JUSTIFICATION—INSTRUCTIONS.

Where, in a prosecution for disorderly conduct in calling a police officer a liar in a public street, there was evidence that abusive language of the officer, uttered outside the course of his duty, provoked defendant to use language no more disorderly or abusive than that used by the officer, the court should charge that, if defendant's language was provoked by the conduct of the officer outside the course of his duty, the officer was not justified in arresting accused without a warrant for such offense.

[Ed. Note.—For other cases, see Disorderly Conduct, Dec. Dig. § 12.*]

Appeal from Common Pleas Circuit Court of Georgetown County; R. W. Memminger, Judge.

"To be officially reported."

C. Le Roy Scurry was convicted of disorderly conduct, and he appeals. Reversed.

Walter Hazard, for appellant. Walter H. Wells, Sol., and James W. Wingate, for respondent.

WOODS, J. The appellant, C. Le Roy Scurry, was convicted by a jury in the court of the recorder, in the city of Georgetown, under the charge of violating the following ordinance: "That any and every person guilty of disorderly or drunken conduct or all parties assisting to produce any riot, or in any way maliciously or mischievously dis-

turbing the peace and good order of the town, or using any profane or obscene language, to the annoyance of any citizen, shall, upon conviction thereof, be fined in any sum not exceeding (\$12.00) twelve dollars for each offense, nor less than (\$5.00) five dollars, or to be confined in the county jail for not exceeding ten days." The specification of the offense is thus set out in the warrant: " * * * That at Georgetown, in said state, on the 23d day of May, A. D. 1911, Le Roy Scurry, in the city of Georgetown, S. C., did disorderly and unlawfully conduct himself, in that he (the said Scurry) did resist a lawful arrest by striking and fighting an officer of the said city, duly authorized to make arrest, and refused to submit to the said arrest, then and there being lawfully made. * * * "

[1] The circuit court affirmed the judgment of the recorder's court. The case turned mainly on the issue whether the defendant was guilty of such disorderly conduct on the street as to justify the chief of police in arresting him without a warrant. L. L. Bolick, chief of police, thus testified against the defendant: "On last Tuesday morning, in the forenoon, Mr. Scurry, the sheriff, and I were talking. We first started talking on the sidewalk, and afterwards I got in my buggy. Mr. Le Roy Scurry came up while we were talking, and said these words: 'I told you in the recorder's court that you were a liar, and I still say you are a liar.' Then I appealed to his father, and told him I would not stand for that; if he called me a liar again, I would arrest him. Afterwards Le Roy said: 'Chief, I told you that you and Spry both lied, and I mean it.' I then started towards him, and he began to strike me several times about the body and arm. If he ever struck me in the face, I didn't feel it. I had him about the neck with my left arm, and his father, Mr. Scurry, got hold of my right hand; then Mr. Tom Skinner came up, and said: 'Mr. Bolick, I will hold Le Roy, turn him loose'—and I then got loose from the sheriff, and told him not to put his hands on me any more, and I turned around as if I was going towards Le Roy, and Mr. Scurry said: 'Don't arrest him; I will put up a bond for him'—and I charged him with \$10 bond, and I told him I also wanted \$10 fine."

The defendant did not testify, but the account given on his behalf by C. W. Scurry, his father, was as follows: "On last Tuesday morning, somewhere about noon, Mr. Tommy Skinner and I called into Mr. Smith's office to sign a bond. When I came out of the office, I saw the Chief, and I walked up to shake hands with him, and asked him had any excitement taken place during my visit, and he said: 'Everything is quiet; reasonably so.' 'You haven't had any trouble at all?' 'Only Le Roy tried to take charge of the town since you were gone. His mother

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

told me that Mrs. Doar had the cow locked up; that was all I heard.' He then told me what was done, and said Le Roy went on ridiculous, and also had lied. I said: 'Well, Le Roy is a boy, and is hot-headed, I know; but I didn't know he was a liar.' Mr. Bolick said: 'He lied, and we made him admit it on cross-examination at the recorder's court.' About that time Le Roy walked up, and said: 'Chief, I told you that you were a liar, and why do you continue lying?' Mr. Bolick said: 'I am not going to stand for it.' And I said, 'Chief, there is no use of this,' and finally he got out of his buggy. I don't remember what he said. Le Roy said: 'I told you that you and Spry lied, and I mean it.' Chief got out of his buggy, and they commenced fighting. He said: 'I am going to lock this young man up; I have been watching him quite a while.' And I said, 'I will furnish bond for him,' and Chief still said, 'I am going to lock him up.' Tom Skinner came up about that time, and grabbed hold of Le Roy and pulled them apart. I said: 'If you want a bond, just say so; but you cannot lock him up to-day.' And then Mr. Bolick stated that he wanted \$10 for bond. I went in my office and got the \$10, and gave it to him. He then said: 'I want \$10 fine,' and I went in and got it from some one and gave it to him."

The scene of the disorder was immediately in front of the courthouse, and John Harrison, a witness for the defendant, testified that he heard the abusive language of the defendant in the aisle of the courthouse, where he was engaged in conversation. In view of this testimony, it seems to us clear that the appeal cannot be sustained on the ground that there was no evidence to sustain the conviction for the offense charged.

[2, 3] In his charge to the jury, the recorder made the question of Scurry's violation of the ordinance depend entirely on whether his language in the street was disorderly conduct, or the using of profane language to the annoyance of any citizen. It was in effect an instruction that the defendant could not be convicted of resisting an officer, if his language was not such as to warrant the officer in making the arrest. It is true that profane language is language irreverent toward God or holy things, and the recorder erred in charging the jury that calling a man a liar in an insulting manner would be using profane language. But we think the error was cured when, in concluding his charge, the recorder thus submitted but one issue to the jury: "The one question for you all to decide is the manner in which Mr. Scurry addressed Mr. Bolick when he called him a liar. If it is plain to your minds, jurors, that Mr. Scurry approached Mr. Bolick in an insulting manner while he was addressing his father, which would cause

Mr. Bolick or any citizen not in uniform to resent it by a fight, Mr. Scurry is guilty, and should be punished. If, on the other hand, Mr. Scurry felt that Mr. Bolick was saying something detrimental to his character, and called him a liar in a cool and reserved way, Mr. Scurry is not guilty and should not be punished." The evidence of defendant's own witness tended to show that the language used by him was very abusive, and loud enough to be heard by persons passing along the street. It was too favorable to the defendant to charge that such language would not justify arrest, unless it was calculated to bring on a fight.

[4] There is one point on which we think the recorder committed a fatal error. There was evidence on the part of the defendant from which the jury might have drawn the inference that the abusive language of the chief of police, uttered entirely outside the course of his duty, provoked the defendant to use language no more disorderly or abusive than that used by the officer. A police officer who goes out of the course of his duty, and speaks so abusively of a citizen, in his presence, as to elicit language in reply which is no more disorderly, either in substance or in manner, than the language of the officer provoking it, is not justified in arresting, without warrant, the citizen for disorderly conduct in using the abusive language. The recorder should have given an instruction to this effect, as requested by defendant's counsel.

The judgment of this court is that the judgment of the circuit court be reversed.

GARY, C. J., and HYDRICK, J., concur.

(90 S. C. 319)

STACK v. HAIGLER.

(Supreme Court of South Carolina. Jan. 8, 1912.)

1. REFERENCE (§ 37*)—REFEREE—QUALIFICATIONS—STATUTES.

Code Civ. Proc. § 295, providing that no judge shall sit as referee in any action in the court of which he is judge, and not already referred, permits one to file his report as referee where he was appointed referee prior to his election and qualification as a judge.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 37.*]

2. APPEAL AND ERROR (§ 170*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

A question involving the constitutionality of a statute not urged in the circuit court is not properly before the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052; Dec. Dig. § 170.*]

3. REFERENCE (§ 37*)—REFEREE—DE FACTO OFFICER.

A referee who acts in good faith and under a supposed authority to file his report, after his election and qualification as a judge,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is a de facto officer for the purpose of filing the report, and must be deemed clothed with authority to make the report.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 37.*]

4. APPEAL AND ERROR (§ 1022*)—FINDINGS OF REFEREE—CONCLUSIVENESS.

An action to recover possession of land, defended on the ground that the deed from defendant to plaintiff was fraudulent, is an action at law, and the court at law may declare the deed a nullity, and the findings of fact of the referee approved by the trial court are not reviewable in the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

5. REFERENCE (§ 100*)—REPORT OF REFEREE—CONCLUSIONS OF LAW AND STATEMENTS OF FACT.

Code Civ. Proc. § 294, requiring the referee to state the facts found and the conclusions of law separately, is directory merely, and where the facts found and the conclusions of law are not stated separately, the remedy is by motion for a recommittal and not by exception.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.*]

6. APPEAL AND ERROR (§ 1044*)—HARMLESS ERROR—ERRORS IN REPORT OF REFEREE.

Where the findings of fact of the referee, approved by the trial court, are not reviewable on appeal, the error in the report resulting from the failure to state separately the facts found and the conclusions of law is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1044.*]

7. REFERENCE (§ 80*)—REPORT OF REFEREE—TIME TO FILE—LACHES.

Under Code Civ. Proc. §§ 294, 295, requiring referees to report within 60 days from the final submission of the action to them, and in default thereof either party may serve notice on the opposite party that he elects to end the reference, a party who does not end the reference by notice to the opposite party may not complain of the failure of the referee to file his report within the specified time.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 116; Dec. Dig. § 80.*]

8. APPEAL AND ERROR (§ 967*)—DISCRETION OF TRIAL COURT—REFUSAL TO RECOMMIT REPORT OF REFEREE.

The refusal of the court to recommit the report of a referee to permit the moving party to prove a fact will not be disturbed unless there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3841, 3842; Dec. Dig. § 967.*]

Appeal from Common Pleas Circuit Court of Calhoun County; Geo. E. Prince, Judge. "To be officially reported."

Action by William F. Stack against Angeline Haigler. From a judgment for plaintiff, defendant appeals. Affirmed.

Jacob Moorers, for appellant. Moss & Lide, for respondent.

GARY, A. J. This is an action to recover the possession of a tract of land, containing about 30 acres. The defendant denied the allegations of the complaint, and alleged that the deed from the defendant to the plaintiff

was fraudulent and without moral or legal consideration. The case was referred to a special referee, whose findings of fact and conclusions of law were in favor of the plaintiff. The defendant filed exceptions to the report of the referee, but they were overruled and the report was confirmed, whereupon he appealed to this court.

The first question that will be considered, is raised by the following exception: "The circuit judge erred in overruling the following exception to the report of the referee: (1) Because the report herein is void for the reason that Hon. Robert E. Copes, referee herein, was at the time of filing the report herein, to wit, the 1st day of April, 1911, and for some time before that date, a duly qualified judge of the circuit courts of this state, and as such judge, he was without authority to file the report in this case. This was error, because filing the report of a referee is an official act of a referee, and, when done by a circuit judge, it is in violation of article 5, § 9, of the Constitution of 1895 of this state."

Section 9, art. 5, of the Constitution, provides that: "Judges shall not be allowed any fees or perquisites of office, nor shall they hold any other office of trust or profit, under this state."

[1] Section 295 of the Code contains the provision that "no judge or justice of any court, shall sit as referee in any action, in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate." The words "and not already referred" were intended to apply to just such a case, as the one now under consideration.

[2] The question whether this provision is unconstitutional was not urged on circuit, and is, therefore, not properly before this court for consideration.

[3] There is another reason, why this exception cannot be sustained. His honor Judge Copes unquestionably acted in good faith, and under a supposed authority to file the report, after his election and qualification as a judge. In filing the report he was a de facto officer for that purpose, and, therefore, must be regarded as clothed with proper authority to make the report. *Cromer v. Bolnest*, 27 S. C. 436, 3 S. E. 849.

[4] These exceptions assigning error on the part of his honor the presiding judge, in sustaining the referee's findings of fact, must be overruled for the reason, that the issue of title is legal in its nature, and the findings of fact thereon, are not reviewable by this court. *Peeples v. Cummings*, 45 S. C. 107, 22 S. E. 730; *Peeples v. Warren*, 51 S. C. 560, 29 S. E. 659; *Johnson v. Jones*, 72 S. C. 270, 51 S. E. 805; *Gunter v. Fallow*, 78 S. C. 457, 59 S. E. 70.

The same principle is applicable to the issue of fraud, alleged in the answer. The

court of equity has not exclusive jurisdiction in cases of fraud. *Miller v. Hughes*, 33 S. C. 530, 12 S. E. 419; *Dubose v. Kell*, 76 S. C. 313, 56 S. E. 968. And in an action to recover possession of land, when it is alleged that the deed of conveyance, upon which the plaintiff relies is fraudulent, it is not necessary to invoke the equitable aid of the court, as a court of law, for the purposes of the issue then pending may, declare the deed a nullity. *McKenzie v. Sifford*, 45 S. C. 496, 23 S. E. 622; *Griffin v. Ry.*, 66 S. C. 77, 44 S. E. 562; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102.

[5] The next question for consideration is whether the circuit judge erred in refusing to recommit the report of the referee, on the ground that the facts found and the conclusions of law are not stated separately. This requirement of section 294 of the Code is merely directory, and the proper practice "was not to except because of the omission, but to move for a recommitment of the report, that it might be reproduced in the desired form." *Bollmann v. Bollmann*, 6 S. C. 29; *Charleston v. Cauldfield*, 19 S. C. 201.

[6] Furthermore, as the findings of fact are not the subject of review by this court, even if there was error, it was not prejudicial.

[7] We proceed to consider whether there was error in refusing to set aside the report, on the ground that it was not filed within 60 days after the reference was closed.

Section 294 of the Code provides that "masters or referees shall make and file with the clerks of the courts of common pleas, of their respective counties, their reports within sixty days, from the time the action shall be finally submitted to them, and, in default thereof, they shall not be entitled to any fees." Section 295 contains the following provision: "The referee or referees shall make and deliver a report, within sixty days from the time the action shall be finally submitted; and, in default thereof, and before the report is delivered, either party may serve notice on the opposite party, that he elects to end the reference; and thereupon the action shall proceed, as though no reference had been ordered, and the referees shall not in such case, be entitled to any fees." The defendant did not undertake to end the reference, by serving a notice to that effect, on the opposite party. Furthermore, where the delay is not attributable to the laches of a party to the action, he shall not be made to suffer, by reason of the action of the court, in causing the delay. *State v. Fullmore*, 47 S. C. 34, 24 S. E. 1026.

[8] The next question for consideration is presented by the following exception: "Because the circuit judge erred in refusing defendant's motion to recommit the report of the referee, which motion was as follows: 'Defendant moves for leave to prove the loss

of the written agreement, between her and plaintiff in this action and the contents thereof, and also moves for leave and extension of time to give notice to plaintiff's counsel to produce any and all receipts and papers in the case that may be specified in said notice.' The refusal of this motion was greatly prejudicial to the defendant's cause, in that she was denied the right to prove that she had paid the mortgage in question, and did not owe the amount as testified to by the plaintiff."

The appellant has failed to show that there was an abuse of discretion on the part of the circuit judge, and this exception is overruled.

Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 331)

SANDERS v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina. Jan. 17, 1912.)

1. APPEAL AND ERROR (§ 866*)—REVIEW—JUDGMENT OF NONSUIT—EXTENT.

A nonsuit will not be sustained by the Supreme Court on grounds not presented to the circuit court, but where the circuit court grants a nonsuit on specified grounds after the denial of a nonsuit on other grounds, defendant may request the Supreme Court to sustain the nonsuit on the latter grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3472; Dec. Dig. § 866.*]

2. TRIAL (§ 139*)—QUESTIONS FOR JURY—NONSUIT—WHEN AUTHORIZED.

Where there is some testimony supporting plaintiff's case, a nonsuit is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 338; Dec. Dig. § 139.*]

3. RAILROADS (§ 358*)—OPERATION—INJURIES TO LICENSEE ON TRACK—CARE REQUIRED.

Where for many years the public generally passed along a railway company's right of way in a switchyard without objection from the company, and without the posting of any notice forbidding such use, a finding that the use was acquiesced in by the company was authorized, and a person on the path so used was a licensee and entitled to ordinary care on the part of the company to prevent injury to him, and, in view of the frequency of the use of the right of way by the general public, the company must anticipate the presence of persons on its track at that place, and must exercise due care to prevent injury to them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

4. TRIAL (§ 142*)—QUESTIONS FOR JURY—INFERENCES FROM EVIDENCE.

Where more than one inference can be reasonably drawn from the testimony, the jury must be permitted to draw the inference, but where the testimony is susceptible of only one inference, the court will declare what that inference is.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

5. RAILROADS (§ 394*)—OPERATION—INJURIES TO PERSON ON TRACK—COMPLAINT—NEGLIGENCE.

A complaint in an action against a railroad company for injuries to a person struck by a train, which alleges that the train ran at a high rate of speed and without giving any signal, so that plaintiff might have been made aware of the approach of the train, does not limit the charge of negligence to the rate of speed of the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.*]

6. RAILROADS (§ 400*)—OPERATION—INJURIES TO PERSON ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a person struck by a train, evidence held to require submission to the jury of the question whether the train was operated at a dangerous speed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1374; Dec. Dig. § 400.*]

7. RAILROADS (§ 381*)—OPERATION—INJURIES TO PERSON ON RIGHT OF WAY—CONTRIBUTORY NEGLIGENCE.

One walking on a well-defined path on a railroad right of way in common use by the public generally was not guilty of negligence, as a matter of law, because he walked too close to a track, when there was room enough to walk at a safe distance.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1285-1293; Dec. Dig. § 381.*]

Appeal from Common Pleas Circuit Court of Charleston County; Robt. Aldrich, Judge. "To be officially reported."

Action by Robert B. Sanders against the Southern Railway, Carolina Division. From a judgment of nonsuit, plaintiff appeals. Reversed.

Logan & Grace, for appellant. Jos. W. Barnwell, for respondent.

HYDRICK, J. This is an appeal from an order of nonsuit in an action to recover damages for personal injuries sustained by plaintiff, as the result of the alleged negligent, reckless, and wanton conduct of defendant in operating a train of cars, which struck plaintiff, knocked him down and ran over his leg, crushing it so that it had to be cut off. At the close of plaintiff's testimony, the defendant moved for a nonsuit upon two grounds: (1) Because there was no evidence of recklessness or wantonness; (2) because, as to the cause of action for negligence, under the evidence, plaintiff was a trespasser in defendant's switchyard, and defendant owed him no duty, except not to recklessly or wantonly injure him. The presiding judge sustained the first ground, but overruled the second, holding that the evidence made an issue whether plaintiff was not a licensee and entitled to ordinary care to prevent injury to him. But he granted the nonsuit on two grounds: (1) That there was no evidence of negligence, saying that the negligence complained of was in operating the train at a high rate of speed, and that the only evidence of the speed of the train was that of the plaintiff, who said that he neither saw nor heard the train, and, therefore, he could

not testify as to its speed; (2) that plaintiff's injury was caused by his own negligence in walking on or near the track when there was room enough for him to walk at a safe distance from it. These rulings are made the grounds of exceptions; and the defendant, according to proper practice, gave notice that this court would be asked to sustain the nonsuit upon the second ground upon which it was moved for on circuit.

[1] Appellant's contention that respondent is not entitled to have the second ground upon which the motion for nonsuit was based on circuit considered by this court, as a sustaining ground is untenable. The cases cited in support of his position hold merely that a nonsuit will not be sustained by this court on additional grounds *which were not presented to the circuit court*. In *Lewis v. Hinson*, 64 S. C. 578, 43 S. E. 15, the court did consider an additional ground to sustain a nonsuit; but in that case, as in this, the ground considered was one which had been presented to the circuit court. In *Kennedy v. Greenville*, 78 S. C. 127, 58 S. E. 990, the court does say: "It is well settled that a nonsuit cannot be sustained on grounds additional to those on which it was granted." Standing alone, this statement of the rule is inaccurate, and is susceptible of a meaning which was not intended by the court, as appears from a consideration of the opinion as a whole, for on the next page, the court stated the rule, correctly thus: "Hence we hold that the motion for a nonsuit must stand or fall upon the grounds set forth in the motion."

[2] As the case will have to go back for a new trial, we will not discuss the testimony more than is necessary to sustain our conclusion; and, in what we shall say, we must not be understood as expressing any opinion as to the sufficiency of the evidence to prove the facts in issue, or as to whether the inferences which we suggest *might* have been drawn from the testimony *should* be drawn. What inferences *should* be drawn are exclusively for the jury. But we merely hold that there was *some* testimony tending to support plaintiff's case, and, therefore, that the nonsuit was improper.

[3] Plaintiff's testimony tended to show that he was struck while walking alongside of defendant's track in a well-beaten path at a place where the general public had been accustomed to walk for many years, without any objection from defendant; that the train which struck him was running backwards, at the rate of from 12 to 20 miles an hour, through a populous section of the city of Charleston at a place where men, women, and children were constantly passing and re-passing along defendant's right of way and upon and near its tracks; that the train ran upon him from behind, without any signal or warning of its approach being given. We

think this testimony made out a prima facie case for plaintiff. From it the jury *might* reasonably have inferred that the use of its right of way by the public was known to and acquiesced in by defendant, and, therefore, that plaintiff was a licensee and entitled to ordinary care on the part of defendant to prevent injury to him; and, also, from the frequency of the use by the general public, that defendant should have anticipated the presence of persons on or near its tracks at that place, and should have exercised due care to prevent injury to them. Jones v. Railway, 61 S. C. 556, 39 S. E. 758; Matthews v. Railway, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286; McKeown v. Railroad Co., 68 S. C. 483, 47 S. E. 713; Goodwin v. Railroad Co., 82 S. C. 321, 64 S. E. 242; Bamberg v. Railroad Co., 72 S. C. 389, 51 S. E. 988; Lamb v. Railroad Co., 86 S. C. 106, 67 S. E. 958, 138 Am. St. Rep. 1030.

In the Jones Case, the court said: "Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent to such use by the company, yet if there was evidence tending to show knowledge of any acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company, under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care under the circumstances to avoid injury." In the Matthews Case, the court said: "But where a railroad company allows the public to use its right of way for a long time at a particular place in a large town so continuously and frequently that it becomes a well-beaten or clearly defined path, plain and open, a reasonable man may well infer that he will not encounter unguarded cuts and the other dangers of the ordinary path along the railroad track. In such a case, the owner of the property knows and acquiesces in the use, and by his acquiescence those wishing to go in that direction are lured into a sense of safety in following the course obviously taken by those who have preceded them. If the owners, or those in control of the property, fail to observe ordinary care in avoiding injury to persons who travel the path, relying on the safety suggested by the implied invitation, they must be held responsible." This doctrine was reaffirmed in each of the other cases above cited and it is the settled law of this state.

But in its second ground of the motion for nonsuit and in its argument in this court, defendant seeks to bring this case within

the principle upon which the cases of Hale v. Railroad Co., 34 S. C. 292, 13 S. E. 537, and Haltiwanger v. Railroad Co., 64 S. C. 7, 41 S. E. 810, were decided. The facts upon which those cases were decided were somewhat alike, but not so nearly so that the Hale Case cannot be distinguished from the Haltiwanger Case, and also from the cases above cited and from this case, but the Haltiwanger Case cannot be reconciled with the cases above cited, and therefore it and the Hale Case, in so far as they are at variance with those cases, are no longer to be considered as authority.

The defendant contends that this case should be distinguished from the Jones Case and those following it, on the ground that, in this case, the accident occurred in defendant's switchyard, where there were numerous tracks upon which cars and trains were being constantly switched, and therefore the danger to pedestrians was so great and obvious that it cannot be reasonably inferred that defendant acquiesced in the use of its switchyard by them. There is some force in this contention, and it is supported by high authority. The same rule that was announced in the Jones Case prevails in the state of Georgia, yet the courts of that state hold that it is not applicable to cases where the injury occurs in the railroad company's switchyard. This exception to the rule is based by the Georgia courts upon the ground that the continuous use of the tracks in a switchyard for switching purposes and the obvious and peculiar dangers to pedestrians there are inconsistent with an inference that the company has impliedly invited or licensed persons to use the yard as a walkway. Waldrop v. Georgia R. & Banking Co., 7 Ga. App. 342, 66 S. E. 1030.

We think, however, that ordinarily the question whether the company knew of and acquiesced in such use of its right of way, whether it be in the switchyard or elsewhere on the right of way, is one of fact to be determined by the jury. In the Matthews Case the court said: "It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation to the public to enter."

[4] Of course, the testimony tending to support the allegation of knowledge and acquiescence on the part of the company may be susceptible of only one inference, and, in that event, the court should declare what that inference is. But, as in other cases, where more than one inference can be reasonably drawn from the testimony, the jury must be allowed to say what inference *should* be drawn. We held, in the Lamb Case, that the obvious danger of attempting to walk across a river on a high railroad bridge, a quarter of a mile long, over which trains were frequently passing when the

company had posted a notice forbidding such use of the bridge, was fatal to any reasonable inference of acquiescence on the part of the company in such use of its bridge. In that case, the court said: "When a railroad company or other owner of dangerous property warns persons against its use, those who insist on incurring the peril of using it, however numerous they may be, have no right to charge the owner with acquiescence in the use." But in this case, there was testimony that, for more than 35 years, the defendant's right of way at the place where plaintiff was hurt had been used by plaintiff and the public generally as a footway, without let or hindrance, and that no sign or notice had ever been posted forbidding such use. We think, therefore, that there was no error in overruling the second ground of the motion for nonsuit.

[6] His honor erred in holding that the rate of speed was the negligence complained of. The complaint charges negligence in that "said train of cars approached said traveled place or walkway and populous part of the city of Charleston at a high and dangerous rate of speed, and without giving any signal by ringing the bell so that the said plaintiff might have been made aware of the approach of said train of cars, or taking any precautions whatever to avoid injuring said plaintiff, so that said plaintiff was unaware of the approach of said train of cars."

[8] Considering plaintiff's testimony as a whole, we think the issue as to the speed of the train should have gone to the jury. At a previous trial, when he was asked at what speed the train was moving, plaintiff answered: "Judging from the way it hit me, I should judge it was not less than 12 to 15 miles an hour." This was brought out on his cross-examination at this trial, because, in his direct examination at this trial, he testified that the speed of the train was "at least about 12 to 15 or 20 miles." At this trial, however, he gave no reason for his estimate of the speed, except as it may be involved in his answer at the former trial. But he testified that he did not lose consciousness when he was run over by the train, and he did not say that he did not see or hear the train after it struck him. His estimate of its speed may have been based upon what he saw and heard of it at the time it struck him and was passing over him and after it had passed over him. Sometimes we reach correct conclusions without being able to give satisfactory reasons for them. Inasmuch as plaintiff testified positively as to the speed of the train, and although he assigned a reason at the former trial for his estimate of the speed which may have been faulty, we are not prepared to say that his testimony on this point is entitled to no weight at all. It should have

been submitted to the jury for what it was worth.

[7] We think his honor erred also in holding that plaintiff was guilty of negligence in walking too close to the track when there was room enough for him to walk at a safe distance from it. The testimony was that he was walking in a well-defined path. From this, the jury might have inferred that the path had been used by many people before, and that in walking where many others had gone before, plaintiff was exercising ordinary care. In *Lamb's Case*, the court said: "In the cases cited (that is, the *Jones Case* and those following it), it was entirely consistent with reason to say that it was not negligence per se for a person to walk on the right of way expecting to step off on the approach of a train." See, also, *Matthews v. Railway*, supra, and *Sentell v. Railway*, 70 S. C. 183, 49 S. E. 215.

Reversed.

GARY, C. J., and WOODS, J., concur.

(90 S. C. 498)

MACKORELL BROS. v. WESTERN UNION TELEGRAPH CO.†

(Supreme Court of South Carolina. Jan. 24, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 73*)—TELEGRAPH MESSAGES—TRANSMISSION—FORWARDING BY TELEPHONE—QUESTION FOR JURY.

Where the addressee of a telegraph message had a direct telephone connecting with one of defendant's intermediate offices from which the message could not be sent by telegraph to destination because of a strike of the operator located there, whether it was defendant's duty to forward the telegram from such intermediate point to the addressee by telephone was for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

2. TELEGRAPHS AND TELEPHONES (§ 38*)—TRANSMISSION OF MESSAGES—DELAY.

It was the duty of a telegraph company, as soon as it discovered that its office at the destination of a commercial message was closed, to promptly notify the sender so that he might take further steps in the premises to protect his interests.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

3. TELEGRAPHS AND TELEPHONES (§ 38*)—MESSAGES—TRANSMISSION—DELAY.

The fact that defendant's telegraph office at the destination of a commercial message was closed because the operator had gone on the strike did not excuse a delay of two days in delivering the message by mail, in the absence of proof that the strike was not brought about by the telegraph company's fault or negligence, and that it exercised due care and diligence to supply the place of the striking operator.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For opinion on petition for rehearing, see 73 S. E. 875.

Appeal from Common Pleas Circuit Court of York County: J. W. De Vore, Judge.

Action by Mackorell Bros. against the Western Union Telegraph Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Geo. W. S. Hart and John R. Hart, for appellants. John Gary Evans and Thos. F. McDow, for respondent.

HYDRICK, J. On August 20, 1907, plaintiffs, who are wholesale grocers, filed with defendant's agent at Yorkville, S. C., a night message, addressed to the Dunlop Milling Company, at Clarksville, Tenn., as follows: "Book two thousand barrels same price as last contract." The addressee was engaged in the manufacture and sale of flour, and the telegram was an order for 2,000 barrels at \$4.75 each, that being the price at which the company had last sold plaintiffs flour. According to the testimony, the custom of the trade is that if an order, like the one sent by plaintiffs, is accepted, no notice of acceptance is given, and where no reply to such an offer is received, the party making it regards it as accepted and acts accordingly. Receiving no reply, plaintiffs regarded their offer as accepted and sold flour to their customers on a basis of \$4.75 per barrel, for which they had to pay \$4.95 in the market to fill their contracts. If their telegram had been promptly delivered on the morning of the 21st, as it should have been, in due course, plaintiffs' order would have been accepted, but if it had been declined, they would have been notified, according to the custom of the trade, and they could and would have bought the flour elsewhere at the price which they offered the Dunlop Milling Company. The message was transmitted to Nashville, Tenn., by telegraph, but, on account of a strike among defendant's employees, the defendant's office at Clarksville, was closed, and the agent at Nashville forwarded it to the milling company by mail. On receipt of it, on August 22d, the milling company declined to accept it, and so notified plaintiffs. There was a telephone line between Nashville and Clarksville, and the addressee had a telephone in its office connected with that line. The message could have been telephoned from Nashville directly to the addressee. Defendant sent no service message notifying plaintiffs that its Clarksville office was closed, or of its failure to promptly transmit and deliver the message. When the message was filed, plaintiffs knew that there was a strike among defendant's employees and that some of its offices were closed on that account, but did not know the Clarksville office was closed. The testimony was conflicting as to whether plaintiffs were informed, when the message was filed, that it would be received only "subject to indefinite delay" on account of the strike.

This action was brought to recover damages alleged to have resulted to plaintiffs on account of the failure to deliver the message promptly. Under the instructions given them, the jury found for the defendant, in whose favor judgment was duly entered.

[1] The circuit judge erred in charging the jury that it was not the defendant's duty to telephone the message from Nashville to the addressee. This instruction was based upon a misapprehension by his honor of the decision of this court in the case of Hellams v. Tel. Co., 70 S. C. 83, 49 S. E. 12. In that case, the telegram was sent from Greenville, S. C., to Hellams, who was on Sullivan's Island, near Charleston, S. C. The island was connected with the city of Charleston by steamboats and also by a telephone line, but Hellams had no telephone in his house. On the back of the blank upon which the message was written were the following words: "And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination." Construing this language, the circuit judge instructed the jury that if defendant could have forwarded the message by telephone and failed to do so, they should find for plaintiff, if they also found that due care and diligence in the transmission of the message required the forwarding thereof by telephone. On appeal, this court held that this instruction was erroneous, holding that the words in the contract above quoted, "the lines of any other company," meant the lines of any other telegraph company, and not the lines of any telephone company. The court also held that, as the proof showed that Hellams had no telephone in his house, to impose on defendant the duty of forwarding the message by telephone would have required the intervention of some third person through whom it would have had to be conveyed to Hellams, which would have impaired the confidential relations assumed in the handling of the telegram. In this case, the message could have been telephoned directly to the addressee, without in the slightest degree impairing the confidential relations assumed in undertaking to deliver it. The court should have left it to the jury to say whether, under the circumstances, due care and diligence in the transmission and delivery of the message required defendant to forward it from Nashville to Clarksville by telephone. In Sullivan v. Tel. Co., 82 S. C. 569, 64 S. E. 752, 22 L. R. A. (N. S.) 1214, 129 Am. St. Rep. 903, this court said: "It is the duty, however, of these companies, where they have been thus interfered with (that is, by a strike) to make a reasonable effort to transmit the telegram by other lines or other means, and on failure to do so, they will be held liable for all losses suffered."

[2] Moreover, it was defendant's duty to

notify plaintiffs, as soon as it discovered that it could not deliver the message promptly on account of the office at Clarksville being closed, so that they might take such further steps in the premises as they might have deemed necessary for the protection of their interests.

[3] The mere fact that the Clarksville office was closed, because the operative there had gone on a strike, does not excuse the delay. Before it can avail itself of that defense, the burden is upon the defendant to prove that the strike was not brought about by its own fault or negligence, and that it exercised due care and diligence to supply the place of the striking employé. Jones on T. & T. Cos. §§ 361, 365.

Defendant seeks to sustain the judgment on the ground that the court should have directed the verdict in its favor. As there was some evidence in support of the facts hereinbefore stated, there was no error in refusing to direct the verdict. Lathan v. Telegraph Co., 75 S. C. 129, 55 S. E. 134.

Judgment reversed.

GARY, C. J., concurs.

WOODS, J. (concurring in the result). I concur in reversing the judgment and in the reasoning of the opinion except in one particular. When delay in the carriage of goods or in the transmission and delivery of telegraph messages is due to a strike of the carrier's employes, the question whether the burden is on the carrier to prove that the strike was not brought about by its own negligence is a difficult and important one which seems not to be settled by a controlling current of authority. The point is not made in the exceptions, and its decision is not necessary to a disposition of the appeal. I think, therefore, the court should not commit itself on the question until a case arises in which it is directly involved, and the court has had the benefit of full argument.

(90 S. C. 340)

STATE v. DETYENS et al.

(Supreme Court of South Carolina. Jan. 18, 1912.)

1. COUNTIES (§ 101*) — TREASURER — BOND — DEFENSES.

In an action on a county treasurer's bond for failing to turn over fish stamp taxes collected under act of 1906, it was no defense as to the surety that the stamps were left in the treasurer's office by the treasurer's predecessor, and were never receipted for by the treasurer.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.*]

2. COUNTIES (§ 101*) — TREASURER — BOND — DEFENSES.

In an action on a county treasurer's bond for failing to pay over road taxes collected, it was no defense that they were collected after

expiration of the time during which by law he was entitled to collect the same.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.*]

Appeal from Common Pleas Circuit Court of Georgetown County; Ernest Gary, Judge.

Action by the State of South Carolina against James F. Detyens and another. From an order sustaining a demurrer to defenses, defendants appeal. Affirmed.

The order and exceptions thereto referred to in the opinion read as follows:

"Order.

"This action was brought by the state against James F. Detyens as principal and the American Bonding Company of Baltimore as surety on the official bond of Detyens as county treasurer of Georgetown county.

"It is alleged in the complaint and specifically admitted in the answer of the American Bonding Company that Detyens, as county treasurer, collected certain moneys as taxes imposed upon persons engaged in gathering oysters, catching fish, etc., which tax is provided for under the act of 1906, and that the money so collected was not turned over to Detyens' successor in office. The bonding company sets up as a defense for failure of its principal in this respect that the fish stamps were left in the treasurer's office by the predecessor of Detyens and were never receipted for by the said Detyens as county treasurer or so as to render his official bond responsible therefor. The state interposed a demurrer to this defense upon the ground that the allegations contained therein fail to constitute a defense.

"I am of the opinion that the demurrer in this respect should be sustained for the reason that the tax imposed by the act of 1906, commonly known as the fish stamp tax, has been paid by the individuals and collected by the treasurer as a tax upon fish taken in the public waters of the state, and such tax is a part of the public revenue. The fact that Detyens did not receipt for the unsold stamps on hand when he took charge of the office cannot affect the case. He actually received them—his answer so specifically admits—and sold them to persons liable for the tax, and, having failed to account for the money so collected, his surety is liable to the public therefor.

"As a further defense to the cause of action set up by the plaintiff, the defendant American Bonding Company alleges in the fourth and fifth paragraphs of its answer that included in the amount of the admitted shortage are items erroneously charged against the said county treasurer for commutation of road duty collected by the treasurer after the expiration of the time during which by law he was entitled to collect the same; that the treasurer had no authority

to receive the same, and that it, as surety upon the bond, cannot be held liable therefor. The plaintiff demurs to the defenses set up in these paragraphs of the answer upon the ground that they fail to state facts sufficient to constitute a defense. Defendant contends that the law did not require or allow the collection of the highway tax at the time of the actual collection thereof, and that having been collected under such circumstances no liability rested upon it as surety to account; that if there is any liability whatsoever it rests upon James F. Detyens as a personal and private obligation and not as an official trust. To sustain this view, defendant relies upon the case of *State v. White*, 10 Rich. Law, 442, and *Elliott v. Jeter*, 59 S. C. 483, 38 S. E. 124. An examination of the *White Case* will show that the money for which the surety of the ordinary was sought to be held was neither taxes nor public revenues of any kind, nor was it money received by the ordinary *colore officii*. The court said the only way he could receive it was as a mere personal trust, for which he alone was responsible. In the *Jeter Case* neither tax nor public revenue was involved; the liability was to individuals for personal funds. In that case the court held that if the probate judge had no jurisdiction to partition realty, any funds coming into his hands from a partition sale could not create a liability under his official bond. The defendant cited cases from other states which seem to be more nearly in accord with its contention, but the great weight of authority is to the contrary. In the case of *Town of Pawlet v. Kelly*, 69 Vt. 401,¹ it is said: 'It is no defense herein that the selectmen included the unpaid highway tax for 1891 and 1892 in the tax bill for 1893. If the taxpayer paid Kelly the amount of the tax, the money became the money of the town, and the surety liable if the collector did not pay it over. If the tax levy was invalid, it was no defense as to the nonpayment of the moneys in fact collected.'

"In *Fuller v. Calkins*, 22 Iowa, 305, it is said: 'The substance of the whole matter, however, is that, though the collector may not have been legally bound to receive this money at the time, yet he did receive it, and, as we are bound to presume, executed the usual and proper receipts, and entered the proper memorandum on the tax list at the time, or so soon as the same was placed in his hands. By so doing he was in no just sense the mere custodian or trustee of the taxpayers, holding the funds for their use and alone liable to them, or individually to the government, for the faithful application of the funds. This was public money, funds in his hands by virtue of his office, revenue which he was bound to account for and pay over; and, by the very terms of the bond, the sureties were liable therefor. As was said in *Warren County v. Ward*, 21 Iowa, 84, the officer was perhaps not bound

to take the money, but he did, accepting it as collector, and he is therefore bound for it as money received by virtue of his office.'

"In the monographic note to the case of *Feller v. Gates*, 91 Am. St. Rep. 558, it is said: 'Where, however, money is received by a treasurer as public funds, and in his capacity as treasurer, he or his sureties cannot, by the weight of authority, attack the validity of the means by which it was raised, in order to turn his official trust into a private one, or make his appropriation of such money an extra official delinquency, and, therefore, not a breach of his official bond. Thus, where money is borrowed or raised by taxation, and paid into the treasury, it is no defense that the board which raised the money, in so doing, exceeded its lawful authority. As is said in *Cheboygan Co. v. Erratt*, 110 Mich. 156, 67 N. W. 1117: "We think it altogether clear that, when it is shown that moneys have actually come into the hands of the treasurer as treasurer, neither he nor his bondsmen can avoid liability by showing that either irregularities exist in the proceedings by which such moneys were collected, or that there was no authority to enter into the agreement which resulted in the receipt of the money by the county. It is enough to impose upon the treasurer an active duty that the county has received the money, and the obligation on the bond exists when the money finds its way into his hands as treasurer." So it is no defense for failure to pay over or account for money paid into the treasury as taxes, that they were collected without warrant (*Berrien Co. v. Bunbury*, 45 Mich. 79, 7 N. W. 704), or that the levy was irregular (*Ma-haska Co. v. Ingalls*, 14 Iowa, 170). * * *

"In the cases above considered, and by the authorities generally, no distinction is made between a treasurer and his sureties, so far as concerns the right of either to question the legality of the means by which money paid to and received by him as treasurer was raised.' And in this case, page 554, a number of authorities are cited as sustaining the rule that sureties are even liable for taxes collected under an unconstitutional statute.

"It is admitted that the highway tax was collected by Detyens, as county treasurer, and no excuse for failure to turn it over to his successor is given other than that it was paid subsequent to the time fixed by statute. The state requires certain citizens to perform manual labor upon the public highways each year, but grants to each the privilege of commuting such service by the payment of a fixed amount of money before the 1st day of March. The payment of money within the time prescribed is a privilege granted the citizen, of which he may avail himself or not in accordance with his desire, but if he fails to pay within the required time, he cannot complain upon being required to labor upon the highway for the stipu-

¹ 23 Atl. 22.

ated number of days. On the other hand, if the treasurer permits the payment, and in fact receives the tax after the expiration of the prescribed time, the citizen being thereby relieved of performing the labor, the money so collected is a public revenue, and is received by the county treasurer by virtue of his office. This, at most, was a mere irregularity in the collection thereof, which should not, according to an unbroken line of authorities, excuse the treasurer from turning it over to his successor, and could not relieve the surety from liability therefor. The various persons liable to perform road duty have only tardily paid the tax, and the treasurer having elected to receive it, neither he nor the sureties will now be heard to say that it was irregularly or improperly collected. Having been thus intrusted with this fund by virtue of his office, it was the duty of Detyens to turn it over to his successor, as provided by section 605, Code of Laws 1902, volume 1. The demurrer to the fourth and fifth paragraphs of the answer must, therefore, be sustained.

"Exceptions.

"First. Because the circuit judge erred in sustaining the demurrer to the defense set up in the sixth paragraph of the answer of the defendant, the American Bonding Company of Baltimore, the error assigned being that it was alleged in said paragraph and admitted by the demurrer that the said Detyens, county treasurer, never receipted for, nor did he assume any responsibility whatever for the fish stamps therein mentioned, and his surety was never in law responsible to the state or the county for said fish stamps.

"Second. Because the circuit judge erred in sustaining the demurrer to the defense set up in the seventh paragraph of the defendant's answer, the error assigned being that the amount therein mentioned as charged against the county treasurer as moneys received by him in commutation of road duty was alleged in the answer and admitted by the demurrer to have been received by the county treasurer after the expiration of the time during which by law he was entitled to collect the same, and the surety was therefore not responsible for his failure to pay over the same.

"Third. Because the circuit judge erred in sustaining the demurrer to the defense set up in the eighth paragraph of the defendant's answer, the error assigned being that the answer having alleged that the said county treasurer received the amounts stated in said paragraph in commutation of road duty after the expiration of the time when he was by law authorized to collect the same, and that the surety was therefore not responsible for his failure to pay over the same.

"Fourth. Because the circuit judge erred in not holding that if there was any liability resting upon the county treasurer because of the collection of the commutation of road duty, the same created simply a personal liability on the part of the county treasurer, and was not a liability for which his bondsman would be responsible."

Mordecai & Gadsden and Rutledge & Haggood, for appellants. J. Fraser Lyon, Atty. Gen., and Walter H. Wells, Sol., for the State.

PER CURIAM. [1, 2] This appeal is from an order sustaining demurrer to the fourth and fifth paragraphs of the answer, which order is herewith reported with exceptions thereto.

After due consideration we are satisfied that the exceptions should be overruled for the reasons stated in the order.

Judgment affirmed.

(187 Ga. 163)

TAYLOR v. GARY et al.

(Supreme Court of Georgia. Dec. 12, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

Error was assigned upon rulings of the court relative to the admissibility of evidence, and upon the charge of the court and refusal to charge, and also upon the refusal of the judge to grant a new trial on the ground of alleged newly discovered evidence. Upon a careful examination of the entire record it does not appear that there was any error of law committed upon the trial, or that the newly discovered evidence was of such character as would probably produce a different result on another trial. The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Berrien County; J. H. Merrill, Judge.

Action between G. M. Taylor and J. H. Gary and others. From the judgment, Taylor brings error. Affirmed.

J. W. Powell and J. P. Knight, for plaintiff in error. W. D. Bule, J. H. Gary, and Hendricks & Christian, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 164)

THOMPSON v. STATE.

(Supreme Court of Georgia. Dec. 12, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§§ 203, 216*)—CRIMINAL LAW (§ 822*)—EVIDENCE—DYING DECLARATIONS—INSTRUCTIONS.

On the trial of one indicted for murder, where it appeared that the deceased was badly cut with a knife, and died three or four hours thereafter, and that upon being cut he exclaimed

ed, "Oh Lordy! I am stabbed to death!" and very shortly thereafter stated that he was cut all to pieces and was dying, a prima facie case was made for the admission in evidence of his statement, then made, as to who cut him, and there was no error in admitting such statement; it appearing that the court gave to the jury, in connection therewith, proper instructions on the subject of dying declarations. *Jones v. State*, 130 Ga. 274 (2), 60 S. E. 840; *Lyens v. State*, 133 Ga. 587 (3), 66 S. E. 792.

(a) This rule is not altered by the fact that a physician, subsequently to the time the declarations were made, informed the declarant that he had a chance of recovery. *Wheeler v. State*, 112 Ga. 43 (5), 37 S. E. 126.

(b) While it was inaccurate to instruct the jury that they might pass upon the "admissibility" of the alleged dying declarations, the context in connection with which this portion of the charge complained of was given clearly shows that the jury could only have understood the court to mean that they might consider the alleged dying declarations as evidence only in the event they believed that they were made under such circumstances as to constitute them dying declarations.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 436, 457; Dec. Dig. §§ 203, 216; **Criminal Law*, Cent. Dig. § 1990; Dec. Dig. § 822.*]

2. SUFFICIENCY OF EVIDENCE—NEW TRIAL DENIED.

The evidence was sufficient to support the verdict, and the court committed no error in denying the defendant a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Will Thompson was convicted of murder, and brings error. Affirmed.

W. D. McNeil, for plaintiff in error. W. J. Grace, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 272)

GILMORE et ux. v. HUNT.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 201*)—DEED BY WIFE—CANCELLATION—DURESS—PAYMENT OF HUSBAND'S DEBT.

Equity will entertain a petition by a married woman to cancel, in the hands of her grantee, a warranty deed improperly procured by duress and in payment of her husband's debt, which has been duly recorded, although the grantee be in possession of the land, and there be no specific prayer for the recovery of the land.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 201.*]

2. HUSBAND AND WIFE (§ 201*)—ACTION BY WIFE—CANCELLATION OF DEED—EVIDENCE.

Where a married woman seeks cancellation of a deed on the ground that it was procured by the grantee in payment of her husband's debt, and the grantee contends that the consideration was the payment of a certain sum of money and a note and mortgage on the land, executed by the plaintiff to a third person, it is competent for the grantee to prove that he did actually pay the mortgage without

notice that its consideration was the husband's debt.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 201.*]

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by Polly Ann Hunt against George T. Gilmore and wife. Judgment for plaintiff, and defendants bring error. Reversed.

W. E. Armistead and Hines & Jordan, for plaintiffs in error. Hardwick & Wright and J. E. Hyman, for defendant in error.

EVANS, P. J. Polly Ann Hunt filed her petition against George T. Gilmore and his wife, making substantially the following allegations: During the night of December 11, 1906, George T. Gilmore brought with him three other men, one of whom was an officer authorized to make arrests, to the home of the plaintiff, and demanded that D. H. Hunt, her husband, pay a debt due by him to said Gilmore. "The said Gilmore exhibited a criminal warrant, sworn out by said Gilmore, charging said D. H. Hunt with larceny after trust, and threatened to have the same then and there executed unless said indebtedness was then and there settled and satisfied. The said Gilmore suggested and demanded that petitioner execute the aforesaid deed [a deed hereinafter referred to] in settlement of the indebtedness of said D. H. Hunt, and acting under stress of the surroundings and circumstances, and being coerced by the fears of said threatened criminal prosecution against her husband, and being moved by the importunities of her husband, and the demands, coupled with said threats, of the said Gilmore, petitioner authorized her name to be signed to said deed, which had already been prepared by said George T. Gilmore." Her deed was made to the wife of George T. Gilmore upon a stated consideration of \$300, and contained a warranty of title, and it was duly recorded. The only consideration of the deed was the settlement of a debt due by the plaintiff's husband to George T. Gilmore. "The said defendant George T. Gilmore knew at the time that the land described in said deed was the property of petitioner, and that her husband, D. H. Hunt, had no interest therein; and he knew that said deed was given for the sole purpose of paying a debt of petitioner's husband, for which petitioner was in no wise liable or responsible." The defendants are in possession of the land which the deed purports to convey. In addition to a prayer for process, the prayers of the petition are that the deed "be, by the judgment and decree of this court, declared null and void, and the same be canceled; that the said defendants be required to produce said original deed into court, that the same may be canceled by the clerk thereof as a cloud upon petitioner's title; that petitioner have such

other and further general relief as necessities of the case may require." A verdict was rendered in favor of the plaintiff. The defendants excepted to the overruling of their motion for a new trial, and to the refusal of the court to sustain their demurrer.

[1] According to the allegations of the petition, the deed sought to be canceled was without consideration. The deed of a married woman in payment of the debt of her husband is void. Likewise a deed executed under compulsion or duress is not binding upon the maker. It is alleged in the petition that late at night one of the defendants came to the house of the plaintiff, accompanied by three men, one of whom was an officer, and called up her husband from bed, threatening to arrest him for some criminal offense, unless he would procure her to sign a deed; and yielding to her husband's entreaties, and under fear that their threats of prosecution would be carried into execution, she signed the deed. These circumstances constitute duress. *Southern Express Co. v. Duffy*, 48 Ga. 358; *Crawford v. Cato*, 22 Ga. 594; Civil Code 1910, § 4255. It is urged by way of demurrer that, notwithstanding the deed sought to be canceled may be invalid, according to the allegations of the petition the plaintiff is not entitled to a decree of cancellation, because she had an adequate remedy at law by ejectment to recover the land. It is true that a married woman may recover possession from her grantee, who claims under a deed from her given in payment of her husband's debt, without equitable pleadings to cancel it on account of its invalidity. *Taylor v. Allen*, 112 Ga. 330, 37 S. E. 408; *Bond v. Sullivan*, 133 Ga. 160, 65 S. E. 376, 134 Am. St. Rep. 199. There is also an instance of a physical precedent where a plaintiff sued in ejectment, notwithstanding the defendant undertook to defend under a deed from the plaintiff, which the jury found to have been procured by fraud and duress. *Findley v. Hulsey*, 79 Ga. 670, 4 S. E. 902. However, it is one of the established grounds of equitable jurisdiction to cancel deeds obtained by fraud or other illegal means.

Under the common-law practice in ejectment, the issue only comprehended a competition between the titles of the adverse parties. The plaintiff could only recover upon legal title or its equivalent, a perfect equity; and ordinarily it was a good reply to the plaintiff's title to exhibit a deed from the plaintiff. In the course of time the practice allowed proof of the invalidity of a deed relied upon as muniment of title; but this practice did not serve to oust equity of its jurisdiction, if the remedy at law was not as adequate as that afforded in equity. In *Crawford v. Cato*, supra, one of the parties, by means of duress, obtained three promissory notes from the other. He brought his action upon one of them, whereupon the maker filed a bill to restrain that action and to

cancel all the notes; and the court held that, as the notes were obtained under duress, a court of equity would relieve the maker by canceling them and by preventing their collection. In *Walker v. Hunter*, 27 Ga. 336, the defendant was in possession of land under a deed obtained by undue influence, and the heirs at law of the maker brought suit to decree its cancellation; and it was held that a court of equity had jurisdiction to cancel a deed without consideration, which was procured by undue influence. In *Bond v. Watson*, 22 Ga. 637, there was an ejectment suit pending against the defendant, who filed a bill to cancel the deed under which the plaintiff held, on the ground that it had been improperly obtained; and the court held that such an equitable suit was maintainable, because the court of law had no jurisdiction to set aside and cancel a deed improperly obtained. There can be no doubt that, if the plaintiff had prayed for a recovery of the land, her suit would have been maintainable. *Fulghum v. Pate*, 77 Ga. 454.

Since the uniform procedure act of 1887 (Laws 1887, p. 64), it is competent for the plaintiff to obtain both legal and equitable relief in the same suit; but it does not follow that a plaintiff cannot go into a court of equity, where the only relief claimed is of an equitable character. The plaintiff would have a right to go into a court of equity and have the deed canceled, preparatory to filing her action to recover the land, if she elected to prosecute her demands separately. It is no reply to the maintenance of her action for cancellation that she could recover in ejectment without having the deed canceled, for the reason that if she did recover the land the recorded deed would be outstanding against her, and would be a cloud upon her title. While it may be true, as a general rule, that, in order to maintain a petition to remove a cloud upon a title, the land must be vacant or the plaintiff be in possession, or have no present right of action (*Weyman v. Atlanta*, 122 Ga. 539, 50 S. E. 492), nevertheless an action is always maintainable to cancel a deed procured by fraud or duress, where the legal remedy is not as efficacious as that afforded by a court of equity.

[2] 2. On the trial there was a sharp conflict between the testimony of the plaintiff and the defendants respecting the consideration of the deed sought to be canceled and the circumstances under which it was executed. The plaintiff's testimony tended to support the allegations of her petition. The defendant Gilmore testified that the deed was freely and voluntarily executed by the plaintiff; that it was executed in consideration of the payment of a mortgage on the land conveyed, given by the plaintiff to one Jackson, and a certain sum to be paid the plaintiff; that he paid the amount due on this mortgage to Jackson, which the plaintiff had neither paid nor offered to pay. The plaintiff replied to this contention by

testifying that the mortgage to Jackson was given to secure a debt of her husband, and that the defendant paid the same after its maturity. The defendant Gilmore then offered to testify that at the time he paid the mortgage to Jackson he had no knowledge that it was given to secure her husband's debt. The court repelled the testimony. We think the testimony was admissible. Any contract of a married woman to secure or pay her husband's debt is void, and in the hands of the payee, or one with notice, she may set up this defense. Such defense, however, is not available against one who pays the debt at her instance, without notice that it was the debt of her husband. This is not a suit to enforce the mortgage note, so as to make applicable the rule that one who takes negotiable paper after maturity takes it subject to any defense the maker may have to it. If the contention of the defendant Gilmore be true, he simply paid a certain sum of money in satisfaction of a mortgage note, apparently the debt of the married woman, and at her direction, without notice that it was her husband's debt; and she will not thereafter be permitted to repudiate the payment, made by him at her request and without notice of the invalidity of the note discharged by his payment. To hold otherwise would be to permit a married woman under these circumstances to perpetrate a fraud. This testimony was vital to the contention of the defendants, as made in the pleadings and in the evidence; and the court erred in repelling the testimony.

3. In other respects the trial was without error.

Judgment reversed. All the Justices concur, except FISH, C. J., disqualified, and HILL, J., not presiding.

(137 Ga. 255)

STEVENS v. WORRILL.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

MORTGAGES (§ 151*) — PRIORITIES — YEAR'S SUPPORT — RIGHTS OF WIDOW.

Where one executed to a named grantee a security deed, and subsequently, upon the death of the grantor, his widow became his administratrix, and a year's support was duly set apart to the widow, embracing all the right, title, and interest of the decedent in the lands conveyed by the security deed, she, remaining in possession, was entitled to the rents and profits growing out of the land, until the institution of an action to recover the land, or other appropriate proceedings by the grantee in the security deed to subject the land and mesne profits to the debt due him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307-336; Dec. Dig. § 151.*]

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by J. M. Stevens against C. H. Worrill, administratrix. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. Y. Harrell and T. T. James, for plaintiff in error. F. A. Hooper and Tomlinson Fort, for defendant in error.

BECK, J. J. M. Stevens was grantee in a deed to secure debt, made and executed by B. H. Worrill; the deed being second in priority to a deed given on the same day to the British & American Mortgage Company to secure a loan. The two deeds covered the same property, consisting of several lots of land in Stewart county; and in each instance the grantee gave to Worrill a bond to reconvey the property upon his making payment of the loan. Worrill died, having defaulted in the payment of either loan. The mortgage company filed in the United States court an equitable petition to foreclose its security deed as a mortgage, and obtained a judgment against the property for the amount of its debt. Under this judgment the land was sold for less than the mortgage company's judgment. Worrill having died in the latter part of 1905, the appraisers, in May, 1906, regularly set apart to Mrs. Worrill, as a year's support for herself "all the right, title, and interest which B. H. Worrill had at the time of his death in and to" the property covered by the security deeds given to Stevens and the mortgage company. Mrs. Worrill rented out the lands, and received the rents and profits therefrom for the years 1907, 1908, and 1909, before the land was sold in the fall of 1909. These rents were the only property that came into her hands which the plaintiff claimed was subject to his demands. After the sale of the land under the proceedings of the mortgage company, Stevens filed suit, praying a general judgment against Mrs. Worrill, administratrix, and a special judgment against the land. The administratrix filed a plea of plene administravit. Under the direction of the court the jury returned a verdict in favor of the plaintiff for the principal debt, with interest, "to be levied of the goods and chattels of B. H. Worrill that may hereafter come into the hands of Mrs. Carrie H. Worrill as ex. off. administratrix of B. H. Worrill," and found in favor of her plea of plene administravit. The plaintiff made a motion for a new trial, which was denied, and he excepted; he contending that the rents and profits received by Mrs. Worrill were a part of the Worrill estate, to be administered, and that the same were subject to his debt, while Mrs. Worrill contended that such rents and profits constituted a part of the year's support regularly set apart to her.

Under the statement of facts agreed upon by the parties to this case at the trial, which constituted the only evidence submitted for the consideration of the judge in passing upon the case, the sole question for determination was whether the plaintiff was entitled to a general judgment against the defendant

as administratrix, to be levied of the goods and chattels of the decedent, or to a judgment quando merely. The trial judge was of the opinion that the plaintiff was entitled only to a judgment quando, and rendered such in his favor; and of this the plaintiff complains. Under the terms of the order setting apart to Mrs. Worrill the year's support in question, she took all the right, title, and interest in the lands involved in this controversy, which remained in her husband after the execution of the deeds to the mortgage company and to Stevens. It is only necessary to consider what right, title, and interest in the land was left in Worrill after the execution of the security deed to Stevens, because the right, title and interest of Worrill, the grantor in the deed to Stevens, was identical with the right, title, and interest which, after his death, the widow had in the lands. It is contended in the brief of counsel for the plaintiff in error that, after default in the payment of the debt secured by the deed, Worrill could have been compelled to attorn to Stevens, just as if the deed, after default, created the relationship of landlord and tenant between the two. This proposition is not supported by the authorities cited.

The exact question has been raised in this court before, and resulted in a holding laying down the reverse of the proposition maintained by the plaintiff. In the case of Polhill v. Brown, 84 Ga. 338, 10 S. E. 921, it was said: "While he [the holder of a security deed] had a right to the possession of the land, and might have recovered the same in an action of ejectment, he had no right to recover mesne profits from the owner of the land, * * * except pending the action and to apply the same in payment of the debt due him." And in the case of Ray v. Boyd, 96 Ga. 808, 22 S. E. 916, it was ruled that one who makes to a creditor, for the purpose of securing a debt, a deed to land, but retains possession of the land, does not thereby become a tenant either of such creditor or his vendee. If Worrill himself had continued in life and in possession of the lands conveyed by the security deed to Stevens, he would have had the right to collect and use the rents and profits growing out of the land, and to continue to do so, even after default in the payment of the debt secured by the deed, until the holder of the deed should bring an action to recover the land, or other appropriate proceedings to subject the land and mesne profits to the debt secured by that deed. And it follows, from what we have said above as to the identity of the right, title, and interest in the land vested under the year's support in the widow with the right, title, and interest which Worrill himself would have had, if he had continued in life, that his widow was entitled to the rents of

the land which the plaintiff insists are subject to his claim.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 284)

MAYOR AND COUNCIL OF CITY OF
BRUNSWICK v. GILL.
GILL v. MAYOR AND COUNCIL OF CITY
OF BRUNSWICK.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and to authorize the charge of which complaint was made; and there was no error in overruling the motion for a new trial.

2. DECISION ON APPEAL.

The judgment being affirmed on the main bill of exceptions, the cross-bill of exceptions is dismissed.

Error from Superior Court, Glynn County; O. B. Conyers, Judge.

Action between the Mayor and Council of Brunswick and M. F. Gill. From the judgment, the Mayor and Council bring error. Affirmed

Bolling Whitfield and J. T. Colson, for plaintiff in error. D. W. Krauss and H. F. Dunwoody, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified, and HILL, J., not presiding.

(187 Ga. 232)

PITTSBURG-BARTOW MINING & MFG.
CO. et al. v. WASHINGTON TRUST CO.
(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. REFUSAL OF INJUNCTION.

There was no abuse of discretion in denying the interlocutory injunction prayed for in this case.

2. COSTS (\$ 260*) — APPEAL — DELAY — DAMAGES.

A motion to award damages on the ground that the case was brought to this court for delay only must be denied; the judgment to which exception was taken being the refusal of an interlocutory injunction, and not a money judgment. Civil Code 1910, § 6213; Brantley v. Buck, 62 Ga. 172; Collins Park & Belt R. Co. v. Short Electric Ry. Co., 95 Ga. 570, 20 S. E. 495.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996; Dec. Dig. § 260.*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by the Pittsburg-Bartow Mining and Manufacturing Company and others against the Washington Trust Company, trustee. From an order denying an interlocutory injunction, plaintiffs bring error. Affirmed.

J. T. Norris, for plaintiffs in error. Thos. W. & Watt. H. Milner, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(137 Ga. 398)

WALKER v. STATE.

(Supreme Court of Georgia. Dec. 12, 1911.
Rehearing Denied Jan. 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 922*)—NEW TRIAL—HARMLESS ERROR—INSTRUCTIONS.

Where, on the trial of one accused of the murder of his wife, the defendant offered in evidence three letters purporting to have been written by his wife several months before her death and left with him, not to be opened until after her death, two of which were addressed to the sister of the wife and one to a young lady of the neighborhood, referring in affectionate terms to the defendant, and these letters were received in evidence in rebuttal of the proof submitted by the state tending to show that the defendant was cruel to his wife, though the court should not have restricted a consideration of them to this purpose, yet, in view of the evidence, such an instruction is not cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

2. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—SUFFICIENCY—APPLICABILITY TO CASE.

The state submitted evidence tending to show that the letters were written by the defendant, and in formulating the state's contention in this regard the court inadvertently used the word "conspiracy," in the sense of a premeditated plan, but the context, as well as the language complained of, is such that the jury were not likely to understand that the word "conspiracy" was used in its technical sense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.*]

3. CRIMINAL LAW (§ 366*)—EVIDENCE—RES GESTÆ.

Where the accused is on trial for the murder of his wife by setting fire to her person and clothing, and it appears that immediately after the clothing of the decedent was ignited the defendant ran to a neighbor's house about 175 yards distant, and also called to a person, who lived about 75 or 100 yards further on, that his wife was on fire and to run quickly, and that person ran to the house closely behind the defendant, the testimony of such person that upon entering the house and seeing the decedent lying on the floor, moaning and screaming, and the defendant pouring water upon her smoking body, the witness exclaimed: "My God! How did it happen?" And the decedent's reply was, "He did it. He stuck fire to me and did it. He did it on purpose." And, upon the defendant's saying to the witness, "I don't know no more about it than you do," the decedent called the witness to come nearer and said, "He [the accused] is afraid the court will handle him, and he did it on purpose"—is admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 811; Dec. Dig. § 366.*]

4. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—IMPEACHMENT OF WITNESS.

It is not error to instruct the jury that "a witness is successfully impeached whenever

the minds of the jury become satisfied from the testimony that that witness is unworthy of belief."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1891; Dec. Dig. § 785.*]

5. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

When there is no attempt to impeach any witness by proof of general bad character, but there is evidence tending to impeach a witness by proof of previous contradictory statements, and there is a conflict in the testimony of some witnesses, a charge on the subject of the impeachment of witnesses by proof of contradictory statements is not erroneous because the court does not in terms instruct the jury that one mode of impeachment of a witness is by disproving the facts testified by the witness, where the court properly instructs the jury upon the rules respecting the weight and credit to be given a witness in the event of conflicts in the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1889-1894; Dec. Dig. § 785.*]

6. CRIMINAL LAW (§ 811*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Where there exists a difference between opposing counsel as to whether there is a discrepancy between the testimony of a witness and a previous statement alleged to be contradictory of the testimony, it is not error for the court to allude to the particular witness in stating the contentions of counsel in this respect, and instructing the jury that they must decide the controversy between counsel from the evidence in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1971; Dec. Dig. § 811.*]

7. HOMICIDE (§ 166*)—EVIDENCE—ADMISSIBILITY.

The defendant, his wife, and his mother concurrently took out policies of insurance on their respective lives. The policies on the lives of the defendant's wife and his mother were payable to him, and that on his own life was payable to his wife. On the trial of the defendant for the murder of his wife, the state introduced the policy on his wife's life, as tending to show motive, and the defendant in rebuttal offered the policies on the life of himself and of his mother. The former was received and the latter repelled as irrelevant. This was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

8. HOMICIDE (§ 290*)—INSTRUCTIONS—CONTENTION OF PROSECUTION.

Where an indictment for murder contains two counts, the first charging that the defendant threw gasoline and other inflammable liquids on the person and clothing of the decedent and then set fire to the decedent's person, and the second charge that he set fire to the person and clothing of the decedent, a statement of a contention of the prosecution that the defendant set fire to the person of the decedent is not erroneous because of the failure of the court to separately direct the attention of the jury to the formal charge in each count.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 290.*]

9. CRIMINAL LAW (§ 560*)—DEGREE OF PROOF—NATURE OF CRIME.

It is not erroneous to decline to instruct the jury that, "on the trial of a person charged with crime, the manner of proof ought to be

more clear in proportion as the crime is more detestable."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. § 560.*]

10. CRIMINAL LAW (§§ 941, 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT.

The alleged newly discovered evidence is cumulative, and not of such character as would probably produce a different result. The grounds of the motion are without substantial merit, and the evidence is sufficient to uphold the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2328; Dec. Dig. §§ 941, 945.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

W. B. Walker was convicted of murder, and brings error. Affirmed.

Jno. P. Ross, for plaintiff in error. W. J. Grace, Sol. Gen., H. H. Elders, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. The defendant was indicted for the murder of his wife, Alma Walker. He was convicted and sentenced to be hanged. The indictment contained two counts. The first charged that the defendant, after having thrown gasoline and other inflammable liquids upon her person and clothing, did set fire to her person; and the second count charged that he set fire to her person and clothing. The evidence was entirely circumstantial, and we think sufficient to authorize the verdict. It would be unprofitable to reproduce the essential features of the case as embodied in the voluminous record, and for that reason we will not attempt it.

[1] 1. The state offered evidence tending to show that the defendant had cruelly treated his wife. The defendant introduced certain letters purporting to have been written by his wife several months prior to her death and left with him not to be opened until after her death. Two of these letters were addressed to an unmarried sister of the decedent, and one to a young lady of the neighborhood. They referred most affectionately to the defendant, and each contained a request for the addressee to marry the defendant in the event of her death. The state submitted evidence tending to show that the letters were written by the defendant, and the defendant introduced evidence tending to prove that they were written by his wife. With reference to these letters the court charged that the defendant had offered them for the purpose of showing that no ill feeling existed between him and his wife, and that his treatment of her was kind and proper. The defendant complains that this instruction unduly limited the effect of the evidence, because the letters also tended to show a morbid disposition or unbalanced mind of the reputed writer so as to raise an inference of self-destruction, or accidental death by careless act. While the court's charge may have been somewhat restricted,

yet, in view of the evidence in the record, we do not think the charge sufficient ground for a new trial.

[2] 2. In stating the state's contention with reference to the authenticity of the letters, the court said that the state contended that the letters were written by the defendant, "and contends that there was a purpose in writing those letters; that it fixes the crime as a conspiracy arising under this bill of indictment charging the defendant with the death of Alma Walker." The quoted language is objected to on the ground that no conspiracy was charged and none proved. It is clear from the context that the court did not use the word "conspiracy" in its technical sense, and it is equally clear that the jury could not have so understood. The trend of the charge, and the very next sentence, show that the court meant that it was the state's contention that the letters were fabricated in pursuance of a plan of the defendant which indicated preparation and premeditation.

[3] 3. A witness, Classie Lightfoot, was permitted to testify to declarations of the decedent, made while she was lying on the floor and her husband was pouring water on her smoking body, and within a few minutes after her clothing had become ignited, to the effect that the defendant had intentionally set her on fire. It is insisted that the declarations were not spontaneous with the act and indicated deliberation on the part of the declarant, and were inadmissible as part of the *res gestæ*.

It is impossible to frame a definition of the term "*res gestæ*" which will adequately cover all the various and different uses to which it is put. As was said by Bleckley, J., in *Cox v. State*, 64 Ga. 410, 37 Am. Rep. 76: "The difficulty of formulating a description of the *res gestæ* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family." Our Code defines it as declarations accompanying an act so nearly connected therewith in time as to be free from all suspicion of device or afterthought. Civil Code 1910, § 5766. "The *res gestæ* of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the *res gestæ* ends. Each case turns on its own circumstances." *Hall v. State*, 48 Ga. 608. The best guide to keep within the rule is furnished by the decided cases which serve as illustrations of its application. In *Monday v. State*, 32 Ga. 676, 79 Am. Dec. 314, a witness was attracted by the cries of the person assaulted. He went to where he was, and some one ran off. He asked the per-

son assaulted what was the matter, to which he replied that the defendant was trying to choke him to death; and this conversation was allowed in evidence as *res gestæ*. In *Burns v. State*, 61 Ga. 192, testimony of a witness who lived about 600 yards from the place of the assault, that the deceased came to his home about an hour before day, Sunday morning, bloody, and, when asked what was the matter with him, said, "You know I went to sleep on the chair and fell out on a piece of wood," was held to be a part of the transaction and so nearly connected with it as to constitute a part of the *res gestæ*. In *Stevenson v. State*, 69 Ga. 68, the witness' testimony was that he heard the report of a gun and the scream of a woman about 300 yards away. He ran immediately to her assistance, and when in speaking distance she cried out for help. He saw that she had been shot, was bleeding freely, could move nothing but her hands, and, whilst begging that something be done for her, she said that defendant had shot her. This occurred from three to five minutes after the shooting. It was held to be admissible as a part of the *res gestæ*. Where a wounded man, within five minutes from the time he was shot, asked one of the persons who was assisting him what he shot him for, this question was held to be a part of the *res gestæ*. *Mitchell v. State*, 71 Ga. 128. In *Kirk v. State*, 73 Ga. 621, evidence that immediately after the deceased was shot a person near by halloed and asked them what was the matter and who had shot him, to which he replied that the defendant had shot him, was admitted as a part of the *res gestæ*. Illustrations may be multiplied to show that declarations to be a part of the *res gestæ* need not be precisely concurrent in point of time, if they spring out of the transaction and are made so near to it as to preclude reasonably the idea of deliberation. *Mitchum v. State*, 11 Ga. 615; *Herrington v. State*, 130 Ga. 307, 60 S. E. 572. When the testimony in question was offered, evidence had been submitted tending to show that, immediately after the clothes of the decedent became ignited, the accused ran to a neighbor's house about 175 yards distant and told the young daughter of the neighbor that his wife was on fire; that about the same time the accused called a negro by the name of Frank Lightfoot, who lived about 75 or 100 yards from the neighbor's, and exclaimed: "Alma [the wife of the defendant] is on fire! Run quick!" The accused returned to his home, closely followed by Frank and his wife. When Frank entered the house, he saw the decedent upon the floor, "screaming and halloeing." Her body was smoking, and the accused was pouring water upon her. Frank left at once for a neighbor, at the request of the accused. His wife, Classie, then came into the room. She testified that she found the decedent lying upon the floor, moaning and screaming, and that the accused was pouring water upon

her smoking body. Upon entering the room, the witness exclaimed: "My God! How did it happen?" The accused attempted to say something, but his wife headed him off and said: "He did it. He stuck fire to me. He did it. He did it on purpose." Upon the decedent's reiteration of the statement, the accused touched the witness and said, "Classie, I don't know no more about it than you do." Then the decedent called the witness to come nearer and said: "He [the accused] is afraid the court will handle him, and he did it on purpose." The decedent made no further statement, and died within an hour after the conversation with the witness. The transaction inquired about was the homicide of the decedent accomplished by burning. The conversation occurred within a very few minutes, possibly from five to seven minutes, after the clothing of the deceased was ignited. Although the flame had been extinguished, the body was still smoking, and the defendant was pouring water upon the prostrate form of his wife at the time of the conversation. The declaration of his wife, under such circumstances, was clearly a part of the *res gestæ*, and the instruction relative thereto is not subject to the criticism made on it.

[4] 4-6. The court instructed the jury on the law of impeachment of witnesses by contradictory statements and the effect of a successful impeachment. He also called their attention to the defendant's contention that the state's witness Classie Lightfoot had sworn differently on the commitment trial, and the Solicitor General's contention that the witness repeated the same testimony which she delivered in the committing trial, instructing them that there was an issue between counsel as to whether or not the witness delivered the same testimony on this trial as she did before the committing court, and the jury must determine that issue from the evidence. Many exceptions are taken to this charge. One relates to that part of the charge which instructed the jury that "a witness sought to be impeached, by showing that that witness has made contradictory statements, may be sustained by proof of general good character of that witness. You will see, therefore, whether or not as a question of fact a witness has been successfully impeached is a matter for determination of the jury. A witness is successfully impeached whenever the minds of the jury become satisfied from the testimony in the case that that witness is unworthy of belief." This instruction was not erroneous. *Powell v. State*, 101 Ga. 11, 29 S. E. 317, 85 Am. St. Rep. 277.

[5] Another objection is that, the court having undertaken to charge on the subject of impeachment of witnesses by contradictory statements, it was incumbent upon it to charge concerning other modes of impeachment of witnesses provided by law. Our Code declares that a witness may be impeached (1) by disproving the facts testified

by the witness, (2) by proof of previous contradictory statements, and (3) by proof of the general bad character of the witness. Civil Code 1910, §§ 5880, 5881, 5882. If no testimony as to the general bad character of a witness has been offered, it would be error to instruct the jury that a witness may be impeached by this mode. *City Bank of Macon v. Kent*, 57 Ga. 284 (9). There was no attempt to impeach any witness by proof of general bad character. It is urged that there was conflicting testimony, and that the court should have charged in terms that a witness may be impeached by disproving the facts testified by the witness. In a certain sense testimony to disprove a statement of a witness is impeaching in its nature. A charge upon the weight and credit to be given a witness' testimony, and the rule as to conflicting testimony, is in effect and substance a charge relating to this mode of impeachment. The jury were elaborately and properly instructed in this respect, and the court's instruction was not open to this objection.

It was also alleged that the charge was confusing and misleading, and should have been more elaborate. We do not think the charge was either confusing or misleading. The subject of impeachment of witnesses is not one of the main questions in a case, but is of an incidental or collateral nature; and, where the court instructs the jury on the mode and effect of impeachment, the instruction is not so defective as to require a new trial because the court might have elaborated his instruction so as to cover minor corollaries which may be involved in the main proposition.

[6] Nor was the instruction erroneous because the court alluded to a particular witness in stating the deductions which counsel for the state and the accused drew as to any discrepancy between her testimony in the two trials. Counsel for the state contended there was none, and counsel for the accused contended otherwise. In justice to the witness, we do not think there was any substantial conflict; but certainly nothing was contained in the court's instruction, that the jury should decide this controversy between opposing counsel by a reference to the evidence in the case, which was calculated to harm the defendant. Besides, this witness was the only one sought to be impeached by proof of contradictory statements, and in such a case it is not error for the court, in instructing the jury on the subject of impeachment by contradictory statements, to refer to the witness by name. *Shaw v. State*, 102 Ga. 660, 29 S. E. 477.

[7] 7. The defendant offered three certificates issued by a burial association in December, 1908, respectively to himself, his wife, and his mother, entitling each to a burial and funeral benefit of a stated amount according to the by-laws of the association; also, a policy of insurance for \$150 on the life of his mother, in which he was the benefici-

ary; and the premium receipt book of the company. This testimony was rejected. The defendant contends that in view of the fact that the state had introduced in evidence a policy of insurance on the life of the decedent of the same date and for the same amount, payable to him in the event of death, and that he had introduced in evidence a policy on his own life, payable to his wife in the event of death, issued by the same company, for the same amount, and on the same date, it was relevant to show that the insurance policies and burial certificates were all issued in pursuance of a plan of family protection, and to rebut any inference that he killed his wife to get the insurance on her life. The policy of insurance on his mother's life could not possibly illustrate any issue in the case. The burial certificates were likewise irrelevant; but, even if they tended to elucidate any issue in the case, their rejection was harmless, as an officer of the association was permitted to testify that the accused, his wife, and mother were insured in the association, and that the association buried the deceased on account of her certificate.

[8] 8. In stating the contention of the state, the court said: "Now the state claims in this case that Alma Walker died on the 21st of August of last year; and the state claims that her death was the result of a felonious act, an unlawful act of the defendant in bringing about her death, by setting fire to her and burning her up, in such a way as to bring about that death; and the state charges that the defendant in doing so is guilty of murder." This charge is alleged to be error, because the court failed to invite the jury's attention specially to the two counts in the indictment, one of which charged the defendant with setting fire to the decedent after having thrown upon her person and clothing gasoline and other inflammable liquids, and the other charged him with killing the decedent by setting fire to her person. The defendant was charged with having committed murder by setting fire to the decedent, and the indictment was framed to meet possible phases of evidence as to the manner in which life was taken; and the court's summary of the state's contention in this respect was fair to the accused, and not open to the criticism made upon it.

[9] 9. The court declined to charge, on request, that, "on the trial of a person charged with crime, the manner of proof ought to be more clear in proportion as the crime is more detestable." The same degree of proof is required in all criminal trials, viz., that the evidence be sufficient to establish the defendant's guilt beyond a reasonable doubt. This request was properly declined.

[10] 10. The motion for new trial included numerous grounds; but, after a careful consideration, we do not find anything contained in them which requires a new trial. The newly discovered evidence was cumulative,

and not calculated to produce a different result should another trial be had. The evidence is sufficient to uphold the verdict.

Judgment affirmed. All the Justices concur.

(137 Ga. 180)

GABBETT v. CITY OF ATLANTA.

(Supreme Court of Georgia. Dec. 18, 1911.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§§ 55, 180*)—PLEADING—ACTION FOR NUISANCE—LIMITATION—DEMURRER TO PLEADING.

The petition, properly construed, was an action for damages arising from a continuing nuisance.

(a) Although a suit for the creation of a nuisance may be barred by the statute of limitations, yet if the nuisance be of a continuing character, which can and should be abated, suit may be brought for damages arising from its maintenance.

(b) In an action for the maintenance of a continuing nuisance, damages may be recovered resulting from such maintenance which accrued at any time within the period prescribed in the statute of limitations before the institution of the suit.

(c) In such an action the fact that the petition may allege damages, some of which are barred by the statute of limitation and others not, will not render the petition demurrable as to those which are not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306, 670-675; Dec. Dig. §§ 55, 180.*]

2. AMENDMENT OF PLEADING—NEW CAUSE OF ACTION.

The amendment did not set forth a different cause of action from that alleged in the petition, and it was the right of the plaintiff upon election to amend.

3. APPEAL AND ERROR (§ 242*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—RULINGS ON PLEADINGS.

The special grounds of demurrer were not ruled on in the trial court, and will not be considered here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

4. APPEAL AND ERROR (§ 671*)—QUESTIONS PRESENTED FOR REVIEW.

Questions argued in the brief of counsel, which are not made by the record, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

(Additional Syllabus by Editorial Staff.)

5. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

Where the original petition for the maintenance of a continuing nuisance was sufficient as against a demurrer without amendment, a proposed amendment, alleging as the measure of damages the value of land affected for rent, and claiming a less amount than specified in the original petition, did not set forth a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Sarah E. Gabbett against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

W. R. Hammond, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

ATKINSON, J. Sarah E. Gabbett instituted suit for damages against the city of Atlanta. The original petition alleged: That plaintiff owned described land in that city, through which the municipality constructed and maintained certain sewers as a part of the sewerage system of the city. "and in times of rain, which frequently occur, and especially of heavy rains, which are not infrequent, said sewers become filled with water and sewage, and become strained and burst, and overflow your petitioner's said land with water and sewage filth, so that the same is rendered unfit for cultivation or pasturage, whereby your petitioner is deprived of the profit from said land to which she is entitled and which she would otherwise receive. Said land is wholly and totally unfit for cultivation or pasturage, or for any useful or profitable purpose whatever, caused by said repeated overflows and the deposit of filth upon the same. And your petitioner avers that said conditions have existed for more than 10 years, and that said land had become permanently unsuited for cultivation or pasturage, or for any useful or profitable purpose whatever." Also: "Any vegetable crops your petitioner might raise upon said land, if the same could be raised at all on account of the repeated overflows of the same, and the grasses on said land, would be and are totally unfit for use, because of the poisonous sewage matter that becomes deposited on the same from the overflows of said lands, as herein set forth; and your petitioner avers that she cannot obtain cows for pasturage, or rent said lands for market garden purposes, for that reason." Also: "Petitioner avers that she has suffered injury and damage to her said land, by reason of said defective sewerage conditions, and by reason of the facts herein set forth, in the sum of \$5,000; and she prays for the recovery of said amount." Plaintiff's written ante litem demand, which was presented to the city, was attached to and made a part of the petition. In such demand it was alleged that for reasons as above indicated the property was "rendered unproductive and valueless" to plaintiff, to her damage in the sum of \$500 a year since 1893. After filing her petition, the plaintiff sought to amend by striking portions of it and inserting other allegations, so that the damages claimed should be for the rental value at \$500 per year for the four years next preceding the institution of the suit, and praying recovery of \$3,000.

To the petition as amended the defendant demurred as follows: "(1) The declaration as amended presents a new and distinct cause of action from the case made in original petition. This defendant says that the original suit was brought to recover damages to land, and the amendment seeks to bring an action as for a nuisance. (2) The original declaration was barred on its face, and therefore there was nothing to amend by. (3) The original declaration being by its terms barred, it is not permissible to so amend as to save the declaration from a motion to dismiss based on the original petition." Also several grounds of special demurrer were urged. On the hearing the judge ordered that the amendment be disallowed, and that the general demurrer be sustained and the case dismissed. The bill of exceptions assigned error upon this ruling.

[1] 1. The demurrer complained that the petition should be dismissed, because it appeared upon its face that the action was barred, and therefore there was nothing to amend by. This ground of demurrer, though general, restricted by its own terms its attack upon the petition to the single question that the action was barred. It is declared in Civil Code, § 4457: "A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man." The allegations of the petition set forth the injury to the plaintiff and the causes thereof in such manner as to charge the existence of a nuisance. The nuisance was of such character as that it could be abated and the injury terminated. A nuisance of that character would be a continuing one, and the person injured would not be limited to a single action for damages resulting from its creation, but might sue for injuries resulting from its maintenance. *City Council of Augusta v. Marks*, 124 Ga. 365 (1), 52 S. E. 539, and citations. See, also, *Nalley v. Carroll County*, 135 Ga. 835, 70 S. E. 788. In a suit for the maintenance of such a nuisance, all legitimate damages are recoverable which accrued within the period of limitation prescribed by statute before the institution of the suit. *Langley v. City Council of Augusta*, 118 Ga. 590 (9), 45 S. E. 486, 98 Am. St. Rep. 133, and citations.

That some of the damages alleged were barred and others not will not render the petition objectionable as to those which were not barred. *Monroe v. McCranie*, 117 Ga. 390, 45 S. E. 246. It was alleged in the original petition that the injuries complained of were permanent, and that the value of the

land was destroyed for all purposes, and the damages were laid at the lump sum of \$5,000. Considered alone, such allegations are somewhat confusing as to whether the pleader contemplated a recovery of all of the past and future damages in one action, based on creation of the nuisance, or whether he contemplated a recovery of recurring damages based on the maintenance of the nuisance. But the allegations upon consideration of the general objection which was urged by demurrer are to be construed in connection with all of the other allegations of the petition. No prospective damages were alleged, but throughout the petition the allegations as to damages related to such as had incurred in the past. There were no allegations relative to diminution of the market value of the property, which would have been the measure of the damages had the suit been for a creation of the nuisance; but the damages laid had reference to the value of the land for pasturage and cultivation and other purposes for which the plaintiff could have used the property, and which would have rendered her profits had the nuisance not been maintained. The petition in its entirety was not subject to dismissal on the ground that the cause of action was barred.

[2, 5] 2. Under the views expressed in the first division, the original petition was sufficient as against the demurrer without amendment. The proposed amendment did not set out a new cause of action. The original petition, and as well the amendment, were for damages on account of the injury to the plaintiff, founded upon the maintenance of a nuisance upon her land. The mere fact that the amendment alleged as the measure of damages the value of the land for rent, and alleged a less amount than that specified in the petition, would not make it set forth a different cause of action. It was the right of the plaintiff, upon election to do so, to amend, even though unnecessary.

[3] 3. The court did not rule on the grounds of special demurrer, and no ruling will be made upon them.

[4] 4. Other questions were discussed in the brief of counsel for the defendant in error, in support of the judgment of dismissal. While the points thus raised might have been pertinent, had there been a general demurrer complaining that the petition set forth no cause of action, they were not pertinent to the question actually raised, namely, that the petition showed upon its face that it was barred by the statute of limitations, and therefore that there was nothing to amend by, and that the amendment set forth a different cause of action.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 177)

STERLING et al. v. MAYOR AND ALDERMEN OF CITY OF ST. MARYS.

(Supreme Court of Georgia. Dec. 13, 1911.)

*(Syllabus by the Court.)***1. CONTINUANCE (§§ 12, 26*)—GROUNDS—DEATH OF PARTY—ABSENCE OF EVIDENCE.**

On April 15, 1910, 12 plaintiffs united in one action to enjoin the sale of their respective properties under executions issued against each of them individually for taxes for the year 1909 by the mayor and aldermen of the city of St. Marys, and obtained a restraining order. One of the plaintiffs died about July 1, 1910, and there was no representation upon his estate. The case was set for hearing in a different county on November 11, 1910. On the 10th of November, and also prior thereto (the date not being disclosed by the record), the plaintiffs' counsel had applied to the clerk of the mayor and aldermen of the city of St. Marys for a certificate relative to certain matters which he desired to introduce in evidence, but which on both occasions the clerk refused to give. *Held:*

(a) The plaintiff who had died was not a necessary party to the suit of the remaining plaintiffs, and his death furnished them no ground upon which to continue the case.

(b) Even if the certificate of the clerk would have been admissible, the plaintiff showed no such diligence as would have required the judge to postpone the case.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 40, 74-93; Dec. Dig. §§ 12, 26.*]

2. EVIDENCE (§§ 121, 317*)—RELEVANCY—HEARSAY—DECLARATIONS.

A statement of the clerk of a municipal council, made to a person who inquired of him as to the existence of a municipal ordinance, that no such ordinance appeared upon the record in his office, and that he had never seen any such ordinance, and knew nothing of its existence, is mere hearsay, and not admissible in evidence to prove the nonexistence of such an ordinance, in a suit against the municipality to enjoin the collection of a tax. See *Griffin v. Wise*, 115 Ga. 610 (1), 41 S. E. 1003, and citations; *Youmans v. Thompson*, 122 Ga. 331, 50 S. E. 141, and citations.

(a) Such a statement cannot be introduced in an action of the character mentioned, on the theory that it was the declaration of an agent made dum ferret opus.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 308, 1174-1192; Dec. Dig. §§ 121, 317.*]

3. MUNICIPAL CORPORATIONS (§ 958*)—POWERS IN GENERAL—STATUTORY PROVISIONS.

Even if the municipality of St. Marys did not have the power to assess and collect taxes for general purposes of the municipality under its original charter and various amendments thereto, such power was expressly given under section 12 of an amendment to its charter passed in 1908 (Acts 1908, p. 914).

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 958.*]

4. AD INTERIM INJUNCTION—DISCRETION OF COURT.

Under the evidence submitted by the plaintiffs, and that introduced by the defendants without objection, there was no abuse of discretion in refusing to grant an ad interim injunction.

Error from Superior Court, Camden County. C. B. Conyers, Judge.

Action by D. C. Sterling, administrator, and others, against the Mayor and Alder-

men of the City of St. Marys. Judgment for defendant, and plaintiffs bring error. Affirmed.

Crovatt & Whitfield, for plaintiffs in error. S. C. Townsend, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 291)

DE LANG v. CLARE et al.

(Supreme Court of Georgia. Dec. 15, 1911.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 637*)—RECORD—DEFACTS—EFFECT.**

The judgment of the court overruling the motion for a new trial was rendered on May 27, 1911. The bill of exceptions assigning error on the judgment is regular upon its face down to and including the portions of the record specified in the same, except that it is not signed by the attorneys for the plaintiff in error prior to the certificate of the trial judge, which was signed on August 12, 1911, more than 76 days after the signing of the judgment complained of. It appears from the certificate of the clerk of the superior court of Ben Hill county: "I further certify that the April term of said court, at which said case was tried, adjourned —, 19—." In the acknowledgment of service, immediately following the certificate of the trial judge, by the attorneys for the defendant in error, it is stated: "We agree not to make any objection to said bill of exceptions on account of not being presented to the judge in time. Aug. 14, 1911." It further appears that the bill of exceptions is all bradded together, and marked "Filed in office" by the clerk of the superior court on August 19, 1911, and the judge's certificate follows immediately after the specification of the portions of the record desired sent to this court, and the bill of exceptions is not signed by the attorneys for plaintiff in error preceding the judge's certificate; but on a separate page, following the judge's certificate, appear these words: "And now comes the said Charles A. De Lang, within 30 days from the adjournment of the court, and presents this his bill of exceptions, and prays that the same may be signed and certified, that the errors complained of may be reviewed and corrected. Attorneys for Plaintiff in Error." *Held*, that this court is without jurisdiction to review this case, and the agreement of counsel for the defendants in error not to make objection in this court to the bill of exceptions as "not being presented to the judge in time" cannot confer such jurisdiction, and, therefore, the writ of error must be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2784; Dec. Dig. § 637.*]

Error from Superior Court, Ben Hill County. U. V. Whipple, Judge.

Action between Charles A. De Lang and Sidney Clare and others. From the judgment, De Lang brings error. Writ of error dismissed.

M. Wall and Griffin & Griffin, for plaintiff in error. L. Kennedy and McDonald & Quincey, for defendants in error.

HILL, J. Writ of error dismissed. All the Justices concur.

(137 Ga. 453)

ALFORD v. STATE.

(Supreme Court of Georgia. Dec. 14, 1911.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 286*)—DETERMINATION OF CONSTITUTIONAL QUESTION—NECESSITY.**

The defendant, on trial charged with the offense of murder, filed a special plea alleging that "he was insane at the time the homicide was committed," and prayed that he be discharged from the custody of the superior court, where he was being tried, and that "he be tried before the ordinary of the county and lunacy commission according to the laws of the land." The plea contained no allegation of insanity at the time of the trial. Sections 3092, 3101, and 5215[?] of Civil Code of 1910, and section 1047 of the Penal Code of 1895 (as to the last of which sections see Acts 1903, p. 77), were attacked as unconstitutional and void, on the ground that they do not afford due process of law. *Held*, that none of these sections relates to or affects the trial of the issue made by one who sets up the defense of nonliability, under the law, to answer the charge of murder because of his insanity at the time the homicide was committed. Under the law of Georgia this defense must be made under the general plea of not guilty, and, if satisfactorily made out, would finally acquit the defendant of the charge preferred against him. *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 490. Consequently the question of the constitutionality or unconstitutionality of the sections referred to was immaterial, and the judge did not err in striking the special plea.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 286.*]

2. MOTION FOR CONTINUANCE—NO ERROR.

Under the facts appearing in the record, the court did not err in overruling the motion for a continuance.

3. JURY (§ 131*)—IMPANELING—EXAMINATION OF JURORS.

The competency of a juror is tested primarily by propounding the voir dire questions prescribed in Pen. Code 1910, § 1001; and counsel for the accused cannot, as a matter of right, in order to further test the competency of a juror, extend the examination without first putting the juror on the court as a trier, though the court may, in his discretion, allow other questions, or may, if it appears that the juror does not understand the voir dire questions, of his own motion or at the request of counsel, explain any of the voir dire questions.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 131.*]

4. CRIMINAL LAW (§ 698*)—TRIAL—RECEPTION OF EVIDENCE—EFFECT OF RECEPTION WITHOUT OBJECTION.

The ground of the motion for a new trial complaining of the admission of evidence touching a confession of the defendant does not show that the evidence was objected to when offered. Confessions are legal evidence. Unless the circumstances under which they were made show they were not voluntary, they are admissible. If they are given in, and not objected to, it is too late after the verdict to say that there was not sufficient inquiry into the circumstances. *Eberhart v. State*, 47 Ga. 598.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1651-1654; Dec. Dig. § 698.*]

5. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—REQUISITES—NECESSITY.

Failure to charge upon the subject of impeachment of witnesses is not ground for a

new trial, where no written request was made for pertinent instructions to the jury upon this subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

6. CHARGE OF COURT—SUFFICIENCY OF EVIDENCE.

The portions of the charge excepted to were not error for any of the reasons assigned. The evidence supported the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

E. B. Alford was convicted of murder, and brings error. Affirmed.

John R. Cooper and J. J. Harris, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

BEOK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 253)

EVERETT et al. v. JENNINGS et al.

(Supreme Court of Georgia. Dec. 15, 1911.)

*(Syllabus by the Court.)***1. NEW TRIAL (§ 27*)—GROUNDS—RULINGS ON PLEADINGS.**

The striking of the amendment to the plea and answer is not ground for a new trial. In so far as the amendment attempted to set forth the evidence upon which the defendants relied, it contained matter which does not find a proper place in the pleadings; and in so far as it contained allegations material to the defense, evidence to sustain them was admissible under the issues raised by the original answer to the petition, the defendant being allowed to introduce evidence sustaining the defense set up in the amendment; and the issues thus made having been submitted to the jury in the court's charge, the striking of the amendment was not harmful to the plaintiff in error.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 41; Dec. Dig. § 27.*]

2. REQUESTS TO CHARGE—GENERAL CHARGE SUFFICIENT.

The requests to charge, in so far as they were legal and pertinent, were sufficiently covered by the general charge.

3. RELIGIOUS SOCIETIES (§ 7*)—ACTIONS—INSTRUCTIONS.

Complaint is made of the following charge of the court: "Where a majority of the members of a congregational church adhere to the organization and doctrines of the church, the majority has the right to control; but should the majority of the members composing the membership of such church of a congregational form of government, that is to say, governed by action of its members, abandon its organization and doctrines, then those adhering to its organization and doctrines would constitute the church. In a church of a congregational form of government, a majority of those adhering to its organization and doctrines represents the church and has the right to manage its affairs and to control its property for the use and benefit of such church; and when such majority acts within the scope of its authority in matters appertaining to the affairs of the church, such act would be binding upon

the part of the majority." This charge is excepted to on the grounds that it is confusing as a whole, and especially so in so far as it attempts to charge the law applicable to the defendants' contention in the case, that it does not attempt to give rules by which the jury may determine whether the majority have abandoned the doctrines of the church, and that it is too narrow in its scope. None of these exceptions point out any error in this charge authorizing the grant of a new trial.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 7.*]

4. TRIAL (§ 193*)—RELIGIOUS SOCIETIES (§ 7*)—INSTRUCTIONS—OPINION OF JUDGE—ARGUMENTATIVE INSTRUCTIONS.

Complaint is made of the following portion of the court's charge: "The court charges you that an arbitrary expulsion of the majority of the members of a church by a minority without notice or trial, or allowing such majority opportunity to appear and be heard, would be a void act." This charge is not objectionable on the ground that it intimates an opinion as to what has been proved, or that it is argumentative, or that it unduly stresses the opinion of the court on the subject as to how certain members of this church were expelled by the defendants, or that it instructs the jury that the expulsion of the majority by the minority was illegal and unauthorized.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 193;* Religious Societies, Dec. Dig. § 7.*]

5. TRIAL (§ 193*)—INSTRUCTIONS—OPINION OF JUDGE.

The following excerpt from the charge is also complained of: "The court further charges you that where a church is sovereign in its character of government, having the exclusive right and power to manage and settle its own internal affairs, and where it is not subservient to some higher church authority to settle disputes arising among the members, then the act or conduct of some other church or churches which may assume to voluntarily act in some matter of dispute would have no binding effect in the assumption to settle such disputes, but such act by such church or churches, unless clothed with authority to act in such matter, would be null and void." This charge was not objectionable on the ground that it contained an intimation of an opinion of the court upon any issue of fact in the case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 193.*]

6. RELIGIOUS SOCIETIES (§ 7*)—TRIAL (§ 193*)—INSTRUCTIONS—OPINION OF JUDGE.

Complaint is made of the following charge: "The court charges you, further, that whereas there has been a dissension, and where some other church acts or attempts to act in the matter for the purpose of settling such dispute, that the party who claims the advantages of such act or settlement assumes the burden of showing the authority to act in such matter by some other church. It would be incumbent upon the party who claimed such benefit to show that the church or churches had jurisdiction or authority to act in such matter; and unless such authority be shown, then the party claiming it could not rightfully claim any benefit from such act." This charge was not objectionable on the ground that it was in effect an instruction to the jury to disregard the findings of the council of the churches "on the issue as to which faction constituted the Chickasawhatchee Primitive Baptist Church in order, and in effect left the decision of the whole matter to the decision of a majority of that church to decide upon the question of faith, customs, doctrines," etc. Nor did it contain

an intimation of opinion which amounted to direct instruction to the jury as to the weight they should give to the findings of a council of the churches.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 7;* Trial, Dec. Dig. § 193.*]

7. INJUNCTION (§ 130*)—VERDICT—INSTRUCTION AS TO FORM.

The court charged the jury as follows: "Should you find for the plaintiffs, the form of your verdict would be: 'We, the jury, find for the plaintiffs, and we further find and decree that the defendants be enjoined and restrained as prayed for in the petition.'" The instruction here complained of was not objectionable on the ground that it authorized the finding of a "verdict for a mandatory injunction requiring the defendants to deliver up the books and records now in their possession."

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 130.*]

8. SUFFICIENCY OF CHARGE—SUFFICIENCY OF EVIDENCE.

The charge as a whole fairly submitted the contentions of the parties to the jury, and the evidence supported the verdict.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by M. E. Jennings and others against W. T. Everett and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

M. J. Yeomans and W. H. Gurr, for plaintiffs in error. M. C. Edwards and H. A. Wilkinson, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 269)

WHITE v. J. E. LEVI & CO.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. PLEADING (§ 355*)—MOTIONS—STRIKING OUT PLEADING.

Where an action was brought to recover damages on account of an injury to the plaintiff, arising from being struck by an automobile, and the defendants named were the owner of the automobile and the firm to whose place of business it was being carried for repairs, but the only defendant served was one member of the firm, there was no error in overruling a motion to strike a demurrer filed by such defendant, on the ground that it was filed in his individual capacity, and not as one of the copartners, or in the interest of the copartnership.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 355.*]

2. MASTER AND SERVANT (§ 801*)—INJURIES TO THIRD PERSON—AUTHORITY OF SERVANT.

If a master sent a servant to bring to his place of business an automobile for the purpose of having it repaired, and the servant so sent procured another to take the machine to its destination in his stead, the master was not liable for the negligence of such person, unless the servant had authority, express or implied, to employ him, or unless the employment was ratified.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 801.*]

MASTER AND SERVANT (§ 329*)—INJURIES TO THIRD PERSON—ACTIONS—PLEADING.

In the absence of any direct allegation of ratification, a mere averment that the person so employed was arrested and fined for violating a municipal ordinance in regard to the driving of automobiles in the city, and that the master gave bond for the appearance of such assistant after his arrest, and paid the fine imposed upon him, will not suffice to sustain the petition against a general demurrer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 329.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by George White against J. E. Levi & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

R. J. Jordan, for plaintiff in error. Bell & Ellis, for defendants in error.

LUMPKIN, J. G. White brought suit for damages against J. E. Levi & Co., alleging that the defendant was a partnership composed of J. E. Levi and D. D. McCall, and against J. D. Davidson, a resident of a county other than that where the suit was filed. The allegations were in brief as follows: On June 4, 1910, Davidson came from his home in Griffin to Atlanta in an automobile. Because of the failure of some of the machinery of the car to work properly, it was left on the outskirts of the city of Atlanta, and Levi & Co. were notified to send for it and take it to their place for repairs. Accordingly, they sent one of their employés for the car. He found that by doing some work on the machine it would be unnecessary to pull the car into the firm's place of business. He and Davidson directed a young negro boy to take the machine to the place of Levi & Co. When they did so, they knew that the boy "was inexperienced and had no license to run an automobile in the city of Atlanta without first being examined and granted a license." While the plaintiff was crossing the street he was struck by the automobile and injured. This occurred from no fault of his, but was the result of gross negligence on the part of the driver of the machine. Had the latter known the duties of one skilled in the business of running automobiles, and had he kept a proper lookout, the injury would not have occurred; but he was not capable of running an automobile, and was looking across the street when the plaintiff was struck. The boy was tried before the recorder of the city of Atlanta for violating the municipal ordinance regulating the manner in which automobiles might be run in the city limits, and was adjudged guilty and fined \$50 and costs, "which said fine was paid by defendants, or some of them." In another paragraph it was alleged that "said defendants, Levi & Co., gave bond for said boy after his arrest, and the boy's fine was paid by them." No service was made on any of the defendants except McCall; an entry of

non est inventus being made as to J. E. Levi. McCall interposed a general and special demurrer. Counsel for the plaintiff made an oral motion to strike the demurrers, on the ground that they were filed by one of the partners, D. D. McCall, in his individual capacity, and not as one of the partners, or in the interest of the partnership. This motion was overruled. The general demurrer was sustained, and the case dismissed. The plaintiff excepted.

[1] 1. In the petition the defendants named were an individual and a partnership, alleged to be composed of two named persons. It does not appear that any service was made on the individual defendant. There was an entry of service on one of the partners, "one of the firm of J. E. Levi & Co.," and an entry of non est inventus as to the other. The partner served interposed a demurrer. A motion was made to strike this, on the ground that it was filed by one partner individually and not in the interest of the partnership. It was properly overruled. 15 Enc. Pl. & Pr. 941; *Wynne v. Millers & Sibley*, 61 Ga. 343; *Importers', etc., Bank v. McGhees & Co.*, 88 Ga. 702, 710, 16 S. E. 27.

[2] 2. It was alleged that, on account of the failure of some of the machinery of the automobile to work properly, the car was stopped at or near the limits of the city of Atlanta, and Levi & Co. were notified to send for it and take it to their place of business for repairs, and thereupon "sent one of their men for said machine," but that the man so sent, by doing some work on the machine, found it unnecessary to pull the car to its destination, and that he and the owner of the car directed a young negro boy, who was inexperienced and had no license to drive an automobile in the city, to take it to the place of business of Levi & Co. The employé of the defendant firm does not appear to have been present when the plaintiff was hurt. There was no allegation that the man sent by the firm to carry the machine to their place of business had any further authority, or that he was authorized, expressly or impliedly, to employ the boy, or direct him to carry the machine to its destination; nor was there any allegation that the boy was an employé of the firm. So far as appears from the petition, the man sent to get the machine acted outside the scope of his authority in employing the boy and delivering the machine to him. Under such circumstances, the firm was not liable for the negligence of the boy, unless the act of employment was ratified by them. *Atlanta & West Point R. Co. v. West*, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. Rep. 179; *Cooper v. Lowrey*, 4 Ga. App. 120, 60 S. E. 1015; *Mechem on Agency*, §§ 185, 197.

[3] 3. There was no sufficient allegation of ratification. It was not alleged that the defendant firm confirmed or ratified the act of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

their employé in procuring the subagent. The only averment on that subject was that, after the plaintiff had been injured by being struck by the automobile while it was driven, the boy driver was prosecuted in the recorder's court of the city for violating a city ordinance regulating the manner in which automobiles should be run, and was fined, and that the firm gave bond for the appearance of the boy after his arrest, and paid his fine. What was the ordinance violated did not appear. In another part of the petition it was stated that the fine was paid "by defendants, or some of them." Had there been a proper allegation of ratification of the employment of the boy and the intrusting of the machine to him, perhaps the facts above mentioned might have been admissible in evidence as bearing on the question, leaving the jury to draw proper inferences or conclusions from them and any other evidence pointing toward ratification, if there was any. But the pleader must allege his case, and not merely set out certain detached pieces of evidence, which do not directly prove ratification, and trust to inference to supply the lack of it. The petition alleged neither express nor implied authority on the part of the person sent for the automobile to employ the person who was driving it when the plaintiff was injured, nor ratification of his act in so doing. It was, therefore, properly dismissed on demurrer.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 407)

PROCTOR & GAMBLE CO. v. BLAKELY OIL & FERTILIZER CO.

(Supreme Court of Georgia. Dec. 14, 1911.
Rehearing Denied Jan. 12, 1912.)

(Syllabus by the Court.)

1. CUSTOMS AND USAGES (§ 17*)—EVIDENCE—ADMISSIBILITY.

Where differences arose between parties in relation to the purchase and sale of cotton seed oil, and the differences were submitted for arbitration by the parties thereto in writing, "to the arbitration and decision of the arbitration committee on cotton seed products of the Memphis Merchants' Exchange, or a quorum of them," etc., it is not competent to prove a custom of the exchange which varies the plain written agreement of such submission.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17; Evidence, Cent. Dig. §§ 1945-1952.]

2. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence in this case.

3. ARBITRATION AND AWARD (§ 26*)—SUBMISSION—PERFORMANCE OR BREACH.

Where by the terms of a written submission to an arbitration committee, which is composed of five members of a regular standing committee of the Memphis Merchants' Exchange, one of the members is absent and fails to act, but another person, not a member of the regular standing arbitration committee, is substituted by the chairman of the committee to act

in the place of the absent member, such appointment being without the consent of one of the parties to the submission, and the substituted arbitrator hears the matter in controversy and signs the award with the other committeemen, it follows, as a matter of law, under the contract of submission, that the award is null and void, and cannot be the foundation of a suit predicated thereon.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 131-136; Dec. Dig. § 26.*]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action by the Proctor & Gamble Company against the Blakely Oil & Fertilizer Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. F. Crosland, for plaintiff in error. C. L. Glessner and J. R. Pottle, for defendant in error.

HILL, J. This is the third time this case has been before this court. It will be found reported in 128 Ga. 606, 57 S. E. 879, and 134 Ga. 139, 67 S. E. 389. The decisions in those cases turned upon questions of procedure, exclusion of evidence, defenses, etc., but the case was finally remanded to the trial court for determination upon its merits. The present case was brought by the Proctor & Gamble Company against the Blakely Oil & Fertilizer Company in Early superior court for the sum of \$1,732.38, alleged to be due the plaintiff by the defendant by reason of a certain award finding said amount due the plaintiff by the Blakely Oil & Fertilizer Company. It was alleged by the plaintiff that it purchased from the defendant two tanks of crude cotton seed oil, on a basis of "prime"; that upon the arrival of the oil at destination a difference arose between the plaintiff and the defendant as to the quality of the oil, and as to what deduction should be allowed the plaintiff, if any, from the contract price of 33½ cents per gallon; that the plaintiff had paid for the oil on the basis of prime crude at the contract price of 33½ cents per gallon; that under the terms of the contract of submission the differences between the plaintiff and the defendant were to be submitted to the arbitration and decision of the arbitration committee on cotton seed products of the Memphis Merchants' Exchange, or a majority of them; that the arbitration committee did, on the 7th day of May, 1903, make their award, in which they held that the oil was not "prime crude," and accordingly awarded the plaintiff 13 cents per gallon on each tank, which amounted to the sum of \$1,732.38. The defendant, in its answer, among other defenses, alleged that the award was not binding upon it; that it was void and of no effect, because the contract and agreement of submission claimed by the plaintiff to have been made by the defendant provided that the differences and

controversies between the parties were to be submitted to the arbitration and decision of "the arbitration committee of cotton seed products of the Memphis Merchants' Exchange, or a quorum of them;" but defendant alleged that the award was signed by one A. H. D. Perkins, who was not a member of the arbitration committee on cotton seed products of said Memphis Merchants' Exchange, but that said Perkins was called in by four members of said committee to take the place of an absent member of the committee, to wit, H. P. Johnson; that said Perkins participated in said arbitration and award without the knowledge or consent of the defendant, which had but recently, and since the award was published, discovered that the said Perkins participated in the award, and that he was not a member of the arbitration committee of the Memphis Merchants' Exchange, to the members of which alone were the matters in controversy between plaintiff and defendant submitted under the alleged contract of submission. After the charge of the court, the jury returned a verdict in favor of the defendant, the Blakely Oil & Fertilizer Company. A motion for a new trial was made by the Proctor & Gamble Company on the various grounds therein stated, which was overruled by the court, and this ruling is assigned as error.

[1-3] We think that the decision of this case rests upon the proper construction of the contract or "agreement for arbitration" entered into between the parties to this case. That agreement is as follows: "Memphis Merchants' Exchange. Agreement for Arbitration. This article of agreement, made and entered into this 27th day of April, A. D. 1903, witnesses: That whereas, difference and controversies are now existing and pending between Blakely Oil & Fert. Co., Blakely, Ga., and the Proctor & Gamble Company, Cincinnati, Ohio, in relation to purchase and sale of cotton seed oil, terms, basis prime crude weights and quality guaranteed, in accordance with the rules of the Memphis Merchants' Exchange, arbitration at Memphis: Now, therefore, we, the undersigned, do hereby mutually and voluntarily agree to submit the said differences and controversies to the arbitration and decision of the arbitration committee on cotton seed products of the Memphis Merchants' Exchange, or a quorum of them, with the right of appeal on the part of either of the above-named parties to the committee of appeals, according to the rules and regulations of said Memphis Merchants' Exchange; and we do further authorize and empower the said arbitration committee, or a quorum of them, or, in case of appeal, the said committee of appeals, or a quorum of them, to arbitrate, award, adjust, and determine the differences now existing between us in the aforesaid matter.

A decision is desired upon the following points: Whether or not samples marked 'P and G 85, and 532 Blakely, Ga., April 7th' contain prime crude cotton seed oil; if not, to what allowance per gallon is the Proctor & Gamble Co. entitled? Samples to be submitted by the Proctor & Gamble Company, and properly tested by the official chemist." It will be observed upon an inspection of this agreement that differences existing between plaintiff and defendant in relation to the purchase and sale of certain cotton seed oil, and the price paid therefor, and the differences as specified in said contract, were to be submitted "to the arbitration and decision of the arbitration committee on cotton seed products of the Memphis Merchants' Exchange, or a quorum of them," etc. It appears from the record that one A. H. D. Perkins, who was not a member of the regular standing arbitration committee, though a member of the Exchange, was called in by the chairman of the arbitration committee of the Memphis Merchants' Exchange, and was a party to the award which is the foundation of the present suit, without the knowledge or consent of the defendant in this case.

It is insisted on the part of the plaintiff in error that the substitution of Perkins as a member of the arbitration committee for a regular member of the arbitration committee, who was absent, was the result of a long, constant, and common practice or usage of the Memphis Merchants' Exchange, and therefore was valid and binding, as a matter of law, upon both parties to the award; and it is insisted that, inasmuch as the court charged the jury that if such practice did as a matter of fact exist, such practice would be valid and binding as a matter of law upon both plaintiff and defendant, the verdict of the jury finding against such charge was contrary to law and the evidence and without evidence to support it. To this contention and charge we cannot give our assent. We hold that the contract entered into between the plaintiff and defendant was equally binding upon both. By the terms of that agreement all differences and controversies were to be submitted "to the arbitration committee on cotton seed products of the Memphis Merchants' Exchange, or a quorum of them," etc.; and no custom or long-continued practice, which substituted one not a member of that arbitration committee for one who was, would be binding on the defendant without its consent. When that agreement was entered into, the defendant doubtless knew who composed that committee, and with a knowledge of the personnel of such committee it might readily sign such an agreement; but it is in effect making a new agreement to substitute, without the consent of the defendant, a new committeeman for one already agreed to in writing by the defendant

and the plaintiff as well. If one can be substituted by custom, why not two, or three, or four? In fact, A. S. Graves, the secretary of the Memphis Merchants' Exchange, testified that the chairman could have called in, under the custom, three more persons to fill the places of regular members of the committee who might be absent. Surely the parties to the original agreement never contemplated such a condition as that. It is one thing to agree to a certain standing committee as a board of arbitration; but it is quite a different thing to have that committee, or any portion of it, left off the board of arbitration, and an entirely different member, or members, substituted therefor, without the consent of one party to the agreement. We hold that a custom of the Memphis Merchants' Exchange, which was not authorized by their printed rules or regulations, and which is in conflict with the written contract or agreement of submission to arbitration between the parties in this case, cannot be proven in order to sustain an award which was rendered by arbitrators one of whom was not authorized to act by the agreement of arbitration. See *Werner v. Footman*, 54 Ga. 128 (6); *Emery v. Atlanta Real Estate Exchange*, 88 Ga. 330 (2), 14 S. E. 556.

It is further insisted by plaintiff in error that the submission was to be according to rules and regulations of the Memphis Merchants' Exchange, and that there were printed rules of the exchange which provided for a contingency in which a vacancy on the committee could be filled, and the manner of filling it; that all previous rules and regulations were abolished; and that while this usage or practice, if consistent with a written by-law or regulation, would nevertheless be valid and prevail over and repeal the same, yet, under the facts of this case, the usage was in no sense in conflict with any written regulation, but was supplementary merely to existing rules, etc. We think otherwise, and that an award made by certain members of the regular committee of the Memphis Merchants' Exchange and an outside member of the exchange was not a compliance with the written submission for an award; nor was this rendered a compliance with the submission by showing a custom of the committee to supply the place of absent members by calling in other members of the exchange to take part in arbitrations. It is therefore our opinion that, notwithstanding that portion of the charge of the court above referred to, the jury, under the law and the facts, reached a correct verdict. The ruling here made makes it unnecessary to pass upon the other questions made in the record.

Judgment affirmed. All the Justices concur.

(187 Ga. 258)

HUNTER v. BOWEN.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. EJECTMENT (§ 64*)—PLEADING—DESCRIPTION OF LAND—DEMURRER.

In an equitable action, which is the substantial equivalent of a suit to recover land, the premises sought to be recovered must be definitely described. As against a special demurrer, a description is too indefinite which describes the land in controversy as situated in the southeast corner of the western half of a certain lot in a certain land district of a certain county, bought from the defendant and on which he is farming, and adjacent to other lands of the defendant, without giving the area or the dimensions of the lot, or other descriptive words identifying the premises, so that the sheriff, in the execution of a writ of possession, can deliver the possession in accordance with its mandate.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164; Dec. Dig. § 64.*]

2. RECEIVERS (§ 19*)—INSOLVENCY OF TENANT—SUIT TO RECOVER LAND.

A landlord may maintain against his insolvent tenant in possession, who is allowing the land to deteriorate, a suit to recover the land and to prevent waste pendente lite, by the appointment of a receiver to take possession of the land and hold the rents and profits until final decree.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 27; Dec. Dig. § 19.*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by R. V. Bowen against G. E. Hunter. Judgment for plaintiff, and defendant brings error. Reversed.

Otis H. Elkins, for plaintiff in error. Haygood & Cutts, for defendant in error.

EVANS, P. J. The plaintiff, R. V. Bowen, filed his petition against G. E. Hunter, alleging that he was the "owner of a certain tract of land situated in the southeast corner of the west half of lot of land No. 269 in the Third district of originally Irwin (afterwards Wilcox, now Ben Hill) county; the title thereto being derived as herein shown: The said described tract of land and other portions of the same land lot in the year 1887 belonged to D. E. Hunter, the father of the defendant, who had long owned the same and been in actual possession thereof, and his ownership and possession were open, peaceable, and notorious, and accompanied by a claim of right. On September 27, 1887, the said D. E. Hunter conveyed to his said son a portion of the land above described, and thereupon his son, the defendant, G. E. Hunter, took possession of the said lot of land, and remained in actual possession thereof, living and farming thereon, until the 31st day of August, 1905. On the 27th day of September, 1887, the said G. E. Hunter borrowed from the petitioner \$269.50, and thereupon on said date the said G. E. Hunter executed to petitioner a warranty deed in fee simple, conveying to him the said de-

scribed piece of land, which deed was duly executed, and was recorded, on April 11, 1904, in the clerk's office of Wilcox superior court, where the land was at that time located; the deed being recorded in Deed Book U, p. 620." It was further alleged that, though this deed was unconditional on its face, yet it was understood that the defendant would have the privilege of paying back the indebtedness and repurchasing the land, but that he agreed to and did pay rent for the premises during the time he held the same. On August 31, 1905, it was agreed between the plaintiff and defendant that the plaintiff should pay to the defendant the additional sum of \$350, and should become the absolute owner of the tract of land, and that the defendant should make to the plaintiff a quitclaim deed for the purpose of showing that he had parted with his right of redemption. Accordingly the transaction was consummated, and the additional purchase money paid, and on said date the defendant executed to petitioner his certain quitclaim deed, reciting a consideration of \$800, and conveying to petitioner the same described premises, which deed was duly executed and recorded in the clerk's office of Ben Hill county February 11, 1906, in Deed Book 4, page 37. It was further alleged that the defendant remained on the premises the succeeding year of 1906, under an agreement to pay a rental of \$48. The defendant failed to pay the rent for 1906, and the plaintiff caused a distress warrant to be issued and levied upon certain property, which was claimed by members of the defendant's family. That on January 20, 1906, being unable to collect his rent, he sued out a warrant against the defendant as a tenant holding over, and the defendant under this warrant was dispossessed by a deputy sheriff of the county; and afterwards the defendant re-entered possession and has since that time forcibly and unlawfully held possession of the premises. That he was prosecuted in the city court of Fitzgerald for trespass on account of the manner in which he took possession of the land, and he had continued his case for at least three terms of court on various pretexts. That the plaintiff, in the hope of satisfying the defendant, caused the land to be processioned, due notice having been given to the defendant, who was in possession of an adjoining piece of land, which he claimed subject to a long loan deed to the same. That the processioners awarded the land to the plaintiff, but notwithstanding all of these facts the defendant continues in possession of the land, making a crop thereon, and refusing to allow the plaintiff to take charge of the same. That the defendant is insolvent, and it is doubtful whether the crop on the premises will be sufficient to pay the rent. Wherefore the petitioner prayed that a receiver be appointed to take charge of the entire premises, including the crops, that

the defendant be enjoined from interfering with the possession of the receiver, that the premises be decreed to be the property of the plaintiff, that it be decreed that the defendant has no claim or interest therein, and for permanent injunction, general relief, and process. The defendant demurred generally to the petition, on the ground that no cause of action was stated, and that "the allegations of said petition set forth no description sufficiently accurate and definite to enable the court legally to enter any decree granting any of the prayers of said petition." The court construed the demurrer to be general, and overruled it, and the case proceeded to trial, resulting in a verdict for the plaintiff. The defendant moved for a new trial, which was denied, and he excepted.

[1] 1. The petition was in the nature of an equitable action of ejectment. The plaintiff prayed for a decree declaring the title to be in him, and to enjoin the defendant from interfering with the premises. The defendant was alleged to be in possession, and the plaintiff sought to have him deliver up possession to the receiver, who was to turn over the land to him in the event that he prevailed. A suit of this character is substantially the equivalent of an action of ejectment. In *Harwell v. Foster*, 97 Ga. 204, 22 S. E. 994, it was held: "It is essential to the maintenance of an action of ejectment that the premises alleged to have been demised be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment, and describing the premises as laid in the declaration, shall so identify the premises sued for as that the sheriff, in the execution of the writ, can deliver the possession in accordance with its mandate." This case has since been followed. *Clark v. Knowles*, 129 Ga. 291, 53 S. E. 841; *Hollywood Cemetery v. Hudson*, 133 Ga. 276, 65 S. E. 777. The only description of the land is that contained in the second paragraph of the petition, which describes the land as situated in the southeast corner of the west half of lot of land No. 269. Neither the area nor the dimensions of the lot are given; and its shape, whether in the form of a square, or other geometrical figure, or of irregular shape, is left to conjecture. The further allegation that it is the same land upon which the defendant was farming, or the same land that was described in a certain deed recorded in the clerk's office, which is not attached, will not serve to aid the defective description, as against a special demurrer. The rule of pleading is that the property sought to be recovered must be definitely described in the pleadings. We think that ground of the demurrer which complains of the insufficiency of the description of the premises was special, and not general, and that the defendant was entitled to have a more specific description of the land. The plaintiff

prayed for a memorial record declaring that he had title to the land in controversy, and the defendant had the right to demand that the petition definitely describe the land as a basis of the decree. Not only this, but the petition affirmatively disclosed that the defendant was in possession of adjacent land, claiming title thereto; and it was important that the land should be so accurately described as to locate the boundaries between the land of the contending parties. This special demurrer should have been sustained.

[2] 2. If the land had been definitely described, the petition made a case entitling the plaintiff to relief. *Patterson v. Clark*, 89 Ga. 700, 15 S. E. 641; *Tufts v. Little*, 56 Ga. 139; *Vizard v. Moody*, 117 Ga. 67, 43 S. E. 426. In view of the erroneous ruling on the special demurrer, it becomes necessary to consider the various grounds of the motion for new trial.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 225)

NICHOLSON v. DILLARD.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 837*)—BILL OF EXCEPTIONS—ERRORS—TIME FOR PRESENTATION.

The motion to dismiss the bill of exceptions in this case is without merit, as it comes within the ruling made in the case of *Castleberry v. Parrish*, 135 Ga. 527, 69 S. E. 817.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

2. LIBEL AND SLANDER (§ 9*)—WORDS ACTIONABLE—INJURY IN PROFESSION.

The following words, spoken of a female school-teacher, are actionable in a suit for slander, brought by the person of whom the words were spoken against the person speaking them, to wit: "That under the circumstances I cannot send to her; that her character was not good; that my daughter Claudie Dillard had heard things concerning her character, and that she would not go to her unless I made her; that I have been told things by several that pointed to bad character; that I have been told by young men that they had been to her home and had taken drinks of coca-cola, cider, or something, and that she would give toasts that would actually make them blush, and that she and her sister, Susie Nicholson, lived in a home alone in Buena Vista, and that this house was a regular stopping-off place for traveling men; that if she was taken for a teacher it will cut me out of school, as she was mighty fast from what I have been told, and I believe what I have heard to be true; that I have a particular reason for not sending to her; that I have been told that her character was bad; that I have been particular with my own girl, and I don't [care] for her to associate with her."

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

3. LIBEL AND SLANDER (§ 9*)—WORDS ACTIONABLE—INJURY TO PERSON IN TRADE OR PROFESSION.

At common law only words imputing a crime to another were actionable per se; but

under our statute words calculated to injure one in his trade or profession are actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

4. LIBEL AND SLANDER (§§ 36, 50, 51*)—PRIVILEGED COMMUNICATIONS—RESPONSIBILITY.

Privileged communications are absolute or conditional; in the former case, the privilege is a bar to recovery; in the latter case, in order for communications to be so privileged as to be a bar in a suit for slander, it must appear that the words were spoken bona fide to protect the speaker's private interests, and not with malicious intent.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 113-150; Dec. Dig. §§ 36, 50, 51.*]

Error from Superior Court, Chattahoochee County; S. P. Gilbert, Judge.

Action by Mary Nicholson against J. S. Dillard. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Reversed.

J. J. Dunham, C. C. Minter, and Hatcher & Hatcher, for plaintiff in error. Wynn & Wohlwender, for defendant in error.

HILL, J. Mary Nicholson filed her petition against James S. Dillard, in which it was alleged that the defendant did falsely and maliciously say of plaintiff to Mr. C. H. McGlaun, who had called on petitioner in behalf of petitioner's application to teach school: "That under the circumstances I cannot send to her (meaning petitioner); that her (meaning petitioner) character was not good (meaning that petitioner was not virtuous); that my daughter Claudie Dillard had heard things concerning her (meaning petitioner's) character, and that she (meaning his daughter Claudie) would not go to her (meaning petitioner) unless I made her (meaning his daughter Claudie); that I have been told things by several that pointed to bad character (meaning that petitioner was not a virtuous woman); that I have been told by young men that they (meaning the young men) had been to her (meaning petitioner's) home and had taken drinks of coca-cola, cider, or something, and that she (meaning petitioner) would give toasts that would actually make them (meaning the young men) blush (meaning that petitioner was a debauched and immoral person), and that she (meaning petitioner) and her (meaning petitioner's) sister, Susie Nicholson, lived in a home alone in Buena Vista, and that this house (meaning the home wherein petitioner lived) was a regular stopping-off place for traveling men (meaning that the home of petitioner was a place of ill repute); that if she (meaning petitioner) was taken for a teacher it will cut me out of school, as she (meaning petitioner) was mighty fast from what I have been told (thereby meaning that your petitioner was not virtuous), and I believe what I have heard to be true (meaning that he, Dillard, did not believe petitioner

to be a virtuous woman)." And also that the defendant used the following language in a conversation with Mr. Wess McGlaun: "That I have a particular reason for not sending to her (meaning petitioner); that I have been told that her (meaning petitioner's) character was bad (meaning petitioner was not a virtuous woman); that I have been particular with my own girl, and I don't [care] for her (meaning his daughter) to associate with her (meaning petitioner)." Plaintiff further alleged that, by reason of the "false, malicious, and defamatory" statements made by said Dillard concerning her character, she had failed to be selected as a teacher for the school for which she applied, and she alleged as special damages the sum of \$400 and as general damages the sum of \$5,000.

The defendant filed both special and general demurrers to the petition. The first special demurrer was as follows: "Paragraph third of said petition is specially demurred to, on the ground that the language, to wit: 'That under the circumstances I cannot send to her; that her character is not good; that my daughter Claudie Dillard had heard things concerning her character, and that she would not go to her unless I made her; that I have been told things by several that pointed to bad character; that I have been told by young men that they had been to her home and had taken drinks of coca-cola, cider, or something, and that she would give them toasts that would actually make them blush, and she and her sister, Susie Nicholson, lived in a home in Buena Vista, and that this house was a regular stopping-off place for traveling men; that if she was taken for a teacher it will cut me out of school, as she was mighty fast from what I have been told, and I believe what I have heard to be true'—are not such words and language as would in law entitle plaintiff to a cause of action against this defendant, for the reason that such words are not in their nature slanderous, and that such words are too general to inform defendant of plaintiff's demand, and that they fail to set out in what way the said words could or did affect said plaintiff, and said words and language could not in any wise affect the plaintiff's trade, calling, or profession, and they fail to state wherein the same was or could have been affected, and that said words or language do not impute to plaintiff the commission of a crime punishable by law, or with any contagious disorder, or being guilty of an act which would exclude her from society, nor do they relate to said plaintiff's trade, office, or profession, calculated to injure her therein, nor are such words productive of special damages flowing therefrom, and no special damages are set out therein." The general demurrer was to the effect that no sufficient cause of action was set out in said petition and that no special damages were alleged. The court sustained the special demurrers to paragraphs 3 and 4 of the petition, on the

ground that the words set out, independent of innuendoes, were not sufficient to set out a cause of action. No ruling was made upon the demurrer to the fifth paragraph of the plaintiff's petition. The court also sustained the general demurrer and ordered the petition dismissed.

[1] 1. On the call of the case in this court, a motion was made to dismiss the bill of exceptions, because it had not been tendered to the judge within 30 days from the rendition of the order and judgment sustaining the demurrers of the defendant and dismissing the plaintiff's petition, "in that the record shows that the judgment complained of was rendered on the 1st day of June, 1911, and the certificate of the judge shows that the bill of exceptions was tendered to him on July 8, 1911, and the certificate also shows that the judge was absent only from June 21, 1911, to July 3, 1911, and fails to show any reason why the bill of exceptions was not presented and certified sooner than the 8th day of July, 1911, or that the plaintiff in error was without fault." The bill of exceptions itself recites that "now, within 30 days from the rendition of said judgment," etc., comes the plaintiff and presents this bill of exceptions, etc. The judge also certifies: "I was out of the circuit and state from June 20 to July 3, 1911." Under the repeated rulings of this court, a writ of error will not be dismissed, where it appears from the bill of exceptions and certificate of the trial judge that it was *tendered* within 30 days from the date of the judgment complained of. *Castleberry v. Parrish*, 135 Ga. 527, 69 S. E. 817. The recital in the bill of exceptions that it was tendered within 30 days after the rendition of the judgment complained of is not negated by the statement of the judge in his certificate: "I was out of the circuit and state from June 20 to July 3, 1911."

[2] 2. This was a suit for slander, brought by Mary Nicholson against James S. Dillard in Chattahoochee superior court. The court below sustained general and special demurrers filed to the petition, and we are called upon to decide whether this judgment was error. The answer to that question depends upon whether the words spoken by the defendant are actionable per se, or whether special damages must be alleged. The plaintiff was a school-teacher and had applied for a school. She had secured the requisite number of patrons, save one, to obtain the school. That one was the defendant, James S. Dillard. To C. H. McGlaun, who had called on Dillard in behalf of the plaintiff's application for the school, the defendant is alleged to have used the following language of and concerning the plaintiff, and to have done so falsely and maliciously, to wit: "That under the circumstances I cannot send to her; that her character was not good; that my daughter Claudie Dillard had heard things concerning her character, and that she would not go to her unless I made her;

that I have been told things by several that pointed to bad character; that I have been told by young men that they had been to her home and had taken drinks of coca-cola, cider, or something, and that she would give toasts that would actually make them blush, and that she and her sister, Susie Nicholson, lived in a home alone in Buena Vista, and that this house was a regular stopping-off place for traveling men; that if she was taken for a teacher it will cut me out of school, as she was mighty fast from what I have been told, and I believe what I have heard to be true." And again: "That I have a particular reason for not sending to her; that I have been told that her character was bad; that I have been particular with my own girl, and I don't [care] for her to associate with her." It appears from the record that the plaintiff did not secure the position as teacher of the school; the defendant, Dillard, refusing to support the plaintiff for the reasons given by him above.

Were the words of defendant actionable? We think they are. We hold that the language set forth in the plaintiff's petition is susceptible of the construction placed upon it by the innuendo, and is calculated to injure the plaintiff, and therefore actionable. Our law defines slander as follows: "Slander, or oral defamation, consists, first, in imputing to another a crime punishable by law; or, second, charging him with having some contagious disorder, or being guilty of some debasing act which may exclude him from society; or, third, in charges made on another in reference to his trade, office, or profession, calculated to injure him therein; or, fourth, any disparaging words productive of special damage flowing naturally therefrom. In the latter case, the special damage is essential to support the action; in the three former, damage is inferred." Civil Code 1910, § 4433. The third paragraph of the above section provides that slander shall consist "in charges made on another in reference to his trade, office, or profession, calculated to injure him therein." The demurrer admits the language was falsely spoken of the plaintiff. It was spoken in reference to her fitness as a teacher. Teaching seems to have been the plaintiff's profession. If the above language was spoken, and spoken of the plaintiff in reference to her "profession," the one question remains to be determined, namely: Was it calculated to injure her therein? We have said that the language was susceptible of the construction put upon it by the petition; and, if so, we have substantially from the petition this: That the defendant meant that the plaintiff's character was not good, meaning that the plaintiff was not virtuous; that the defendant had been told by young men that they had been to the plaintiff's home and taken drinks of coca-cola, cider, or something, and that the plaintiff would give toasts that would actually make them blush,

meaning that petitioner was a debauched and immoral person; and that plaintiff and her sister, Susie Nicholson, lived in a home alone in Buena Vista, and that the house was a regular stopping place for traveling men, meaning that the house of the plaintiff was a place of ill repute; that if the plaintiff was taken for a teacher it would cut defendant out of the school, as plaintiff was mighty fast from what the defendant had been told, thereby meaning that the plaintiff was not virtuous, and that the defendant believed what he had heard to be true; that defendant had particular reason for not sending to the plaintiff; that he had been told that her character was bad, meaning that the plaintiff was not a virtuous woman; that the defendant had been particular with his own girl, and did not want her to associate with the plaintiff. This language is susceptible to the meaning placed upon it by the innuendo in plaintiff's petition. If so, was it calculated to injure the plaintiff in her profession as a school-teacher? We think the language of the defendant was calculated to injure the plaintiff.

[4] It may be stated, as a general rule, that published words, written or oral, falsely used, are actionable if they directly tend to the prejudice or injury of any one in his profession, trade or business. 25 Cyc. 326 (G); Civil Code (quoted supra); *Hardy v. Williamson*, 86 Ga. 551, 12 S. E. 874, 22 Am. St. Rep. 479. But the defendant insists that his language spoken of the plaintiff is not actionable, because the language quoted was privileged under our law, and hence he is protected by the bar by which privileged communications shield one coming within its provisions. The following communications are declared to be privileged: "(1) Statements made bona fide in the performance of a public duty. (2) Similar statements in the performance of a private duty, either legal or moral. (3) Statements made with the bona fide intent, on the part of the speaker, to protect his own interest in a matter where it is concerned." Civil Code 1910, § 4436. But this section should be construed in connection with the next following section (section 4437), which is as follows: "In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a right of action." Communications may be either absolutely or qualifiedly privileged. In the latter case it furnishes only a prima facie lawful excuse for making it. *Townsend on Slander and Libel* (4th Ed.) § 209; *Cooley v. Galyan*, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. Rep. 823; *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714 (2), 51 S. E. 756, 3 L. R. A. (N. S.) 1139; *Sheftall v. Central Ry. Co.*, 123 Ga. 589, 51 S. E. 646; *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981. In the former case

no remedy can be had in a civil action. *Cooley v. Galyan*, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. Rep. 823. But in the latter case, while the communication may be privileged, it is so in a qualified sense. One may use of another language, if true, with a bona fide intent to protect his own interest in a matter where it is concerned; but in such a case he must do so at his peril, if he exceeds the limit of his privilege and uses the language, not merely to protect his interest, but to vent his private malice on the person spoken of. Whether it is so spoken is properly a question of fact for the jury trying the case to determine.

[3] At common law an action for slander could not be maintained for imputing want of chastity to a female, in the absence of an allegation of special damages; for such language at common law to be actionable *per se*, the words must impute some crime or misdemeanor. Note to *Battles v. Tyson*, 77 Neb. 563, 110 N. W. 299, in 24 L. R. A. (N. S.) 577, 578; 1 *Odgers on Libel and Slander* (Am. Ed. 1887, from 2d Eng. Ed.) *86, *87, 88; *Townsend on Slander and Libel* (4th Ed. 1890) § 172, and cases cited. And this probably accounts for the decisions in some states where certain slanderous words are held not actionable; for, in the absence of statutes so declaring, the lack of chastity was not punishable at common law. At common law it was held that to charge that the plaintiff had a bastard child was not actionable, for she was not punishable in the temporal courts, nor under 18 Eliz., unless the child was rightly chargeable to the parish. 2 Salk. 694; 2 Ld. Raym. 1004. In our state, before the statute (and Code), only words imputing a crime were actionable *per se*. *Pledger v. Hathcock*, 1 Ga. 550. Words imputing the crime of fornication were held actionable *per se* in *Richardson v. Roberts*, 23 Ga. 215, 221(8). And the following words were held slanderous and actionable: "She is a girl of bad character. I believe her to be a whore." *Beggary v. Craft*, 31 Ga. 309, 76 Am. Dec. 687. Words alleged to have been spoken are to be taken in the sense which is most natural and obvious, and in which those to whom they are spoken will be sure to understand them. 1 Ga. 550, *supra*. In the case of *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, it was held that to say of a school-teacher, "Her character and conduct were not such as would give her a right influence over her pupils, and that she knowingly claimed wages not due her, is actionable *per se*." "It was held actionable to call a schoolmistress a dirty slut, or with being insane, or to charge by writing a school-teacher with making a false report to the school visitors and with general untruthfulness, or with want of chastity." *Townsend on Slander and Libel* (4th Ed.) §

190, p. 241; *Bodwell v. Swan*, 3 Pick. (Mass.) 379. Authorities might be greatly multiplied in support of the ruling here made, but we deem those given sufficient to support the proposition that the language attributable to the defendant tended to injure the plaintiff in her trade or profession as a school-teacher. We think that the words alleged to have been spoken by the defendant are calculated to injure the plaintiff in her trade or profession as a school-teacher, and therefore that the court below erred in sustaining the demurrers, general and special.

Judgment reversed. All the Justices concur.

(137 Ga. 305)

HUGER v. PROTESTANT EPISCOPAL CHURCH IN DIOCESE OF GEORGIA.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. CHARITIES (§ 3*)—VALIDITY OF TRUST—STATUTE OF USES.

Charitable trusts are continuing executory trusts, and not within the statute of uses.

(a) There was no error in overruling the demurrer to the petition of the plaintiff.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

2. CHARITIES (§ 21*)—VALIDITY—DESIGNATION OF BENEFICIARY.

A landowner executed a deed to the Protestant Episcopal Church in the Diocese of Georgia, described as a corporation. It recited a consideration of \$10, "as well as the desire she, the party of the first part, has for the encouragement and promotion of the interests of the Protestant Episcopal Church." The habendum clause contained the following: "To have and to hold * * * unto the said party of the second part, its successors and assigns, in trust, nevertheless, for the use and benefit of the religious congregation in the county and state first mentioned, called St. John's Protestant Episcopal Church, its successors and assigns." There was evidence tending to show that there was at that place an existing congregation known as St. John's Church, or St. John's Mission, though it was never formally organized as St. John's Church. Held, that the trust so created was not void for want of a beneficiary.

(a) Even if there was no such church in actual existence when the deed was executed, but it was only in contemplation, this would not of itself render the trust void.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 44-50; Dec. Dig. § 21.*]

3. CHARITIES (§ 30*)—VALIDITY—TERMINATION OF TRUST.

The deed containing no reversionary clause upon condition subsequent, no reversion arose under its terms because the congregation became inactive, or there was no organized congregation at that place, for a number of years.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 61; Dec. Dig. § 30.*]

4. CHARITIES (§ 30*)—VALIDITY—TERMINATION OF TRUST.

Under a deed of the character above set forth, it could not be declared that the trust therein created had failed or become impossible of accomplishment, so as to cause a reversion to the founder or her heirs, although there had

been no active or organized congregation known as St. John's Church for some 14 or 15 years before the commencement of litigation.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 61; Dec. Dig. § 30.*]

5. TRUSTS (§ 43*)—PAROL EVIDENCE AFFECTING TRUST.

In an action by the grantee in such a deed of trust to recover the land conveyed by it from the executor of the grantor, who had taken possession thereof, it was not competent by parol evidence to substantially add a condition subsequent to the written terms of the instrument, although this was offered as being explanatory of the consideration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

6. EVIDENCE (§§ 108, 471*)—OPINION EVIDENCE—MOTIVE.

There was no error in rejecting the testimony of a witness as to what was the motive of the grantor in making the deed. This was objectionable as opinion evidence; and the motive of one party, not shown to have been disclosed to the other, was irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 202-212, 2149-2185; Dec. Dig. §§ 108, 471.*]

7. CHARITIES (§ 80*)—TERMINATION OF TRUST—ADMISSIBILITY OF EVIDENCE.

The opinion of the executor that there were already sufficient churches of the Episcopal denomination in the city where the land was located to supply all members of that denomination, and there was no real or apparent necessity for building a church on the land in controversy, as all the probable members were already members of other churches, and there would be no congregation to support it, would not suffice to show that the trust had terminated and a reversion had taken place; and the rejection of such evidence will not cause a reversal.

(a) If there were any slight inaccuracies in any of the numerous rulings of which complaint was made, they were not such as to require a reversal.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 30.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by the Protestant Episcopal Church in the Diocese of Georgia, as trustee, against F. K. Huger, executor, and others. Judgment for plaintiff, and defendant executor brings error. Affirmed.

R. D. Meader, for plaintiff in error. E. S. Elliott, Crovatt & Whitfield, and R. E. Dart, for defendant in error.

LUMPKIN, J. The Protestant Episcopal Church in the Diocese of Georgia, as trustee, brought ejectment against Huger, executor, and others. The court directed a verdict for the plaintiff, and the defendant excepted. The testatrix of the defendant executor had made a deed to the plaintiff, recited to be a corporation, as trustee. The latter claimed that there was no beneficiary in existence, and that the deed was void, but, if not, that there had been a reversion, and that the grantee was not entitled to recover possession.

[1] 1. A demurrer was urged to the petition as amended, but it was without merit. Charitable trusts have been held to be continuing executory trusts, and not within the statute of uses. *Beckwith v. Rector, etc., of St. Philip's Parish*, 69 Ga. 564; *Beckwith v. McBride*, 70 Ga. 642.

[2] 2. The deed of trust to the plaintiff recited a consideration of \$10, "as well as the desire she, the said party of the first part, has for the encouragement and promotion of the interests of the Protestant Episcopal Church." The habendum clause contained the following: "To have and to hold . . . unto the said party of the second part, its successors and assigns, in trust, nevertheless, for the use and benefit of the religious congregation in the county and state first mentioned, called St. John's Protestant Episcopal Church, its successors and assigns." There was evidence to show that there was in existence a congregation known as St. John's Church, or St. John's Mission, though never formally organized as St. John's Church. This continued in active operation for some two years or more. Since then there has been no active or organized congregation or church. It will be observed that the plaintiff was not declared to be trustee for a particular organized or incorporated church, but for a religious congregation called St. John's Episcopal Church. Even if there was no such church in actual existence when the deed was made, but only in contemplation, this would not ipso facto render the trust void. *County of Gordon v. Mayor, etc., of Calhoun*, 128 Ga. 781, 58 S. E. 860; 2 Story, Eq. (13th Ed.) § 1169.

[3] 3. The deed contained no deed subsequent, and there was no reversionary clause in case the property should be sold or not used for church purposes. There was thus no reversion by virtue of the provisions of the deed. *Thompson v. Hart*, 133 Ga. 540, 66 S. E. 270; *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140, 111 N. W. 757, 11 L. R. A. (N. S.) 509 and note.

[4] 4. Neither did the evidence show that a reversion had occurred, on the ground that the trust had failed or become impossible of accomplishment. Civil Code 1910, §§ 3739, 4153. As stated above, the deed recited a consideration of \$10, as well as the desire the grantor "has for the encouragement and promotion of the interests of the Protestant Episcopal Church." This indicated a broader purpose than merely to build a certain edifice. There was no mention of building. The trustee was to hold for the use and benefit of a religious congregation called by a certain name, its successors and assigns. Thus the trust was not limited to a particular corporation or organized church, so as to fail or terminate if such church or corporation became inactive. It appears that the congregation or mission has not been active for

some years. But a sluggish or dormant congregation is not beyond the possibility of being awakened to ecclesiastical activity; nor is it impossible that there may be a successor. If any diversion of trust property from the purposes of the trust should be sought to be made, it may perhaps be the subject of restraint by a court of equity. But it cannot be held that any reversion or resulting trust has arisen in favor of the executor of the grantor.

[5] 5-7. Certain parts of the answer were stricken on demurrer, and certain evidence was excluded. Aside from the lack of technical sufficiency in the pleading in the particular respects, the substantial defense sought to be raised by the pleadings and evidence was that the deceased grantor was the owner of a considerable tract of land, of which the lots in dispute formed a part; that she divided it into lots for sale, and believing that it would enhance the value of the property to have a church located upon it, and being herself a member of the Protestant Episcopal Church, of which her husband was also a member, and being desirous of honoring his memory by seeing a church of that denomination erected there, which should be called St. John's Protestant Episcopal Church (John being the Christian name of her husband), and being further actuated by a religious motive, in that a church erected at that place would be beneficial to the people of that immediate settlement, she made the deed in trust for St. John's Protestant Episcopal Church of Glynn County; that she was not herself able to erect the church, but believed that the plaintiff would do so, and would name it St. John's Church; that this was never done, "and it is extremely doubtful if it will ever be done, as the city of Brunswick is well supplied with churches of that denomination, and that there is no necessity for building such a church, and that the deed is therefore invalid." No fraud, accident, or mistake in drawing the deed was alleged, and no effort to reform it was made, though there was a prayer for cancellation contained in an amendment to the answer. We have already held that the deed was not void on its face. If it was sought by parol to attach a condition subsequent to such deed, this could not be done.

[6] The effort to show by a witness what was the motive of the maker of the deed, if uncommunicated to the other party, was objectionable, both because it was not competent to show the undisclosed motive of a grantor in order to destroy the grant, and also because one person cannot testify broadly what motive is in the mind of another.

[7] The opinion of the executor, as a witness, that there were already sufficient churches of the Episcopal denomination in the city of Brunswick to supply all members of that denomination, and that there was no

real or apparent necessity for building a church on the land in controversy, as all the probable members were already members of other churches, and there would be no congregation to support it, was properly rejected. If it would have been admissible when accompanied by other evidence, it would not alone have sufficed to cause a reversion, and its rejection would not work a reversal. A charitable trust cannot be avoided merely because a witness thinks it unnecessary. Church progress and extension are not limited to cases of absolute necessity. The evidence offered in this case was not such as the Code declares to be admissible to ascertain in what sense the testator or grantor used obscure, doubtful, or equivocal words (Civil Code, § 4608), or in applying the doctrine of cy pres (section 4604).

What we have said above covers the substantial features of the case. Without discussing separately each point raised, even if there were any inaccuracies, none of them present sufficient ground for reversal.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 285)

**E. B. MARTIN & SONS v. BANK OF
LEESBURG.**

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 256*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—REQUESTS.

It is not error requiring a new trial for the court to charge the jury, in a civil case: "Now, in the outset, the burden rests with the plaintiff to establish the plaintiff's allegations. The burden is on the plaintiff to establish that to the reasonable satisfaction of the jury"—where the court has correctly given the jury in charge the general law as to the preponderance of testimony, and no request is made of the court to qualify the language objected to.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Nor is the failure to charge the jury relative to the impeachment of witnesses error, in the absence of a request to so charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

3. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court, in the general charge to the jury, has fully and accurately given the law and covered the issues in the case, it is not error to fail to give any additional charge to the jury, especially in the absence of a request for an additional charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

4. EVIDENCE (§ 511*)—EXPERT TESTIMONY—COMPETENCY.

Where suit was brought for money had and received by a bank, which by its answer denied receiving the deposit, the amount of which was sought to be recovered by the suit, it was not error for the court to allow a witness testifying as an expert, over objection of plaintiff's counsel, to testify: "This \$900 tick-

et [referring to the certificate of deposit for \$900 introduced by plaintiff] was evidently traced from a paper already written. It was not made at the first writing"—the contention of the defendant being that the alleged certificate of deposit was a forgery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2315; Dec. Dig. § 511.*]

5. EVIDENCE (§ 271*)—MEMORANDUM BY PARTY TESTIFYING—ACTION AGAINST BANK—RECOVERY OF DEPOSIT.

There was no error in ruling out the testimony referred to in the fifth division of the opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

6. EVIDENCE (§§ 164, 588*)—RELEVANCY—ABSENCE OF ENTRY IN RECORD.

A witness, who has examined a record for the purpose of showing the absence of a certain entry therein, is competent to testify to the absence of such entry.

(a) And the absence of an entry on the books of the bank has evidential value tending to show that no deposit was made, where the cashier of the bank has testified that deposit slips were always entered on the books of the bank on the day the deposit and slip were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 546, 547, 2432-2435; Dec. Dig. §§ 164, 588.*]

7. NEW TRIAL (§ 42*)—DISQUALIFICATION OF JURY—DISCRETION OF COURT.

Where the competency of certain jurors who participated in the verdict is attacked on the ground that they had formed and expressed an opinion on the merits of the case prejudicial to the plaintiffs, and which was unknown to the plaintiffs and their attorneys until after the verdict was rendered, it is no abuse of discretion for the court to hold said jurors competent, where the evidence on that point was conflicting.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74-79; Dec. Dig. § 42.*]

8. NEW TRIAL (§ 71*)—APPEAL AND ERROR (§ 979*)—CONFLICTING EVIDENCE—DISCRETION OF TRIAL COURT.

A trial court is vested by law with a discretion in granting new trials, and where no errors of law appear, and the evidence on the questions of fact involved in the case is conflicting, the trial court must exercise his discretion in passing on the evidence under the motion for a new trial; and this court will not disturb such exercise of discretion unless it is contrary to law.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.* Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by E. B. Martin & Sons against the Bank of Leesburg. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. W. Walters, Sr., Shipp & Sheppard, and W. G. Martin, for plaintiffs in error. Hardeman, Jones, Callaway & Johnston and H. L. Long, for defendant in error.

HILL, J. E. B. Martin & Sons brought suit in Lee superior court against the Bank of Leesburg to recover the principal sum of \$900 and interest at 7 per cent. thereon from

the 20th day of October, 1909, which amount the plaintiffs claimed to have deposited with the defendant during its banking hours on the above-named date, taking its certificate of deposit therefor. They averred various demands for the money, and refusal of the defendant to pay the same; and they also sought to recover the sum of \$300 of defendant, as counsel fees, because of the stubborn litigiousness of the defendant in refusing to pay the sum of \$900 when often requested. The defendant, by its answer and cross-petition, admitted that it refused to pay the amount claimed by the plaintiffs, but denied that demands had been made upon it as stated, and alleged that the certificate of deposit sued on was never executed by it, or by any person by it authorized to do so, that no such deposit as alleged was made by plaintiffs with defendant, and that plaintiffs were indebted to defendant in the sum of \$170.68, on account of overdrafts by plaintiffs on defendant. The jury trying the case, under the charge of the court, found a verdict for the defendant, also in favor of the defendant for \$170.68, as principal, besides interest on the same at 7 per cent. from December 13, 1909. A motion for a new trial, on various grounds was overruled by the court, and the plaintiffs excepted.

[1] 1. The third ground of the amended motion for a new trial alleges error in the following charge of the court to the jury: "Now, in the outset, the burden rests with the plaintiff to establish the plaintiff's allegations. The burden is on the plaintiff to establish that to the reasonable satisfaction of the jury." This charge is objected to, on the ground that it puts a greater burden on the plaintiffs than is placed by the law. It is insisted that the law does not require the plaintiff to establish the truth of his allegations to the "reasonable satisfaction of the jury," but only by a preponderance of the evidence, and for the further reason that this charge makes the individual mind of the juror the standard, rather than "a reasonable and impartial" mind. While technically inaccurate, perhaps, when taken by itself, yet, when considered in connection with the main charge on this subject, we cannot say that the charge complained of was reversible error. In the case of *Gunn v. Harris*, 88 Ga. 439, 14 S. E. 593, it was held that, where the court had charged the jury that "the burden is upon the plaintiff to make out his case to your satisfaction by proper testimony before he can ask the jury to give him a verdict," the omission to charge, in the absence of a special request, the general doctrine as to the preponderance of evidence, was not error. See, also, *Fusser v. Thompson*, 132 Ga. 280, 64 S. E. 75, 22 L. R. A. (N. S.) 571.

The fourth assignment of error is substantially the same as that offered in the

third ground of the motion, namely, that the judge erred in charging the jury that: "In the outset, the burden rests upon the plaintiff to establish the plaintiff's allegations, the truth of the allegations made. The burden is on the plaintiff to establish that to the reasonable satisfaction of the jury," etc. The plaintiffs in error insist that this charge places a greater burden on the plaintiff than the law authorizes, namely, to prove the contention of plaintiff to the "reasonable satisfaction of the jury," when the law only requires the plaintiff to establish his case by a preponderance of the testimony. We think that, taking the charge as a whole, the language complained of was not calculated to mislead the jury on that subject. The court had charged the jury that if they should find a conflict in the testimony, so that they could not reconcile it and make all the witnesses speak the truth, then what was known as the preponderance of evidence should control them in making their verdict, and on the question of preponderance of testimony he further charged them: "A preponderance of evidence, gentlemen, is simply the superior weight of evidence, gentlemen—is simply that superior weight of evidence that leads or inclines the mind of the jury to accept and believe one side of an issue in preference to the other. It is not required that that superior weight should be sufficient to satisfy your minds beyond a reasonable doubt, but that superior weight that leads you or inclines you to accept one side as the truth instead of the other," etc. Taken all together, we think the charge as given was a correct statement of the rule as to the preponderance of testimony. See *Savannah Electric Co. v. Mullikin*, 126 Ga. 724, 55 S. E. 945. Nor do we think the court's charge as to the shifting of the burden of proof was error.

[2] 2. Failure to charge the jury the law as to the impeachment of witnesses is not error, in the absence of a request so to charge. No such request appears in this case. *Brown v. McBride*, 129 Ga. 93 (7), 58 S. E. 702; *Boynton v. State*, 115 Ga. 587 (3), 41 S. E. 995.

[3] 3. No errors appear in the charge of the court, and failures to charge, as set out in the remaining grounds of the motion for a new trial, especially in view of the certificate of the trial judge, which recites that no request was made to charge on the subject referred to. Taken as a whole, the charge submitted the issues involved to the jury fully and accurately, and, if any additional charge was desired by the plaintiffs in error, a request therefor should have been made of the court.

[4] 4. It was not error for the court to allow a witness testifying as an expert, over objection of the plaintiffs' counsel, to testify: "This \$900 ticket [referring to the certificate of deposit for \$900 introduced by plaintiff] was evidently traced from a paper already

written. It was not made at the first writing."

[5] 5. There is no merit in the contention that the court erred in ruling out the following answer of the witness M. M. Martin, while on the stand, who was presented with a memorandum book, and, referring to the book, said: "This other book presented is a little memorandum that I kept in my safe. I kept this one myself. I put this \$900 entry in it the evening I sent that deposit over there." *Doster v. Brown*, 25 Ga. 24, 25, 71 Am. Dec. 153.

[6] 6. Movants assign error in the court allowing defendant to prove by T. F. Heminger, a witness, the following: "I did not find on the books any entry of the \$900 deposited October 20th, made by E. B. Martin & Sons. There was no record on the books [meaning the books of the Bank of Leesburg] whatever of that deposit, and I found no deposit ticket of that amount to E. B. Martin & Sons." Movants contend that this testimony is incompetent, because it shows negatively a want of an entry on the books of defendant in order to prove that no deposit had been made in the bank. We do not think there is merit in this contention. One way to show the absence of an entry in a record is for some one who has examined the record to testify to the absence of such entry. Nor is it necessary, in order for one to so testify, that they have exclusive possession of the records about which they testify. Any person who has read or examined the record would be a competent witness, if not otherwise disqualified. And testimony of this kind has been held admissible by this court a number of times. *Hines v. Johnston*, 95 Ga. 629, 644 (3), 23 S. E. 470; *Daniel v. Braswell*, 113 Ga. 373, 38 S. E. 829; *Jordan v. State*, 127 Ga. 278 (2), 56 S. E. 422. Nor is the above ruling error as having no evidential value to the effect that the deposit had not been made, taken in connection with what the assistant cashier had testified, namely, that no deposit had been made as alleged, and the cashier's testimony that the deposit slips were always entered upon the books of the bank the same day they came in; the testimony being admissible as tending to show that the deposit had not been made as contended.

[7] 7. The fifteenth ground of the motion alleges that a new trial should be granted because B. E. Fouché and J. W. Fouché, 2 of the 12 jurors who tried this case in the court below and rendered their verdict therein, were incompetent jurors, because they, and each of them, prior to the trial and during the trial, had formed and expressed an opinion on the merits of the case prejudicial to the plaintiffs, which was unknown to the plaintiffs and their attorneys until after the verdict had been rendered. There are affidavits pro and con as to the competency of the jurors named and for the reasons set forth. As the evidence was conflicting on

this point, and the trial judge decided in favor of the competency of the jurors, we cannot say that he abused his discretion in so doing.

[8] 8. One ground of error remains to be considered. It is not specifically set forth in the motion itself, nor, indeed, could it well be, as the ground of error alleged is the order of the court overruling the motion for a new trial, which arose after the motion was argued and submitted. Counsel for plaintiff in error insist in their brief, as they did in the oral argument before this court, that the order of the court overruling the motion for a new trial does not show that the trial judge has approved the verdict in this case by the exercise of the discretion vested in him by law. The order of the trial judge overruling the motion is as follows: "After consideration of the record in this case, I am of the opinion that none of the grounds of the amendment to the motion called for the grant of a new trial, and, as far as the facts are concerned, I feel that is a question I cannot interfere with in this case, but the same is one peculiarly for the jury. I have for years known the witnesses on both sides of the material facts, and should have without hesitation or question accepted any statement made by either of them to me. Therefore the motion is hereby overruled and a new trial denied."

It is insisted that the use of the language by the trial judge quoted above is evidence of the fact that he did not exercise the discretion vested in him by law. The law is plain that a judge of the superior court shall have power to correct errors and grant new trials. Civil Code 1910, §§ 6078, 6079, 6088. In passing upon motions for a new trial, a judge must exercise his discretion, and not fail to exercise it upon questions of fact simply because the jury had passed upon the same. Whether the judge erred in this case by reason of the language used depends upon what he meant when he said in his order, "As far as the facts are concerned, I feel that is a question I cannot interfere with in this case, but the same is one peculiarly for the jury." If the language quoted meant that the judge did not have the power or authority to grant a new trial, then it would be error; but if the court meant that inasmuch as the evidence was conflicting, and the jury had found the issues of fact in favor of the defendant, he *would* exercise his discretion in such matter by not disturbing their verdict and granting a new trial, then we hold that there was no error committed. We are inclined to take the latter view. We must presume that the trial judge knew the rule as to the necessity of exercising his discretion, and that he did exercise it; and, while the language attributed to him is susceptible of the construction placed

upon it by the plaintiffs in error, we cannot assume, in the absence of positive evidence to the contrary, that the judge knowingly declined to exercise his discretion. We hold that he did exercise his discretion.

One other remark with reference to the order overruling the motion for a new trial: The question was raised here after the order had left the hands of the court, and he had no opportunity to explain, by note or otherwise, what he did mean; but, giving the language that interpretation which we think it deserves, we must conclude that there was no intention to evade the exercise of a sound legal discretion in passing on the motion for a new trial. *City of Atlanta v. Brown*, 73 Ga. 633.

We have read and considered the record in this case carefully, and as we discover no errors of law in any of the grounds of the motion requiring a new trial, and the evidence being amply sufficient to sustain the verdict, and the trial judge being satisfied therewith, we conclude that the judgment of the court below must be:

Affirmed. All the Justices concur.

(137 Ga. 215)

VERDERY et al., County Com'rs, v.
WALTON.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. COUNTIES (§ 132*)—LIABILITIES—FEES OF ORDINARY—STATUTORY PROVISIONS.

So much of sections 5 and 7 of the act of 1907 (Acts 1907, p. 107) as provides for the auditing of the fees of the ordinary by the proper county officials, and the payment of such fees by the county, is not impliedly repealed by the act approved August 18, 1908 (Acts 1908, p. 70).

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 132.*]

2. COUNTIES (§ 132*)—STATUTES (§ 64*)—PARTIAL INVALIDITY OF STATUTE—LIABILITIES IMPOSED ON COUNTY—CONSTITUTIONALITY—PURPOSE OF TAXATION.

Under article 7, § 6, par. 2, of the Constitution (Civ. Code 1910, § 6562), a county tax cannot be levied for the purpose of raising money to pay pensions to Confederate soldiers and the widows of Confederate soldiers. The tax authorized for this purpose is one to be laid by the General Assembly over the whole state. If the General Assembly require of a designated official that he render the necessary service to the pensioner, respecting the making of the application and collecting and paying over the money, and fix a fee for such services, payable out of the county treasury, the provision as to payment of fees is unconstitutional and void, because the fee partakes of the character of the pension, and cannot be constitutionally paid out of taxes levied by the county. The legislative scheme of the act of 1907 (Acts 1907, p. 107), requiring payment of the ordinary's fees from the county treasury, contemplated the payment of fees for all classes of pensioners; and the legislative intent cannot be given effect by enforcing the provision only in favor of indigent pensioners

on the ground that a county may constitutionally levy a tax for the care of paupers.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 132; Statutes, Dec. Dig. § 64.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Application by A. R. Walton for mandamus to E. F. Verderer and others, as County Commissioners, to require them to audit his claim for fees in services rendered to indigent pensioners. From a judgment for the applicant, defendants bring error. Reversed.

Salem Dutcher, for plaintiffs in error. E. H. Callaway, for defendant in error.

EVANS, P. J. The main point in this case is whether there existed any valid constitutional law by virtue of which the ordinary could demand payment of his fees from county funds for preparing the applications of those entitled to pensions at the time the services were rendered, for which compensation is demanded. Under the Constitution of this state as originally adopted the power of taxation over the whole state was given to supply soldiers, who lost a limb or limbs in the military service of the Confederate States, with substantial artificial limbs during life. The Constitution was subsequently amended at various times, authorizing taxes to be levied to pay pensions for such Confederate soldiers as may have been otherwise disabled or permanently injured in such service, or who may, by reason of age and poverty, or infirmity and poverty, or blindness and poverty, be unable to provide a living for themselves, and for the widows of such Confederate soldiers as may have died in the service of the Confederate States, or since, from wounds received therein, or disease contracted in the service, or by reason of age and poverty, or infirmity and poverty, or blindness and poverty, are unable to provide a living for themselves. In the various enactments to carry into effect these constitutional provisions, it was provided that blanks should be prepared and sent to the ordinary, to be filled out by applicants for pensions, and, upon proper proof being made before the ordinary of the county that the applicant was entitled to a pension, the completed application was to be forwarded to the proper authority. The ordinary was allowed a fee of \$1 for each case prepared by him, which was to be paid by the applicant. It was declared to be unlawful for any other person to demand, collect, or receive any fee or commission from any pension beneficiary for any service rendered in preparing and presenting an application. The amounts appropriated for pensions were payable annually. By an act approved August 22, 1907 (Acts 1907, p. 107) pensions were made payable in quarterly installments. By the fifth section of the act

it was declared that the "ordinary shall be paid by his county the sum of twenty-five cents for the name of each pensioner so entered on said roll, and for receiving and paying out the money, taking receipts, and for all services rendered each pensioner in each quarter"; and by the seventh section of the act it was made the duty of those officials having in charge the auditing of the claims and accounts of each county of this state to audit and order paid the claims of the ordinary of their county, when presented for services performed for the pensioners of their county, as required by this law, not exceeding 25 cents for each pensioner for each quarter. In the following year, by an act approved August 18, 1908 (Acts 1908, p. 70), it was required that pensioners be paid annually in one sum. The title of the act of 1908 is identical with that of 1907. The third, fourth, and sixth sections of the act of 1908 are in the same words as the corresponding sections of the act of 1907. Sections 1 and 2 of the two acts differ as to the time and mode of payment. The latter part of section 5 of the act of 1907, providing that the county shall pay the fees of the ordinary, is omitted from the act of 1908, and section 7 of the act of 1907, requiring the proper county officers to audit the claims of the ordinary for services performed for pensioners, is also omitted from the act of 1908.

[1] The question is raised whether the provision for the payment of the ordinary's fees by the county, as provided in the act of 1907, is impliedly repealed by the act of 1908. The argument advanced to support this position is that the act of 1907 was a general act dealing exhaustively with the subject of the payment of pensions, and the subsequent act of 1908 was a general act dealing with the same subject, but in a different manner in several particulars from the first act, so as to indicate a plain legislative intent that the later act was to be substituted for the former and to embrace the sole law on the subject. An act which does not purport to amend or repeal any particular law is not within the constitutional provision that no law shall be amended or repealed by mere reference to its title, but that the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made. *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232. Repeals by implication are not favored; and it is only in so far as the statute, is clearly repugnant to a former statute, or is manifestly intended to cover the subject-matter of the former, and operate as a substitute for it, that such a repeal will be held to result. *Johnson v. Sou. Mutual Building & Loan Ass'n*, 97 Ga. 622, 25 S. E. 358. The first of these acts not only wrought a change in the law as to the time and man-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ner of the payment of pensions, but also imposed for the first time upon the counties a charge for the payment of the ordinary's fees for the services rendered in the collection of the pensions. The later act made no reference to the former act, and only purported to change the time and manner of the payment of pensions. Although no reference was made to the act of 1907, it is clear that the act of 1908 is to be construed in connection therewith, and to be given effect only as those matters dealt with in the later act. It did not purport to repeal the provision for the payment of ordinary's fees by the county; and, as that was an important feature in the first act, we cannot say that the Legislature intended to repeal that important provision in the law on the subject of the payment of the ordinary's fees. That which was left in the act of 1907 applied solely to the payment of the ordinary's fees. It could have been made the subject-matter of a complete and independent act. We think, therefore, that the provision with reference to the payment of the fees of the ordinary for services rendered to pensioners was not impliedly repealed by the act of 1908.

[2] May the Legislature constitutionally enact a law imposing upon a county the duty of paying the fees for services rendered by the ordinary to pensioners? The constitutional scheme of taxation contemplates a separation of the taxing power of the state from that of the county. It is declared in article 7, § 1, par. 1, of the Constitution, that "the powers of taxation over the whole state shall be exercised by the general Assembly for the following purposes only": For the support of the state government and the public institutions; for educational purposes; to pay the principal and interest on the public debt; to suppress insurrection, to repel invasion, and to defend the state in time of war; and to supply Confederate soldiers with artificial limbs, and for pensions to Confederate soldiers, and widows of Confederate soldiers. Civil Code 1910, § 6551. By article 7, § 6, par. 2, the General Assembly was prohibited from delegating to any county the right to levy a tax for any purpose, except for educational purposes, to build and repair public buildings and bridges, to maintain and support prisoners, to pay jurors and coroners, for litigation, quarantine, roads, and expenses of courts, to support paupers, and pay existing debts, pay county police, and provide for necessary sanitation. Civil Code 1910, § 6562. The General Assembly has and exercises the power of providing by state taxation for the payment of pensions to Confederate soldiers, and can confer no authority for paying pensions to soldiers and their widows out of the funds to be raised by

county taxation. *Elder v. Collier*, 100 Ga. 342, 28 S. E. 116. The costs and fees incident to the collection of pensions, when added to the bounty appropriated for pensions, partake of the character of the pension. It amounts to an appropriation of an additional sum, whereby the pensioner is relieved of all costs in securing his pension. It is therefore clear that, as the county cannot constitutionally levy a tax to pay the pension, it cannot levy a tax to pay the costs to securing the pension, so that the state's appropriation may be net to the pensioner; and the act of 1907, which makes this a charge upon the county taxes, is unconstitutional and void.

But it is contended that, inasmuch as some of the pensioners are entitled to their bounty by reason of age and poverty, or infirmity and poverty, or blindness and poverty, rendering them unable to provide a living for themselves, it is proper for the General Assembly to classify them as paupers, and provide for the payment of the fees of the ordinary from the pauper funds of the county. The legislative scheme was to treat all pensioners alike, and to make no exception in favor of any class of pensioners; and, even if it be conceded that the Legislature would have the right to make such classification, it has not done so. To recognize such an exception to the legislative enactment would be, not only to give a partial effect to the legislative scheme, but to impute to that body an intention to create an invidious distinction by classifying indigent pensioners as paupers, when no such classification was intended. We therefore are of the opinion that the provision in the act of 1907 that the ordinary's fees in preparing and collecting pensions shall be paid by the county of the pensioner's residence is violative of the Constitution.

Applying these principles to the case in hand, which was an application for mandamus by the ordinary to require the county commissioners to audit his claim for fees in services rendered to indigent pensioners under the act of 1907, the mandamus should have been refused.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 377)

CLARK v. WALTON.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. COUNTIES (§ 132*) — LIABILITIES — STATUTORY PROVISIONS — "PAUPERS."

Confederate soldiers, referred to in the expression "indigent pensioners," as used in section 2 of an act approved August 13, 1909 (Acts 1909, p. 173), cannot be classed as "paupers," in the meaning of that term where it is

employed in our statutes relating to the county poor.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 132.*

For other definitions, see Words and Phrases, vol. 6, pp. 5236-5239.]

2. COUNTIES (§ 132*)—LIABILITIES—PURPOSES OF TAXATION—FEES OF ORDINARY.

Under the decision in the case of *Verdery v. Walton*, 73 S. E. 390, the provision in section 2 of the act referred to in the first head-note (Laws 1909, p. 173), is unconstitutional, in so far as it provides for the payment of certain fees to the ordinaries of this state out of the pauper funds of their respective counties.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 132.*]

3. DEMURRER SUSTAINED—NO ERROR.

The court erred in not sustaining the demurrer to the petition for mandamus; the demurrer being based upon the alleged unconstitutionality of the section of the act referred to.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Mandamus proceedings by A. R. Walton against W. A. Clark. From a judgment overruling a demurrer to the petition, defendant brings error. Reversed.

Salem Dutcher, for plaintiff in error. H. H. Callaway, for defendant in error.

BECK, J. Walton, ordinary of Richmond county, brought mandamus proceedings against Clark, county treasurer, to compel the auditing and payment, out of the pauper fund of the county, of an itemized bill of the former for his services in preparing all papers and proofs, and preparing the annual pay rolls, and for securing and paying out the pensions paid by the state to indigent pensioners of said county, at \$1 per capita, for all pensioners that have heretofore been known as "indigent pensioners." A demurrer filed by the respondent was overruled, and the mandamus was absolute, to which ruling of the court the respondent excepted.

[1, 2] In the case of *Verdery v. Walton*, 73 S. E. 390, it was said: "May the Legislature constitutionally enact a law imposing upon a county the duty of paying the fees for services rendered by the ordinary to pensioners? The constitutional scheme of taxation contemplates a separation of the taxing power of the state from that of the county. It is declared in article 7, § 1, par. 1, of the Constitution, that 'the powers of taxation over the whole state shall be exercised by the General Assembly for the following purposes only': For the support of the state government and the public institutions; for educational purposes; to pay the principal and interest on the public debt; to suppress insurrection, to repel invasion, and to defend the state in time of war; and to supply Confederate soldiers with artificial limbs, and for pensions to Confederate soldiers and widows of Confederate soldiers. Civil Code

1910; § 6551. By article 7, § 6, par. 2, the General Assembly was prohibited from delegating to any county the right to levy a tax for any purpose, except for educational purposes, to build and repair public buildings and bridges, to maintain and support prisoners, to pay jurors and coroners, for litigation, quarantine, roads, and expenses of courts, to support paupers, and pay existing debts, pay county police, and provide for necessary sanitation. Civil Code 1910, § 6562. The General Assembly has and exercises the power of providing by state taxation for the payment of pensions to Confederate soldiers, and can confer no authority for paying pensions to soldiers and their widows out of the funds to be raised by county taxation. *Elder v. Collier*, 100 Ga. 342, 28 S. E. 116. The cost and fees incident to the collection of pensions, when added to the bounty appropriated for pensions, partake of the character of the pension. It amounts to an appropriation of an additional sum, whereby the pensioner is relieved of all costs in securing his pension. It is therefore clear that, as the county cannot constitutionally levy a tax to pay the pension, it cannot levy a tax to pay the costs of securing the pension, so that the state's appropriation may be net to the pensioner; and the act of 1907 (Laws 1907, p. 107), which makes this a charge upon the county taxes, is unconstitutional and void. But it is contended that, inasmuch as some of the pensioners are entitled to their bounty by reason of age and poverty, or infirmity and poverty, or blindness and poverty, rendering them unable to provide a living for themselves, it is proper for the General Assembly to classify them as paupers, and provide for the payment of the fees of the ordinary from the pauper funds of the county."

That decision is controlling in the instant case, unless indigent pensioners, as used in section 2 of an act relating to compensation for services to pensioners by ordinaries, approved August 13, 1909 (Acts 1909, p. 173), fall properly within the purview of the provision in the Constitution authorizing the General Assembly to delegate to the county authorities the right to levy a tax "to support paupers." The second section of the act referred to reads as follows: "Sec. 2. Be it further enacted by the authority aforesaid, that the fees above set out for all those pensioners that have heretofore been known as indigent pensioners, shall be paid out of the pauper fund of the county in which said pensioner may reside, upon a sworn itemized bill made out by the ordinaries and presented to the treasurer or other officer having in charge the paying out of the pauper fund of each county, which treasurer or other officer shall audit said itemized bill, and, if found correct, pay the same and make record thereof as other bills or

orders paid by him." Indigent pensioners include those Confederate soldiers who from age and poverty, or infirmity and poverty, or blindness and poverty, are entitled to a pension. In considering whether those pensioners embraced in the expression "indigent pensioners" fall within the purview of the constitutional provision above referred to and the statutes relating to the support of paupers and the levying of a tax for their support by the counties, it is necessary to determine the meaning of the word "pauper," as employed in the Constitution; and in doing this, as the framers of the Constitution did not attempt to limit or define the term "pauper," to gather the meaning of the word as it stood in our laws at the time of the adoption of the Constitution.

Under the laws of this state of force at that time, the supervision of all paupers was vested in the ordinary of each county. Civil Code 1910, § 541 (Code 1873, § 754). That officer had authority to make all necessary contracts in relation to the county poor, and had authority to purchase a poorhouse and a farm, upon which he might require all paupers in the county to labor who were not, from old age or disease, unable to work. Civil Code 1910, §§ 542, 543 (Code 1873, §§ 755, 756). It was further provided that "no person should be entitled to the benefits of the provision for the poor who was able to maintain himself or herself by labor, or, if not, had sufficient means" to maintain himself. Civil Code 1910, § 553 (Code 1873, § 763). It was also in contemplation of the law that one desirous of sharing the provision for the county poor should make "application to be provided for as a pauper to the commissioner of the poor or the ordinary, upon which a hearing must be had." Civil Code 1910, § 552 (Code 1873, § 762). Evidently, in these sections, only those persons in any particular county who were completely destitute were included among those designated as paupers. They were the poor who were chargeable to the county in which they had their residence. And we do not think that a Confederate soldier, in order to be classed as an indigent pensioner, and to enjoy the bounty of the state as such, must necessarily be in this extreme condition of destitution, be under the supervision of the ordinary, as provided in the case of paupers, and be required to make application for maintenance as a pauper.

True, it is contemplated in our law that some of the indigent pensioners may be in such a state of destitution as would authorize their classification under the head of paupers. But what we are pointing out is that the mere fact of a Confederate soldier being rightfully on the roll of indigent pensioners would not of itself place him among the county poor entitled to support as a pauper. This is more clearly shown by a

consideration of the provisions of another section of the Code relating to paupers who are chargeable to the county, under the provisions of which parent and children are bound to support each other; and if a person had a parent or a child who was able to support him, he was not chargeable to the county; and if the county did maintain him, such county might recover the expense of his maintenance from the parent or the child whose duty it was to support him. Civil Code 1910, § 554 (Code 1873, § 764). In other words, one having a parent or child able to support him is not, under our law now, or as it stood at the adoption of the Constitution, a "pauper." But it could not be contended that a Confederate soldier, who, from age and poverty, or infirmity and poverty, or blindness and poverty, is unable to provide a living for himself, would not be entitled to a place on the roll of indigent pensioners, although he had a parent or child able and willing to support him.

[8] Upon these considerations we must hold that "indigent pensioners" as a class do not come within the purview of our statutes making provision for the maintenance of paupers. And consequently, under the decision in the case of *Verdery v. Walton*, cited above, the court erred in overruling the demurrer to the petition for mandamus against the treasurer.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 282)

McCARTHY et al. v. MCKINNEY.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 283*)—OFFICERS—DETERMINATION OF TITLE TO OFFICE—JURISDICTION OF EQUITY.

Where an election was held by an authorized lodge or convention of a domestic private corporation for officers of said institution on Sunday, the predecessor in office of the one elected cannot resort to a court of equity in order to assert her rights to the office to which she claims to have been elected and to enjoin the successor in office from holding and receiving the salary attached to the office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195-1235; Dec. Dig. § 283.*]

2. CORPORATIONS (§ 283*)—OFFICERS—DETERMINATION OF TITLE TO OFFICE—JURISDICTION OF EQUITY.

Where an adequate remedy is provided by law to test the title to an office claimed by each of two contestants, equity will not entertain jurisdiction of the case, in order to adjudicate the private rights of the parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195-1235; Dec. Dig. § 283.*]

3. INJUNCTION (§ 70*)—SUBJECT OF RELIEF—TITLE TO CORPORATE OFFICE.

Equity will not enjoin de facto officers of a private corporation from discharging the duties of those offices and receiving the salaries

thereof, where a clear remedy is provided by law for testing the rights of the parties to hold those offices.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 136, 137; Dec. Dig. § 70.*]

4. QUO WARRANTO (§ 20*)—SCOPE OF REMEDY—TITLE TO CORPORATE OFFICE.

If the title of an officer of a private corporation is contested by one claiming to have the legal right to the office and the salary thereof, the proper remedy to settle such title is by information in the nature of quo warranto.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 21; Dec. Dig. § 20;* Corporations, Cent. Dig. § 1222.]

Error from Superior Court, Dougherty County; Frank Park, Judge.

Equitable petition by L. E. McKinney against Charlie McCarthy and another. Judgment for plaintiff, and defendants bring error. Reversed.

Pope & Bennet, for plaintiffs in error. R. J. Bacon, for defendant in error.

HILL, J. L. E. McKinney filed her equitable petition in Dougherty superior court against Charlie McCarthy and the "Supreme Circle of Benevolence of the United States of America, a corporation of said county," alleging that she was duly elected and qualified secretary of said corporation at the last meeting prior to October, 1909, and had discharged the duties of said office as such to October, 1909, was elected and qualified as treasurer of said Supreme Circle; that plaintiff is still the elected and qualified secretary, by reason of the failure of the Supreme Circle to elect a successor to plaintiff under the rules of said Supreme Circle, which provide that the Supreme Secretary and the other officers named "shall serve one year, or until their successors are elected"; that at the last meeting of the Grand Lodge of said Supreme Circle there was a failure to elect a successor to petitioner, the law of the Supreme Lodge being that the Supreme Circle shall not meet later than 11 o'clock p. m., whereas, it is alleged, one Joseph H. Watson, who was in league with said McCarthy, in order to secure the position held by plaintiff, induced the Grand Lodge to remain in session after 11 o'clock Saturday night, after the greater portion of the delegates to the Grand Lodge had gone home, and charges were preferred against petitioner, which had previously been investigated, and plaintiff was completely exonerated of said charges; that the election so brought about was illegal, because it was after 11 o'clock p. m., and on Sunday, no notice being given of said election; that it was not participated in by plaintiff, but was held by a fraction of the members of the Grand Lodge between 1 and 2 o'clock Sunday morning, and at said election said Charlie McCarthy was elected Supreme Sec-

retary, and plaintiff Supreme Treasurer: that the office of Supreme Treasurer is as responsible as that of Supreme Secretary, but the former pays only \$300 per annum, and the latter \$720 per annum, and the purpose of the election of the said Charlie McCarthy was to deprive plaintiff of the right to hold said office of Supreme Secretary and draw the salary incident thereto; that plaintiff refused to act as treasurer under said election, because she insists that the elections aforesaid are illegal for the reasons given, and that she is still Supreme Secretary under her former election and tenure of office; that she is ready and willing and has offered her services as Supreme Secretary as aforesaid, and desires to continue in said office until her successor is duly elected and qualified; that said Supreme Circle is a private corporation having for its object benevolence in the way of sick benefits and burial expenses of its members.

Several amendments to said petition were allowed by the court, setting forth the duties of various officers of said Supreme Circle. The prayer of the petition was: (1) That McCarthy be enjoined from acting as Supreme Secretary, and from receiving any salary as such from the Supreme Circle. (2) That petitioner recover judgment of the Supreme Circle and said McCarthy for all salary or salaries heretofore paid by the Supreme Circle to him, "if any shall be shown to have been paid, and for any and all payments that shall or may be made to said McCarthy hereafter for services rendered in the capacity of Supreme Secretary, and of said Supreme Circle for any salary of the Supreme Secretary due or to become due to your petitioner." (3) To have the entire election declared illegal, and "the contracts made by said corporation by the selection and appointment of the officers of Supreme Secretary as aforesaid on said date, and the contract binding said Supreme Circle thereto, surrendered up and canceled as a violation of the laws of Georgia, and fraudulent and void and ultra vires, and the records of said illegal action expunged as unauthorized and illegal."

The defendant filed general demurrers to the petition as amended, which demurrers were overruled by the court, and this judgment is assigned as error.

[1] 1. We think the court erred in overruling the general demurrer in this case. The petition and amendments thereto do not set forth such a cause of action as would bring it within the jurisdiction of a court of equity. The facts are substantially as stated above. The prayers of the petition are: (1) To enjoin the defendant McCarthy from acting as Supreme Secretary and from receiving any salary from "the Supreme Circle." (2) To enjoin the corporation from interfering with the plaintiff in the pursuance of her duties as secretary. (3) That the election of

the defendant and all other officers elected at the Grand Lodge at Valdosta, "and the contracts binding the Supreme Circle thereto," be declared illegal and canceled. It appears from the petition that the plaintiff had been the duly elected and qualified secretary of the "Supreme Circle of Benevolence," and acted as such until defendant was elected by those in authority at the Grand Lodge, which convened at Valdosta on October 3, 1909. The plaintiff insists that the election of McCarthy as Supreme Secretary was brought about by fraud and collusion, and occurred on Sunday, contrary to the laws of the Supreme Circle and of the state. She insists that she was elected as Supreme Secretary for one year and until her successor was duly elected and qualified, and that, as no legal election had been held, she was the duly qualified Supreme Secretary, with the right to hold and exercise the duties of said office and receive the salary for same until her successor was legally elected and qualified, but that the defendant under his pretended claim of election was holding the office and receiving the salary, to both of which plaintiff was entitled, etc. The corporation, "the Supreme Circle," was a party defendant to this suit, and, so far as the record discloses, offered no objection to McCarthy holding said office or receiving the salary attached thereto. It must be assumed, therefore, that McCarthy is at least a *de facto* officer, exercising the duties of the Supreme Secretary with the knowledge and consent of the corporation itself. The plaintiff filed her equitable petition in her individual capacity, to restrain McCarthy from exercising the duties of the office to which she claims to be the rightful occupant, and to prevent the corporation from paying him the salary due the Supreme Secretary rightfully entitled thereto. The suit is not filed by the plaintiff as a stockholder of the corporation for a misappropriation of the funds of the corporation, but as an individual to prevent the corporation from paying McCarthy the salary due the secretary, and to enjoin him from discharging the duties of the office. We think this does not make a proper case for a court of equity.

[2-4] We hold, if the plaintiff had the right, by election or tenure of office, to the position of secretary of the order to which she belonged, and some one else claimed a similar right to this office and the salary, that an ample remedy is provided by law for testing her claim of right to the office. She could proceed by information in the nature of *quo warranto*, without resorting to a court of equity. The law declares that "equity will not take cognizance of a plain legal right, when an adequate and complete remedy is provided by law," etc. Civil Code 1910, § 4538. In the case of *Hussey v. Gallagher*, 61 Ga. 90, this court said that "the application to restrain the officers *de facto* of such a corporation as this is quite rare,

and equity, even if there were salaries attached to these offices, will not usually, perhaps never, interfere in such cases, but leave the contesting parties, as far as the election is concerned, to their remedy by an information in the nature of a *quo warranto*." If the title to the office of secretary is in question (and the pleadings put it in question), then *quo warranto* proceedings seem ample to determine the issue as to who was legally elected and entitled thereto. And, before the plaintiff could recover in a suit for the salary, she must first establish her right to the office. In such a case injunction cannot be invoked, but equity will leave the parties to settle the legal title to the office by information in the nature of *quo warranto*. *Harris v. Pounds*, 64 Ga. 121; 1 *Thomp. Corp.* (5th Ed.) § 941, and cases cited; 32 *Cyc.* 1426, 1427.

It was further held that it was not the province of equity to decide the right to an office. And "where an injunction to prevent an officer from acting as such is really to test the validity of his election, it will be refused." 22 *Cyc.* 878, 879, and citations. Nor is injunction the proper remedy for the removal of an officer, or for restoring one wrongfully removed. *Id.* It is true that where public officers are acting illegally, or without authority and in breach of trust, and are causing irreparable injury, they will be enjoined. 22 *Cyc.* 879. But no such allegation appears in the petition of the plaintiff. She simply claims the right to the office of secretary and its emoluments as an individual, which is also claimed by the defendant McCarthy, and she prays a court of equity to enjoin him from exercising the duties of the office, etc. No irreparable damage is alleged, or such other facts as would give a court of equity jurisdiction. Nor is this a suit for damages or for salary alleged to be due. It is nowhere alleged in the plaintiff's petition that the corporation is insolvent, or the damages irreparable, or that the corporation of which she is a member is misappropriating the funds of such corporation, or such other facts set out which would give jurisdiction to a court of equity. Nor is there any definite allegation in the plaintiff's petition that any salary has been paid McCarthy; and, even if there was, we fail to see how a court of equity could be invoked by one who is claiming in her individual right merely as a rival-elect secretary, to enjoin the payment of such salary. It might be otherwise if the funds of the corporation were alleged by some member of the corporation to be misappropriated by some of the officers. Then the plaintiff, if a stockholder, or some other one of the stockholders, as such, could undoubtedly apply to a court of equity for proper relief. *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40.

In arriving at the conclusion that an application for leave to file an information in the nature of *quo warranto* is the proper

remedy by which the rights of the plaintiff in this case to an office in a private corporation can be tested in the courts of law in this state, rather than by proceedings in a court of equity, we are not unmindful of the doubts expressed on this subject by Judge Benning in the case of *Cole v. Dyer*, 29 Ga. 437, nor of the language of the Code, which was adopted after the decision in 29 Ga. 437, just referred to. It may be that the section of the Code with reference to quo warranto was incorporated to meet the decision in the case of *Cole v. Dyer*, supra. At any rate, section 5451 of the Civil Code of 1910 provides that "the writ of quo warranto may issue to inquire into the right of any person to any public office, the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein." See, also, Civil Code 1910, § 5454. It will thus be seen that the section of the Code cited apparently confines the remedy of quo warranto to a person inquiring into the right of another person to any "public" office, etc., and while, as an original proposition, we might or might not have placed the construction on that section of the Code that was placed on it by this court in *Hussey v. Gallagher*, 61 Ga. 91, and *Harris v. Pounds*, 64 Ga. 121, yet, as this court in the *Harris* case, supra, definitely ruled that, "in a contest between two sets of trustees of a campmeeting ground, one holding an appointment under the quarterly conference of the Methodist Church, and the other under a grant from the superior court by virtue of authority claimed to be derived from the act of 1872 (Code, § 1877), and both claiming to hold the title for the use of the Methodist Church of Warren county for the campmeeting worship, and no allegation being made that either has interfered or threatened to interfere with the beneficiaries in the enjoyment of the religious worship at said camp ground, equity will not interfere by injunction, but will leave the parties to settle the legal title by information in the nature of quo warranto," we feel constrained to adhere to the ruling there made, especially as it is in accord with the weight of American authority on this subject.

The decision in 64 Ga. 121, was rendered in 1879, after the section of the Code referred to was adopted as the law of the state; and we must assume that said decision was rendered with the full knowledge of this court of its existence in the Code. And the ruling made in the case of *Harris v. Pounds*, supra, cites with approval the decision in the case of *Hussey v. Gallagher*, 61 Ga. 96, where it was held to the same effect that quo warranto was the proper remedy to test the title to a private office. Relying, therefore, upon the definite ruling made by this court in the case of *Harris v. Pounds*, we must likewise hold that in the present case the plaintiff's remedy is by information in the

nature of quo warranto, and not by resort to a court of equity for injunction to restrain defendant from exercising the duties of Supreme Secretary and collecting the salary of same, or to enforce the other prayers in the petition.

In view of the ruling here made, it will not be necessary to decide the other question, whether the election alleged to have been held on Sunday was void, as that question can be determined on proper proceedings in the superior court.

Judgment reversed. All the Justices concur.

(187 Ga. 311)

POTTS v. CITY OF ATLANTA.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 9*)—NATURE AND EXTENT OF POWER—STATUTORY PROVISIONS.

Under the provisions of section 5 of the act approved November 29, 1902 (Acts 1902, p. 333), the city of Atlanta has authority to exercise the right of eminent domain, and to acquire, by condemnation proceedings, lands necessary for the construction of sewers beyond the limits of the city.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 9.*]

2. INTERLOCUTORY INJUNCTION—DISCRETION OF COURT.

Upon the trial of the case the trial judge did not abuse his discretion in refusing to grant the interlocutory injunction.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Merry W. Potts against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Affirmed.

Walter R. Brown, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

BECK, J. Mrs. Merry W. Potts filed an equitable petition against the city of Atlanta, seeking to enjoin the city from constructing a sewer through her property on Peachtree road, which is outside the corporate limits of the city, and by amendment she asked that the city be restrained from proceeding by condemnation to appropriate her property for sewer purposes. On the interlocutory hearing the court denied the injunction prayed for by plaintiff, and she excepted.

[1] 1. It has long been recognized that the Legislature has power to authorize a municipal corporation to acquire lands beyond the municipal limits, and for that purpose to exercise the power of eminent domain, where the proposed taking of private property is strictly for public use. What is a public use, so far as respects the exercise of eminent domain by municipalities, has in different cases given rise to controversy; but a controversy over the proposition that

the taking of private property by municipalities for the construction of sewers, which have such an important bearing upon the public health, welfare, and comfort, is a public use, could hardly arise. But it is contended in the present case that the Legislature had not conferred upon the city of Atlanta the authority to appropriate private property beyond the corporate limits. Section 5 of the act approved November 29, 1902 (Acts 1902, p. 333), which act is an amendment to the charter of the city of Atlanta, contains the following provision:

"Sec. 5. Be it further enacted by the authority aforesaid, that the mayor and general council of the city of Atlanta be, and they are, hereby authorized, in their discretion, to lay and construct sewers, of whatever form, fashion and material as in their judgment may be proper, safe and sanitary, without the limits of the city of Atlanta, as well as and to as full an extent as now authorized within the limits of said city; and they are further authorized and empowered, in their discretion, to prepare, construct, and operate plants, means, methods, or whatever system in their discretion is best for the disposal of sewage matter; and said plants or systems or methods may be constructed and operated without the limits of the city of Atlanta as well as within the limits of said city, in the discretion of the mayor and general council. Power and authority is vested in the mayor and general council of said city to condemn lands, leases, and all other interest in real estate, whereby possession and title to land, and as much thereof as may be necessary, may be procured by said city for the construction of sewers, as above provided, as well as plants, means or methods for the disposal of sewage matter, all as provided, without the limits of the city of Atlanta, in whatever direction and to whatever extent it may be deemed necessary and proper within the discretion of said mayor and general council."

Provision more ample and explicit could hardly have been embodied in language for the purpose of clothing the municipality with authority to lay out and construct sewers and appropriate private property beyond the city limits by condemnation. Nor can we agree with council for plaintiff in error in his contention that the power conferred upon the municipality by the section above quoted was limited to the condemnation of lands for the construction of such sewers as might be laid out and constructed by the expenditure of the proceeds arising from the issue of bonds referred to in other sections of the act. Nothing contained in section 5 of the act, or in the entire act, confines the provisions of section 5 within limits so narrow.

[2] 2. The other questions in the case re-

quire no discussion. They are merely questions of fact, dependent upon the evidence in the case. Upon the material issues the evidence was conflicting; and, that being true, they were for determination by the court below; and, his holding upon the issues of fact having been adverse to the complainant, it will not be disturbed. He exercised his sound discretion in passing upon these issues, and there is nothing in the facts of the case to show that this discretion was abused.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 200)

DAVIS v. BLOUNT.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. DISCRETION OF COURT—OVERRULING MOTION FOR CONTINUANCE.

In view of the facts of this case, and the alleged testimony which the witness would have given, had she been present, there was no abuse of discretion in overruling the motion to continue.

2. GRANT OF NONSUIT—NO ERROR.

There was no error in granting a nonsuit.

(Additional Syllabus by Editorial Staff.)

3. WILLS (§ 326*)—PROBATE—NONSUIT.

Where, in proceedings to probate a nuncupative will, the evidence demanded a finding that, while the decedent had a testamentary inclination, there was no design that any words spoken by him should by themselves operate as a testamentary disposition of his property, but that it was his intention that the will which he desired to make should be a written will, there was no error in granting a nonsuit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 771; Dec. Dig. § 326.*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Proceedings to probate the will of John A. Blount. From a judgment of nonsuit, L. W. Davis brings error. Affirmed.

In the superior court a suit for the probate of the alleged nuncupative will of John A. Blount was tried on appeal from the court of ordinary. Blount had a brother, who was his sole heir at law, but was not on good terms with him. For more than a year prior to his death, L. W. Davis and his wife had lived in Blount's house and cared for him. Blount desired to bequeath all of his property to L. W. Davis, and was anxious that his will be so prepared as that it could not be set aside. He had inquired whether a written will would be better than a nuncupative will, and had been informed that it would. After such inquiry and information, he sent for Reuben H. Holton, a justice of the peace, on the 8th day of April, 1908, to write his will. The messenger was L. W. Davis, and he was requested, also, to get John Cochran and John O. Cochran, Sr., to

come to Blount's residence and attest the will with Holton. The first to arrive was Holton, late in the afternoon. There being no suitable paper at hand, Holton so informed Blount, and entered upon a tablet a description of the land and other memoranda, and then told Blount, as he had no suitable paper on which to write the will, he would go home and write it, and bring it back to be signed the next morning. Blount replied, "All right." Blount was suffering from a protracted illness, but expressed himself as feeling better, and as not believing he would die "from that spell," but would be "able to attend to his business." When Holton came, after telling him that he wanted him to write his will, Blount also called in Mrs. Davis and told her to sit where she could hear him and listen, as he "worded it" for Holton to write, as she was the only witness present, "but he could get in more." According to the testimony of Mrs. Davis, Blount made his will "then and there." Holton was in the act of leaving when the two Cochran's arrived, but they were informed by Holton that the will would be executed next morning, and were requested to return in order to attest it. Blount conferred with them about the will after Holton left, and told them and others that he intended to bequeath all of his property to L. W. Davis; but his announcements were not of such character as to indicate to them a present intention to make a nuncupative will. On the contrary, they showed that he had reference to a will which Holton was to write for him. About 1 o'clock during the same night, Blount died. On the 1st day of September, 1908, Holton prepared the nuncupative will and caused the same to be sworn to by more than three subscribing witnesses, which is the same as was afterwards offered for probate. Upon the conclusion of the evidence the judge granted a nonsuit.

Wade H. Watson, V. E. Padgett, and A. V. Sellers, for plaintiff in error. Parker & Highsmith, for defendant in error.

ATKINSON, J. [1] 1. The ruling announced in the first headnote does not require elaboration.

[2, 3] 2. There was no evidence in this case sufficient to authorize a finding that the alleged testator contemplated the making of a nuncupative will. On the contrary, the evidence demanded a finding that, while he had a testamentary inclination, there was no design that any word spoken by him should by themselves operate as a testamentary disposition of his property, but that it was his intention that the will that he desired to make should be a written will. Accordingly, without regard to the sufficiency of the evidence in other respects, there was no error in granting a nonsuit. Civil Code 1895, §

3349; Knox v. Richards, 110 Ga. 6, 35 S. E. 295.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 265)

ATLANTA, B. & A. R. CO. v. BROWN.
(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

In the absence of a request to charge, the instructions given by the court on the subject of allowing damages on account of permanent personal injury were not so deficient as to require the grant of a new trial.

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

3. GRANT OF NEW TRIAL.

None of the grounds of the motion for a new trial require a reversal.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by R. M. Brown against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error, and plaintiff files a cross-bill. Judgment on the main bill of exceptions affirmed; cross-bill of exceptions dismissed.

Crovatt & Whitfield, for plaintiff in error. Francis H. Harris and D. W. Krauss, for defendant in error.

LUMPKIN, J. Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 232)

GOODIN v. MILLS.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 41*)—FILING—TIME.

It appearing that the date of the certificate of the judge to the bill of exceptions is December 24, 1910, and the date of the filing of the bill of exceptions in the office of the clerk of the trial court is January 16, 1911, the writ of error must be dismissed, because the bill of exceptions was not filed in the clerk's office within 15 days from the date of the judge's certificate, as required by Civil Code, § 6167. Norris v. Baker County, 135 Ga. 229 (2), 69 S. E. 106.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65-71; Dec. Dig. § 41.*]

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Action between Candis Goodin and Dolphus Mills. From the judgment, Goodin brings error. Dismissed.

R. S. Wimberly, for plaintiff in error. R. H. Culverhouse and L. D. Moore, for defendant in error.

FISH, C. J. Writ of error dismissed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 376)

DANIEL v. SCHWARZWEISS.

(Supreme Court of Georgia. Dec. 15, 1911.)

*(Syllabus by the Court.)***CONSOLIDATION OF ACTIONS.**

Under the evidence submitted at the interlocutory hearing, there was no abuse of discretion in enjoining the process of the plaintiff in error, and the various cases in the city court of Waynesboro, and providing for their consolidation and trial in the superior court in this proceeding.

Error from Superior Court, Burke County; H. O. Hammond, Judge.

Action between Z. Daniel and S. Schwarzweiss. From the judgment, Daniel brings error. Affirmed.

E. L. Brinson and C. B. Garlick, for plaintiff in error. C. H. & R. S. Cohen and F. S. Burney, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 309)

KENNEDY v. DUKES.

(Supreme Court of Georgia. Dec. 14, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 966*)—REVIEW—DISCRETION OF TRIAL COURT—CONTINUANCE.**

The postponement of the trial of a case to a later date in the term is in the sound discretion of the judge, and his refusal to postpone will not be controlled, unless his discretion is manifestly abused. Lyles v. State, 130 Ga. 234, 60 S. E. 573.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

2. CONTINUANCE (§ 20*)—GROUNDS—ABSENCE OF COUNSEL—DISCRETION OF COURT.

The postponement of the trial of a case on account of the absence of counsel therein, who is, without leave, engaged in the trial of a case in a court of a different circuit, is in the discretion of the court, and a postponement for such cause is not favored. Cotton States Life Co. v. Edwards, 74 Ga. 220.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 51-57; Dec. Dig. § 20.*]

3. NEW TRIAL (§ 132*)—PROCEEDINGS TO PROCURE—DISMISSAL OF MOTION.

According to the cases cited by counsel for defendant in error, it was the duty of counsel for movant in the motion for a new trial to prepare a brief of the evidence and present it for approval upon the hearing of the motion, where the official stenographer who reported the case failed to have the brief ready; but in the present case it appears from the note of the judge that the official stenographer had the brief of evidence ready to deliver to counsel for the movant long before the motion came on for a hearing, and that he delivered it as soon as it was called for by counsel. The motion came on for a hearing in its regular order upon the call of the motion docket, and no brief of evidence having been filed, and no satisfactory reason appearing why it had not been done, counsel for movant not being present

and having no leave of absence, the court did not err in dismissing the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action between S. C. Kennedy and L. B. Dukes. From the judgment, Kennedy brings error. Affirmed.

Hines & Jordan, for plaintiff in error. D. M. Clark and Wilson, Bennett & Lambdin, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 250)

BYNUM v. KNIGHTON.

(Supreme Court of Georgia. Dec. 15, 1911.)

*(Syllabus by the Court.)***1. COMPROMISE AND SETTLEMENT (§ 22*)—PLEADING—SUFFICIENCY.**

A plea averring generally that at a stated time the plaintiff and defendant had a full and complete settlement of all matters, claims, and accounts pending between them in regard to the subject-matter of the suit is open to special demurrer calling for a more specific statement of the terms of the settlement.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 90; Dec. Dig. § 22.*]

2. SHERIFFS AND CONSTABLES (§ 32*)—COMPENSATION—DEPUTY SHERIFFS.

The only fees specifically provided by law for a deputy sheriff are those for his attendance upon courts and elections in counties having a population of 24,000 or more. In other cases fees for services rendered by him are those provided for his principal. These fees, when earned, belong to his principal. A sheriff may contract with his deputy for the discharge of the duties of his trust, either for a specific compensation, or for a reasonable portion of the fees and emoluments of the office.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 52; Dec. Dig. § 32.*]

3. SHERIFFS AND CONSTABLES (§ 74*)—COMPENSATION—DEPUTY SHERIFFS.

A certified copy of the minutes of the superior court, showing the amounts received by the sheriff from the fine and forfeiture fund, is admissible in evidence in an action by a deputy against the sheriff to recover a portion of the fees of the office under an alleged contract with the sheriff that the deputy's compensation should be a certain percentage of the profits of the office.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 74.*]

4. SHERIFFS AND CONSTABLES (§ 74*)—COMPENSATION—DEPUTY SHERIFFS.

Where the plaintiff alleges that his contract with the defendant was that he was to receive one-half of the entire income from the office of the defendant, and the defendant denied the contract, it was competent for the defendant to adduce evidence to show that by its terms the plaintiff was to have only one-half of the net proceeds of the office.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 74.*]

5. PRISONS (§ 8*)—JAILER—COMPENSATION.

The jailer's residence in connection with the jail is provided by the county to enable the jailer to better discharge the duties of his office; and, though the sheriff is *ex officio* jailer, the use of the jailer's residence is in no sense a part of the income of the office.

[Ed. Note.—For other cases, see Prisons, Dec. Dig. § 8.*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by O. E. Knighton against W. C. Bynum. Judgment for plaintiff, and defendant brings error. Reversed.

R. Terry and M. C. Edwards, for plaintiff in error. Geo. H. Perry, for defendant in error.

EVANS, P. J. In his petition the plaintiff alleged that on January 1, 1903, the defendant, having been duly elected sheriff of Randolph county, qualified as such; that on that day the defendant entered into a contract with the plaintiff, wherein the defendant agreed to appoint the plaintiff deputy sheriff of the county for a period of time indefinite, but terminable by mutual consent of the contracting parties, during the term of office of the defendant, and that the plaintiff for services rendered as such deputy sheriff should receive one-half the entire income or revenue received by the defendant as sheriff of the county during the pendency of the contract; that pursuant to this contract the plaintiff qualified as deputy sheriff on January 2, 1903, and continued to serve as such officer under the contract until January, 1908, when by mutual consent the contract was revoked; that during the existence of the contract the sheriff has received from the fine and forfeiture fund of the county certain stated amounts, and has also received certain other revenue and income specifically described, one-half of which under the contract was to be paid to the plaintiff; and judgment is prayed for these amounts, less certain stated credits. The defendant specifically denied the various allegations of the petition, and further pleaded that at certain stated times the plaintiff and the defendant had a full and complete settlement of all matters, claims, and accounts pending between them touching the business of the office of sheriff. The court sustained a special demurrer to the plea of settlement. The trial resulted in a verdict for the plaintiff, which the court refused to disturb on motion. The defendant excepts.

[1] 1. A plea of settlement is in the nature of a plea of accord and satisfaction, and an allegation that the plaintiff accepted and received matter in full satisfaction is a material one. Either the full terms of the settlement should be alleged, or it should be averred that some property, money, or other matter was accepted as a release, discharge, satisfaction, or extinguishment of the

liability sought to be enforced by the action. The allegation of the plea was general that there had been a settlement. The plaintiff was entitled to a more specific statement, and the court properly sustained his special demurrer asking to be more fully informed as to the nature of the settlement.

[2] 2. Over the objection of the defendant the court allowed the plaintiff to testify that the contract between him and the defendant, when he was appointed deputy sheriff, was that the plaintiff was to receive one-half of the proceeds of the sheriff's office from all sources. The objection was that the fees of the deputy sheriff were fixed by law, and not by contract. The only fees specifically provided by law for a deputy sheriff are those fixed for his attendance upon courts and elections in counties having a population of 24,000 or more. Civil Code 1910, §§ 5998, 5999. In other cases the fees for services rendered by him are those provided for his principal. These fees, when earned, belong to his principal. A sheriff may lawfully contract with his deputy that his compensation shall be a part of the income of the office. The sheriff's emoluments are from fees for specific services. An agreement to pay a deputy out of the fees and profits of the office is not opposed to the common-law inhibition of farming out or sale of offices. Our statute (Penal Code 1910, § 285) declaring it to be illegal for any officer to sell or farm out his office is substantially a re-enactment of the old English statute of 5 & 6 Edward VI, c. 16. Under this statute the English courts held that when a principal, on appointing a deputy, takes an agreement for the payment to the principal of a gross sum, which is not to come out of the profits of the office, the contract is void; but where he reserves a part of the fees of the office, which is to come out of the profits, the contract is good, because the whole belongs to him, and he is only reserving a part of his own and giving away the balance to his deputy. *Grant v. McLester*, 8 Ga. 553; *Mott v. Robins*, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Addington v. Sexton*, 17 Wis. 327, 84 Am. Dec. 745; *Godolphin v. Tudor*, 2 Salk. 468.

[3] 3. There was no error in receiving a certified copy of the minutes of Randolph superior court, showing the amount of fees received by the sheriff from the fine and forfeiture fund, on the ground that the original order was the best evidence.

[4] 4. The defendant offered to show that under the contract the plaintiff was to pay one-half of the expenses, and was to receive one-half of the net proceeds of the office of sheriff, as compensation for his services. The court excluded this testimony, on the ground that the defendant had no pleadings to warrant its admission. We think the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court erred in excluding the testimony. The plaintiff alleged that by the terms of the contract he was to have one-half of the entire income of the office; and as the defendant denied that contract in his plea, it was permissible to show that the contract was not as alleged, but that the plaintiff's compensation according to the contract was to be one-half of the net profits of the office. If the contract was to share the net profits of the office, then it was a part of the plaintiff's case to show what were the net profits, and this could only be done by deducting the expenses from the gross income. It would not be necessary for the defendant to plead that the compensation was payable only from net income, before offering testimony to this effect.

[5] 5. The defendant also offered to show that one of the perquisites of the office was the use of a residence, connected with the jail, provided by the county for the jailer, and that the plaintiff as deputy sheriff occupied such residence, and should account for its reasonable value as a residence in arriving at a proper settlement of their contract. The sheriff is, by virtue of his office, the jailer of the county; and it is competent for him to appoint the deputy sheriff to act as jailer. The residence provided by the county for the occupation of the jailer is no more to be regarded as a part of the sheriff's compensation than the use of the sheriff's office in the courthouse. These accommodations are furnished by the county to enable the sheriff to more efficiently discharge the duties of his office, and are not official perquisites. The evidence was properly rejected.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 454)

CITY OF ATLANTA v. JENKINS.
(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 165*)—NONSUIT—MOTION TO REINSTATE.

A motion to reinstate a case will lie, as one remedy, where a nonsuit has been awarded for want of sufficient evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 165.*]

2. TRIAL (§ 165*)—NONSUIT—MOTION TO REINSTATE—BRIEF OF EVIDENCE.

A brief of the evidence must be filed by the movant with the motion to reinstate a case in which a nonsuit has been awarded and the case dismissed for want of sufficient evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 165.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Patience Jenkins against the City of Atlanta. From an order reinstating an action after nonsuit granted, defendant brings error. Reversed.

J. L. Mayson and W. D. Ellis, Jr., for plaintiff in error. Moore & Branch, for defendant in error.

HILL, J. This case came on to be heard in the superior court of Fulton county, on a motion to reinstate the case of Patience Jenkins v. City of Atlanta, wherein a nonsuit had been granted by the presiding judge of said court. When the motion to reinstate was called for trial in the court below, the city of Atlanta, the plaintiff in error here, moved to dismiss the motion on two grounds: (1) That the motion to reinstate did not lie, where a nonsuit had been granted for lack of sufficient evidence. (2) That said motion could not be considered by said court, because no brief of evidence had been prepared, upon which the court could pass, as to whether or not this judgment was right or wrong. The motion to dismiss the motion to reinstate the case was overruled by the court, and an order granted reinstating the case, to which judgment the city of Atlanta excepted.

The motion to reinstate was as follows: "The above-stated case came on for trial on the 8th day of December, 1910, at the regular November term, 1910, of Fulton superior court, before the Honorable W. D. Ellis, judge of said court presiding, and after the evidence for the plaintiff had all been introduced the court granted a nonsuit in the case. Plaintiff insists that the granting of said nonsuit was error, and she comes now, at the term of said court at which said nonsuit was granted, and moves the court to set aside and vacate the nonsuit, and to reinstate the case on the trial calendar."

[1] 1. The first assignment of error is not well taken. In the case of Aiken v. Peck, 72 Ga. 434, this court held: "Where a nonsuit has been granted, the losing party may either bring his case to the Supreme Court by writ of error, or may, during the term of the trial, move to reinstate the case, and from a refusal of that motion, properly made, may bring the case to this court." See, also, Van Dyke v. Van Dyke, 120 Ga. 984, 48 S. E. 380; Buchanan v. James, 134 Ga. 475, 476, 68 S. E. 72.

[2] 2. The second assignment of error raises a question not so easily determined, as it has never been directly passed upon by this court, so far as we have been able to find, and must, therefore, be determined upon principle. There seems to be no statute on the subject, and heretofore the question has been one for the construction of the court. The question is whether a motion made to reinstate a case, where a nonsuit has been granted by the court upon the ground of insufficiency of evidence, should be accompanied by a brief of the evidence, upon which it can be determined whether the judgment of the court allowing or refus-

ing the motion to reinstate was right or wrong. In the case of *Wallace v. Cason*, 42 Ga. 435, the court held, on a motion to reinstate a case, where the judge had granted a nonsuit upon the ground that he "was not satisfied with the argument of the legal question upon which the nonsuit was awarded," that a brief of the evidence was not necessary. In that case the nonsuit was granted solely on a legal question, and not for failure by the plaintiff to prove his case as laid. The motion to reinstate that case was heard upon the ground that the court erred in granting the nonsuit, because the plaintiff did not show that he had given notice of the killing of his horse, as required by the act of 1854. A brief of the evidence, therefore, was not necessary, and any declaration to that effect was obiter.

The right of the trial court to grant a nonsuit on motion of the defendant for failure of proof was not recognized under strict common-law practice, because the plaintiff was deemed to have the right of trial by jury on issues of fact. 6 Enc. Pl. & Pr. 933. And this rule seems to obtain in many of the states and in the federal courts. *Id.* But a nonsuit in this state may be granted where, at the close of the plaintiff's case, it appears that the plaintiff has failed to make out a *prima facie* case, or that, admitting the facts proved and all reasonable deductions therefrom, he ought not to recover. Civil Code 1910, § 5942. Should the movant, seeking to reinstate a case in which a nonsuit has been awarded by the court for insufficiency of evidence, accompany his motion with a brief of the evidence? In the case of *City of Atlanta v. Miller*, 125 Ga. 495 (2), 54 S. E. 538, Justice Lumpkin said: "Where a motion to reinstate a case is made, after a judgment of nonsuit based on the general insufficiency of the evidence to make out a case, the proper practice is to present a brief of the evidence along with the motion. But if the presiding judge based his judgment upon a single question of law, and enough of the evidence was set out for a clear understanding of such ruling, there was no error in entertaining the motion because it was not accompanied by a complete brief of the evidence. Certainly this will furnish no ground for a reversal, if the point was not made before the trial court."

It is true this question was not distinctly made in the case last cited, but is made here; and it seems to us that, on sound reason, a brief of the evidence should accompany the motion to reinstate. If a nonsuit has been granted by the court for insufficiency of the evidence, and the plaintiff excepts and brings the case to this court by a direct writ of error, without moving to reinstate, he is required to bring up enough evidence to give the court a clear understanding of the case. Civil Code 1910, § 6140, par. 1. And by parity of reasoning it appears as equally necessary that, when a motion to reinstate is

made in the court below by the plaintiff, she should file a brief of the evidence offered on the trial, where the judgment of nonsuit was based on the insufficiency of the proof offered by the plaintiff. The motion to reinstate is an appeal to the discretion of the judge. How could that discretion be properly exercised upon the mere recollection of the trial judge as to the evidence offered on the trial of the case? And if the case is brought to this court, how can it rightly be determined whether the judge in the court below has properly exercised his discretion, unless he was presented with a brief of the evidence? Suppose one judge grants the nonsuit, but another judge hears the motion to reinstate, as was the case in 42 Ga. 435, *supra*, how can the second judge know whether the nonsuit was properly granted or not, unless he has a brief of the evidence upon which the nonsuit was awarded? In the case of *Wallace v. Cason*, *supra*, the nonsuit was awarded on a question of law, and not for want of sufficient testimony; and hence a brief of the evidence was not necessary to a correct determination of the question in that case.

If, however, as in this case, the court grants the motion to reinstate, and the other side excepts, can the burden of making the brief of evidence be shifted from the movant to the plaintiff in error? Can the movant appeal to the recollection of the court as to the evidence, instead of a brief of the evidence, to elucidate the question passed upon by the court? We think not. We hold that the motion should be accompanied by a brief of the evidence, as in a motion for a new trial, that the trial court first, and then this court, if appealed to, should have a brief of the evidence by which to determine whether the motion has been properly granted or denied. No brief of the evidence was offered by the movant in the court below, on which the trial judge could exercise his discretion as to whether the motion to reinstate should be granted. The trial judge in the bill of exceptions says: "It is necessary that the evidence be sent up. The statement of it is a conclusion. The evidence was reported by the official stenographer, and he is directed to write it out and file it, and the clerk is directed to send it up as a part of the record." The court appended a note to the evidence sent up by the clerk pursuant to this order as follows: "The city of Atlanta declined to attach a brief of the evidence. The plaintiff claimed not to be able to have it written out. I ordered it to be done, and I approve the foregoing 18 pages as true and correct. They contain the evidence on which the court acted; and to properly determine the case the court decided, and to do justice between the parties, the entire evidence ought to be considered. If I had the power, I would abstract the evidence—make a brief of it; but as no agreement has been made, and as this

is the act of the court, I ask that the evidence be considered in its present form."

When the judge signs the bill of exceptions to a final judgment, he exhausts his power in the case. He cannot direct a brief of evidence sent up to this court, where no brief has been filed by the movant, or the plaintiff in error, as the case may be, and where no brief of evidence has been agreed upon by the movant and plaintiff in error before the brief is ordered sent to this court by the trial judge. There being no brief of evidence before the trial court, therefore, when the motion to reinstate was heard and determined, on which he could exercise his discretion in determining such motion, we think the court erred in not sustaining the motion to dismiss the motion to reinstate the case on the ground that movant had filed therewith no brief of the evidence, and the judgment of the court below is reversed. All the Justices concur.

(10 Ga. App. 302)

MATTHEWS v. STATE. (No. 3,425.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence is insufficient to rebut the presumption that the barn was accidentally burned. Further, in the absence of any evidence showing that the prosecutor's statements in regard to the defendant's lack of financial credit had been communicated to him, no motive on the defendant's part to burn the barn is disclosed.

Error from Superior Court, Monroe County; R. T. Daniel, Judge.

Bob Matthews was convicted of arson, and brings error. Reversed.

Willingham & Willingham, for plaintiff in error. J. W. Wise, Sol. Gen., and Persons & Persons, for the State.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 402)

PEACOCK v. STATE. (No. 3,851.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 236*)—EXAMINATION—QUESTIONS—"CHARACTER."

A person's character is not to be proved by asking a witness what kind of a man that person is. The word "character," as used in legal parlance, is equivalent in meaning to the word "reputation," as used in more precise diction.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 236.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1061-1063.]

2. CRIMINAL LAW (§§ 419, 420*)—SELF-SERVING DECLARATIONS—HEARSAY.

Self-serving declarations of a person that he was sick are usually to be rejected as hearsay, where the witness offering to detail the declarations has no other knowledge on the

subject than what he derived from the declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

3. PROOF OF VENUE.

There was enough direct and inferential testimony as to the venue to support the conviction, as to that phase of the case.

4. MASTER AND SERVANT (§ 67*)—CRIMINAL LAW (§ 447*)—LABOR CONTRACT—VIOLATION—PAROL EVIDENCE.

A contract to perform labor at a definite rate during the "turpentine season" is not on its face such an indefinite contract as will not support a prosecution for a violation of Penal Code 1910, § 715; and parol evidence is admissible to establish the common or customary meaning of the words.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67;* Criminal Law, Cent. Dig. §§ 1029-1031; Dec. Dig. § 447.*]

5. INSTRUCTIONS.

When construed in connection with the context, the excerpt from the charge excepted to is not subject to the objection made to it.

6. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The accused was very plainly guilty, and the alleged newly discovered evidence would not likely change the result, if a new trial were granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. § 945.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Manning Peacock was convicted of crime, and brings error. Affirmed.

T. N. Brown, for plaintiff in error. A. S. Bradley, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 261)

WESTON v. BEVERLY & McCOLLUM.
(No. 3,304.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. GARNISHMENT (§ 1*)—NATURE OF PROCEEDINGS—STATUTORY PROVISIONS.

Garnishment proceedings are purely statutory, and cannot be extended to cases not enumerated in the statute, and courts have no right to enlarge the remedy, or hold under it property not made subject to the process.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. WORDS AND PHRASES—"SUIT."

"Suit" is the following of a person, and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

3. GARNISHMENT (§§ 4, 7*)—NATURE OF PROCEEDINGS—SUIT OR JUDGMENT.

A suit or judgment on which valid garnishment proceedings are based must be a suit or judgment in personam, and not in rem.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. §§ 4, 7.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. GARNISHMENT (§ 4*)—RIGHT TO GARNISHMENT—FORECLOSURE OF LABORER'S LIEN.

The foreclosure of a laborer's lien, in which there is no levy and no issue made by counter affidavit, is in no sense a suit in personam, but is a summary proceeding in rem.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 3; Dec. Dig. § 4.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Petition by Frank Weston for certiorari to review a judgment of the justice awarding a fund deposited by a garnishee to Beverly & McCollum. To a judgment dismissing the certiorari, Weston brings error. Affirmed.

J. Q. Smith and L. H. Foster, for plaintiff in error. M. L. Ledford, for defendants in error.

HILL, C. J. Frank Weston foreclosed a laborer's lien against Lewis Weston and seized under levy certain lumber as the property of defendant. A claim to this lumber was filed by the Dyson Manufacturing Company, whereupon Weston dismissed his levy and sued out process of garnishment, and had summons served upon the Dyson Manufacturing Company. Subsequently Beverly & McCollum obtained a judgment against Lewis Weston in a suit on account, pending when the foreclosure proceedings were instituted, and on this judgment obtained process of garnishment and caused summons to be served on the Dyson Manufacturing Company. The garnishee admitted indebtedness, and paid the money into court for distribution, and the justice awarded it to Beverly & McCollum on their judgment, as against the laborer's lien foreclosure proceedings. Frank Weston petitioned for the writ of certiorari, and on the hearing the certiorari was dismissed by the judge of the superior court, and Weston excepted.

Only one question is raised for decision. Can garnishment proceedings issue on the foreclosure of a laborer's lien? If so, the plaintiff in error was entitled to the money paid into court by the garnishee. If not, the judgment of the justice awarding it to the common-law judgment was correct. Summons of garnishment under the statutes of this state can only issue in three classes of cases: (1) Where there is a suit pending; (2) where a judgment has been rendered by a court having jurisdiction (Civil Code 1910, §§ 5094, 5265); and (3) where a tax collector has issued execution, has it in his hands, and, being unable to find any property of the defendant, makes an entry of nulla bona thereon. Civil Code 1910, § 1154. Process of garnishment issued in any other case or upon any other ground is without authority of law. *Davis v. Millen*, 111 Ga. 452, 36 S. E. 808.

[1] Garnishment proceedings are purely statutory, and cannot be extended to cases

not enumerated in the statute, and courts cannot enlarge the remedy, and to entitle one to the benefit of the statute, he must show that his case is clearly provided for. The remedy cannot be extended to doubtful cases. *Rood, Garnishment*, § 13; *Davis v. Millen*, supra. The second and third cases where garnishment proceedings are provided for by the statutes above quoted are not applicable here.

[2, 4] Is the foreclosure of a laborer's lien a pending suit upon which garnishment process is predicable? We think not. It is in a very loose sense that a proceeding in rem can be called a suit. "Suit is the following of a person, and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem." *The Little Ann*, 15 Fed. Cas. 622. The foreclosure of a lien is strictly a proceeding in rem. It pursues the property, and not the person. It does not become in any sense a suit until a counter affidavit is made. Civil Code 1910, § 3366, par. 6; *Sams v. Covington Buggy Co.* (Ga. App., decided Dec. 19, 1911, 73 S. E. 18).

[3] To authorize a valid garnishment, the judgment or decree upon which it issues must be final, and must be in personam, and not in rem. 20 Cyc. 980, and citations. We conclude that the judgment of the justice in awarding the fund paid into court by the garnishee to the judgment in personam was right, and there was no error.

Judgment affirmed.

(10 Ga. App. 270)

HANSFORD v. NATIONAL BANK OF TIFTON et al. (No. 3,338.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 232*)—"NATIONAL BANK"—POWERS.

A "national bank" is a corporation, the powers of which are defined and limited by the acts of Congress authorizing the creation of these institutions.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 232.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4661, 4662.]

2. COURTS (§ 97*)—RULES OF DECISION—FORMER DECISIONS AS CONTROLLING.

The decisions of the United States Supreme Court are ultimate and paramount authority as to the powers and liabilities of national banks.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

3. BANKS AND BANKING (§ 261*)—NATIONAL BANKS—ULTRA VIRES ACTS—RATIFICATION.

A national bank cannot authorize or ratify an act absolutely ultra vires, committed by its agents or officers.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 991-1000; Dec. Dig. § 261.*]

4. BANKS AND BANKING (§ 262*)—NATIONAL BANK—OFFICERS.

Neither the directors nor other officers or agents of a national bank have authority to institute prosecutions for violations of the public criminal laws of the state, nor to cause requisition papers to be issued for alleged criminals. Such acts are entirely beyond the scope of the powers of a national bank, and liability does not attach against the bank for any attempt on the part of its directors, officers, or agents exercising any such powers on its behalf.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 262.*]

Error from City Court of Tifton; R. Ewe, Judge.

Action by J. D. Hansford against the National Bank of Tifton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

C. C. Hall and Claude Payton, for plaintiff in error. Fulwood & Murray and Hendricks & Christian, for defendants in error.

POWELL, J. Hansford sued the National Bank of Tifton for damages, alleging that the defendant procured one Bailey to swear out a warrant charging the plaintiff with the offense of carrying concealed weapons, to cause requisition papers to be issued thereon, whereupon the plaintiff was arrested and imprisoned in the state of Florida. It is alleged that the bank's officers knowingly and maliciously had this process issued, without probable cause, and for the purpose of extorting from him a sum of money. It is useless to enter upon any discussion of the question as to whether corporations may commit torts. It is well settled that they may. Hence, no doubt, there are some corporations that may commit the torts of false imprisonment and malicious prosecution. This general question is not here involved. The specific question is as to the powers of a national bank and as to its capacity to commit the particular tort alleged in the petition.

[1] National banks are corporations of limited capacity. They have no powers, except such as are given them expressly or by necessary implication by the acts of Congress passed in relation to that subject. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67; 11 Sup. Ct. 496, 35 L. Ed. 107.

[2] 2. Whenever the power or liability of a national bank is called into question, necessarily a federal question is involved, and consequently the United States Supreme Court is the ultimate and paramount authority on the subject; and all authorities of state courts to the contrary must yield. *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. These institutions are so far governmental agencies of the United States as that neither state statutes nor decisions can impose any

liability inconsistent with the liability intended by the federal statutes as construed by the Supreme Court of the United States. An examination of the decisions of the federal courts on this subject discloses that the federal government is vigilant and jealous to protect the assets of these banks from diversion from those purposes for which these institutions are organized. The safety of these national banks and the keeping of their resources unimpaired from diversion by the acts or omissions even of their own officers and agents is a matter of federal concern.

[3] 3. If an agent or an officer of a national bank, with or without the consent of its board of directors, commits an act which entirely transcends the scope of its powers and objects of existence, the individuals participating in the act are solely responsible for its consequences, and the national bank is not. The board of directors and other officers are likewise impotent to ratify any act *ultra vires* in its nature, or to make the bank take any benefit therefrom. *California Nat. Bank v. Kennedy*, *supra*.

[4] 4. The act of which liability is predicated in the present case was that certain officers or agents of this national bank procured one Bailey to swear out a warrant charging Hansford with carrying concealed weapons, upon which the solicitor of the city court made application to the Governor of this state for a requisition, which was duly honored by the Governor of Florida, who issued a warrant upon which the plaintiff was arrested; it being alleged that the object of all this was illegally to extort a sum of money from the plaintiff. If the allegations be true, this was a great wrong, a wrong for which these officers and agents and all others participating in the illegal project are jointly liable as tort-feasors. But it is an affair so utterly foreign to every purpose for which a national bank is organized as to make it absolutely beyond the powers of the officers or agents of such a bank to impose a liability upon the bank for these acts. Under the ruling in the *California Bank Case*, *supra*, which is consistent with a line of authorities similar in their nature, a national bank could do no such act and could not ratify the act of others, even if receiving money which came as a result of it. No matter how far state courts may extend the liability of corporations organized under state laws, or subject solely to state jurisdiction, a determination of powers and liabilities of national banks is not to be extended by any state court, so as to make it responsible for any such transaction as the one at bar. We say this because we recognize that there are a number of state precedents by which ordinary corporations might be held liable in such a

case. The court did not err in dismissing the action against the bank on general demurrer.

Judgment affirmed.

(10 Ga. App. 272)

ROBERTS v. NATIONAL BANK OF TIFTON (two cases). (Nos. 3,336, 3,337.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

FORMER DECISION CONTROLLING.

These cases are controlled by the decision this day rendered in *Hansford v. National Bank of Tifton*, 73 S. E. 405.

Error from City Court of Tifton; R. Eve, Judge.

Actions by W. B. Roberts against the National Bank of Tifton. Judgment for defendant, and plaintiff brings error. Affirmed.

C. C. Hall and Claude Payton, for plaintiff in error. Fulwood & Murray and Hendricks & Christian, for defendant in error.

POWELL, J. While in particular facts these cases differ somewhat from the case of *Hansford v. National Bank of Tifton*, 73 S. E. 405, in general principle they are covered by it. In this case the prosecution was for cheating and swindling; whereas in the *Hansford* Case it was for carrying concealed weapons. Both of these offenses are simply violations of the penal laws of this state, with the enforcement of which national banks have no concern whatever.

Judgment affirmed.

(10 Ga. App. 206)

JAMES v. PEPPER, Constable. (No. 3,334.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 182*)—SECONDARY EVIDENCE—COMPETENCY OF ORIGINAL.

To render admissible secondary evidence of a mortgage purporting to have been made in another state, it must be shown that the lost original mortgage was executed in conformity with the law of that state. Proof that the signing of a paper in the state of Florida was attested by two witnesses, neither of whom signed officially, is insufficient to prove its legal execution as a mortgage, since the law of Florida requires a mortgage to be attested by an officer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 601-604; Dec. Dig. § 182.*]

2. EXECUTION (§ 150*)—CONTRACTS (§ 127*)—BAILEE—AGREEMENTS AS TO PROPERTY LEVIED ON—PUBLIC POLICY.

A levying officer may, at his own risk, deposit with a bailee, for safe-keeping, personal property which he has subjected to levy; and in thus depositing it he does not relinquish possession, but merely selects an agent to retain possession in his behalf. The possession of this agent is still the possession of the levying officer, and a conversion of the property by the bailee, though it consists of nothing more than his failure to deliver on demand, entitles

the officer to proceed by trover. *Pepper v. James*, 7 Ga. App. 518, 67 S. E. 218. Any agreement of a levying officer, affecting the disposition of property which has been subjected to a levy, is contrary to public policy, and void, if it tends to defeat, or in any wise affects, the legitimate result of the legal proceeding of which the levy forms a part.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 402-405; Dec. Dig. § 150;* Contracts, Dec. Dig. § 127.*]

Error from City Court of Blakely; D. F. Crosland, Judge.

Action by W. F. Pepper, Constable, against D. W. James. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Pottle and C. L. Glessner, for plaintiff in error. W. A. Thompson, Jno. R. L. Smith, and H. M. Calhoun, for defendant in error.

RUSSELL, J. [1] This is the second time that this case has been before this court. See 7 Ga. App. 518, 67 S. E. 218. None of the points presented at the former hearing are involved in the present writ of error, except the relevancy or admissibility of evidence relating to a mortgage under which the plaintiff claimed a lien. When the case was here before, we held that the evidence with relation to the mortgage was inadmissible, in the absence of proof of the proper execution of the mortgage. In the trial now under review the judge excluded the testimony with reference to the mortgage; and exception is taken to that ruling. The motion to exclude this testimony was as follows: "We move to rule out the evidence in reference to the mortgage of the bank of Blakely, and the mortgage itself, on the ground that it is illegal and irrelevant." Inasmuch as it was not shown that the mortgage, which appears to have been made in the state of Florida, was executed in compliance with the laws of Florida, the court could properly have sustained the motion upon the authority of our former decision upon that point. This, for the reason, as then held, upon the authority of *Calhoun v. Calhoun*, 81 Ga. 91, 6 S. E. 913, "that, though a paper may have been written and signed by the grantor, it may yet never have been executed according to law."

The copy of the mortgage which appears in the bill of exception is attested by two witnesses, but neither of them purports to be such an officer as is authorized by the law of Florida to attest a mortgage; nor does the witness Waxelbaum, who saw the mortgage signed, testify that he knew either of these witnesses to be such an officer. Perkins, who he says was carried to the place where it was signed for the purpose of witnessing its execution, he had just then met for the first time, and the other witness, Mr. Brown, is shown by uncontradicted testimony to have been at the time the attorney

for the mortgagee. Construing the evidence with relation to the execution of the mortgage most favorably to the defendant, the most that was shown was that one who was qualified by law to complete the execution of the mortgage as an attesting officer failed to perform that duty, and only signed his name individually.

[2] The objection to the testimony was also based upon the ground that the testimony in relation to the mortgage, and the evidence of the mortgage itself, were both irrelevant to the issue, and thus, for the first time in the case, is raised the question as to whether it is within the power of an officer, after he has levied a process of the court, to make any binding agreement with reference to the disposition of the property levied upon which would be at variance with his duty. There is some slight difference between the testimony in behalf of the plaintiff and that of the defendant as to the exact terms of the bailment under which the constable turned the property upon which he had levied into the possession of the latter. It is conceded, however, by all parties, that Pepper, as a constable, after having levied an attachment upon the property, consented for James to receive it upon deposit, and that James knew the facts. Unless an officer can make, at his discretion, a disposition of property which he has seized under the mandate of a court, different from or contrary to its usual legal course, it would be contrary to public policy to permit him to defeat the due process of the law by any agreement of his as to the possession of the property by another, no matter of what nature that agreement might be. In other words, unless Pepper, as a constable, was authorized to fix the legal rights and liabilities of Harris, the plaintiff in the attachment which he had levied, by an agreement with James that the latter should hold the property levied upon until the termination of some other litigation, and that Harris would abide its result, it would be utterly irrelevant what agreement he made in that regard, and therefore entirely immaterial, as a matter of law, whether there was conflict between the parties as to the terms of this agreement, which, if contrary to public policy, would necessarily be a nullity. We have no doubt that it was in this view of the case that the trial judge held that all the evidence in relation to the mortgage was irrelevant; and, doubtless holding also, for the same reason, that the testimony as to the terms of the agreement (the agreement being contrary to public policy) was insufficient to present any issue in the pending action of trover, he directed the verdict in favor of the plaintiff.

As we have already stated, this point was not presented when the case was here before, or it would have resulted in a termination of the litigation, for we are satisfied that the decision of the trial court in the case at bar was correct. It would not seem

to require a citation of authorities to demonstrate that a levying officer, as such, has no power, by his agreement, to increase or diminish the rights of a litigant in whose behalf the processes of a court have been invoked and are being executed.

When this case was here before, in ruling upon the exception presented by the cross-bill, in which it was insisted that the levy was void for indefiniteness, we held (7 Ga. App. 521, 67 S. E. 220) that, "even if the entry of levy was void, the constable would be liable, and it would not lie in the mouth of his bailee * * * to dispute the title of his bailor, or to assert that by reason of the invalidity of the act by which the bailor came into the possession of the bailment he is released from liability to return the property deposited with him for safe-keeping. The bailee cannot justify his refusal on the ground that the bailment is illegal. Although the bailor may have had no legal authority to make it, and even though it were made for the purpose of fraudulently secreting the goods from the bailor's creditors, yet the bailee is bound to restore at the demand of his bailor, and will not be permitted to set up the illegality of the bailment as an excuse for his own default. So far does this principle obtain that although the title to the goods be in the bailee, and even though he may have received them in ignorance of his own right, having accepted the possession of them in the capacity of bailee, he is estopped from claiming them by title until he has fulfilled the obligations of the trust by returning them to his bailor."

But if authority directly upon the point is needed to establish the statement that it is contrary to public policy for a levying officer to make a bailment which by possibility could defeat the legal result of the processes he is charged to execute, the principle is established in the decisions of many of our courts of last resort that while a levy is of full force and virtue a levying officer cannot make any contract divesting himself of dominion over the property, except under such replevy or forthcoming bond as is prescribed by law. In *Burrall v. Acker*, 23 Wend. (N. Y.) 606, 35 Am. Dec. 532, the court say that, while it is perfectly legitimate for a levying officer to store property with a recepter or custodian, "any agreement with such person that the property shall be absolutely his upon paying the amount of the execution would be illegal and contrary to the rights of the defendant in execution; and an agreement which would place the property absolutely beyond the reach of the sheriff before a sale thereof at public auction would be equally illegal and contrary to the duty of the sheriff in reference to the plaintiff's rights." "No public officer can bargain away his power to discharge his official duty." *Cole v. Parker*, 7 Iowa, 167, 71 Am. Dec. 439; *Harrington v. Crawford*, 136 Mo. 467, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653; *Hodsdon v.*

Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 847. "A receptor or custodian in such case is but the servant or agent of the levying officer. He has no property in the chattels. He cannot maintain trover for them in his own name. He cannot set up a title to the property in a third person. He can only defend a trover suit against him on behalf of the officer on the ground that the property has been taken from him by act of law or, possibly, by force. Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 113; Denny v. Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 391; Pettes v. Marsh, 15 Vt. 454, 10 Am. Dec. 689."

Judgment affirmed.

(10 Ga. App. 261)

WILLIAMS-THOMPSON CO. v. WILLIAMS
et al. (No. 3,269.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. RELEASE (§ 12*)—LIABILITY ON NOTE—CONSIDERATION.

For the payee of a promissory note to release one of the makers, there must be a contract to that effect founded on consideration, except, of course, in certain cases, where release flows by operation of law from conduct of the payee.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 18-20; Dec. Dig. § 12.*]

2. RELEASE (§ 12*)—CONSIDERATION.

Where the payee of a joint promissory note executes and delivers to one of the makers a writing purporting to release him from all liability thereon, the writing is ineffectual for that purpose, if it is voluntarily given without legal benefit to the maker of the release or detriment to the person in whose favor it is made.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 18-20; Dec. Dig. § 12.*]

3. PRINCIPAL AND SURETY (§ 116*)—RELEASE OF SURETY—EFFECT ON COSURETIES.

"The release or compounding with one surety discharges a cosurety;" but an attempt to release one of the sureties does not have this effect, where the attempted release is unenforceable for lack of consideration.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 269-282; Dec. Dig. § 116.*]

4. COMPROMISE AND SETTLEMENT (§ 2*)—NATURE—"COMPOUND."

"To compound" is to compromise or make a composition whereby a creditor discharges his debtor on payment of a smaller sum than that actually owing. There was no compounding with the surety in the present case.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 1-4; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, p. 1372.]

5. BILLS AND NOTES (§ 437*)—PAYMENT BY ONE JOINT MAKER—DISCHARGE OF JOINT MAKERS.

Even if the rule were that the payee of a joint note would discharge all the joint makers thereof, by giving to one of them the money wherewith to pay off his ratable part of the

debt, no such effect ensues where the money is given by a third person.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 437.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by the Williams-Thompson Company against W. L. Williams and others. Judgment for defendants, and plaintiff brings error. Reversed.

Anderson, Felder, Rountree & Wilson, E. R. Bradfield, Jr., and W. S. Dillon, for plaintiff in error. F. M. Longley and M. U. Mooty, for defendants in error.

POWELL, J. W. L. Williams was indebted to the Williams-Thompson Company, a corporation. On January 25, 1909, in settlement of this debt he gave to the corporation a negotiable joint promissory note, signed by himself as principal and by six others (the present defendants, Williams himself not being found or served), who signed apparently as joint makers, but in fact as sureties. On the next day after the note was signed, and after the original transaction was closed, one of the sureties, named Harris, came to the officer of the corporation who had taken the note and stated that he wished to "come off" the note. This officer of the corporation, being for some reason willing to accommodate Harris, gave him a written instrument "releasing W. H. Harris from all responsibility by reason of his endorsement" of the note in question. Harris gave nothing for this release, and the corporation received nothing for executing it. Later the officer told Harris that he had no power to bind the corporation by his act, but that he would nevertheless protect him, and gave him \$100 of his (the officer's) own money with which he might discharge his share of the liability, but Harris returned this money to him. The six sureties, being sued on the note, pleaded that Harris had been released and that, as the others were joint sureties with him, they were also released. Some point is made as to the authority of the particular officer to bind the corporation; but we need not go into that question, as there is another point that controls the case.

[1] 1. The release of a party to an executed contract is itself a contract, and, to be binding, must be founded on consideration. Bruton v. Wooten, 15 Ga. 570; Stamper v. Hayes, 25 Ga. 546; Molyneux v. Collier, 30 Ga. 731; Fowler v. Coker, 107 Ga. 817, 33 S. E. 661.

[2] 2. This release was without consideration. The consideration of a contract usually must consist of some benefit to the person to be bound, or of some detriment to the other party. Under this contract of release, all the benefit accrued to the taker of the instrument, and none to the maker; all the detriment accrued to the maker, and none

to the taker. Hence it was without consideration. Clark, Contracts, 106. At common law a release under seal conclusively purported a consideration; but this is not now true, as respects the American states generally (Williston-Wald's Pollock on Contracts, 813), or as respects Georgia in particular (Lacey v. Hutchinson, 5 Ga. App. 865, 64 S. E. 105; Bruton v. Wooten, supra). The record does not show whether the release relied on in this case was under seal or not; but, in the light of the authorities just cited, this makes no material difference, as lack of consideration was affirmatively shown by the proof.

[3] 3. "The release or compounding with one surety discharges a cosurety." Civil Code, 1910, § 3542. If the so-called release had been valid, Harris would have been released, and so would his cosureties; but, since the release is invalid for lack of consideration, neither he nor his cosureties are released. Fowler v. Coker, supra.

[4] 4. There is nothing in the evidence on which to base the suggestion of counsel for the defendants in error that there was a release of the other sureties through the plaintiff's compounding with Harris. "To compound," according to Black's Law Dictionary, "is to compromise, to effect a composition, to obtain discharge from a debt by the payment of a smaller sum." Harris paid nothing; hence the transaction was not a compounding.

[5] 5. The \$100 which the plaintiff's officer afterwards paid to Harris out of his (the officer's) own money certainly did not affect the case. Even if the giving of this money had been the company's own act, it is doubtful that it would have operated as a release of the other sureties; for when Harris had paid in this sum, though he would thereby have paid his ratable part, if all the sureties proved solvent, he would not have discharged his liability as a joint maker of the note. No legal harm would have been done his cosureties. But certainly the individual act of one of the officers of the corporation in giving his money to Harris did not affect the liability of any of the parties.

The hardship of the case is that the principal on this joint note proved unworthy of the confidence imposed on him by his friends who stood his security. The law is very technical in favor of sureties, and justly so. However, we find no legal reason on which the judgment of our able brother of the trial bench can be sustained, though we have examined the questions with great care; for our knowledge of his fairness and ability as a judge makes us canvass our conclusions carefully, lest we be wrong, when we find ourselves disagreeing with him.

Judgment reversed.

(10 Ga. App. 363)

MIZELL LIVE STOCK CO. v. BANKS.

(No. 3,561.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. SALES (§ 347*)—ACTION FOR PRICE—DEFENSES—FRAUD.

The allegations of the plea of fraud set out a good defense, and the demurrer thereto was properly overruled.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 966; Dec. Dig. § 347.*]

2. EVIDENCE (§ 434*)—PAROL EVIDENCE.

The rule that parol testimony shall not be received to change or add to the terms of a written contract does not apply where the alleged contract was procured by fraud. In such case the contract is not binding upon the party defrauded, and may be rescinded at his instance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

3. BILLS AND NOTES (§ 520*)—ACTION—EVIDENCE—FRAUD.

There was no error, and the verdict is supported by some evidence.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 520.*]

Error from City Court of Douglas; W. C. Lankford, Judge.

Action by the Mizell Live Stock Company against A. J. Banks. Judgment for defendant, and plaintiff brings error. Affirmed.

Rogers & Heath, for plaintiff in error. O'Steen & Wallace, for defendant in error.

HILL, C. J. 1. This was a suit on a note given for the purchase price of a horse. The suit commenced by attachment and levy upon the horse. The defendant admitted the execution of the note, and that the plaintiff was the holder thereof. The defense relied upon was fraud by the plaintiff, which entitled the defendant to have the sale rescinded. The specific fraud set up by the plea was that the agent of the plaintiff who sold the horse to the defendant represented at the time that the horse was 8 years old; that the defendant was ignorant of horses, and did not know how to determine their age by inspection or examination; that when he purchased the horse from the plaintiff's agent he relied absolutely on the agent's statement as to the age of the horse, bought it, paid \$50 cash, and gave to the plaintiff the note sued on; that 2 or 3 days thereafter he discovered that the horse was from 15 to 16 years of age, the discovery being made by information given to him by a person who had previously owned the horse; that upon this discovery the defendant went at once to the plaintiff, stated to him that his representation as to the horse's age was untrue, demanded a rescission of the sale on account of the fraud perpetrated upon him, tendered the horse back, and demanded the return of his \$50. Pending the litigation, the horse was sold under a short order, and was

bought by the plaintiff for the sum of \$185. The defendant amended his plea, and asked for a judgment against the plaintiff, not only for the \$50, but also for the \$185 for which the horse had been sold, claiming title to the horse. The jury found a verdict for the defendant for \$25, and the plaintiff filed a motion for a new trial, which was overruled, and he excepted.

[1, 2] Two controlling questions are made. The others are immaterial. A demurrer was filed to the plea, which was overruled, and exceptions pendente lite were preserved, on the ground that it set up no defense, but attempted to vary, alter, and contradict the terms of a written contract. The purchase-money note contained the following express warranty: "This note is for the purchase price of one sorrel mare, about eight years old; name, Hattie; weight, about 1,425 pounds. The above-described property is sold without any guaranty as to its kind or quality, and is purchased by the maker of this obligation with the understanding that no warranty shall be implied as against the seller." It is insisted that this note excluded the parol warranty that the horse was eight years old at the time it was sold. Even if this contention was true, the plea set up fraud, and demanded a rescission of the contract for the fraud. It is only in the absence of fraud, accident, or mistake that a written contract, which appears to be a complete and certain agreement between the parties, will be conclusively presumed to contain all the terms and conditions of the contract, which cannot be varied or contradicted by prior or contemporaneous verbal representations or statements. *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711; *Fleming v. Satterfield*, 4 Ga. App. 351, 61 S. E. 518. There is quite a difference between an attempt to contradict the terms of a contract by parol testimony under a defense that the contract had been breached, and an effort to have the contract rescinded because of fraud in its procurement. *Pryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654.

In this case, however, the written contract itself contained the express warranty that "the horse was about eight years old." The whole warranty should be construed together, and if there is an apparent contradiction between this express warranty as to age, and the latter part of the warranty, which would seem to exclude any warranty as to kind or quality of the horse, and thus render the warranty as a whole ambiguous, it should be so construed as to reconcile all the parts thereof and permit the whole of the warranty to stand; and, if this is impossible, it should be construed most strongly against the party who prepared it and in whose favor it was made. Construing all the parts of the warranty together, it means that, except as to the fact that the mare was about eight years old, every other express warranty as to its kind or quality was excluded, as well

as all implied warranties as to the soundness of the horse, etc. Certainly we cannot exclude from this warranty the distinct statement that the horse was "about eight years old." This is a material statement; the age of the horse being an important factor as to its value. The plea, therefore, can also be construed to be an attack upon the truth of this express warranty. For both of these reasons, we think the judge very properly overruled the demurrer to the plea. The defense set up was a good one, both on the ground that it claimed a rescission of the sale because of the fraud on the part of the plaintiff specifically described, and on the ground that it alleged a specific breach of a material express warranty made in the written contract. The ruling on this point not only goes to the demurrer, but included several of the grounds in the motion for a new trial.

2. The next point relied upon by the plaintiff in error was that the defendant, at the time he purchased the horse and before he signed the note sued upon, not only had full opportunity to examine the horse, but in fact did examine her, and discovered the defect that he set up in his plea; it being contended that the age of the horse was a patent defect, discoverable by inspection, and that he was distinctly told by friends, who at his request examined the horse, that the representation as to her age was not true, but that, on the contrary, the horse was 12 or 14 years old, and that notwithstanding these facts, and with full knowledge of the falsity of the representation as to the age of the horse, the defendant nevertheless accepted the horse, made a payment of \$50 thereon, and gave the note sued on for the balance of the purchase money, and this conduct of his amounted to a waiver, although the warranty as to age may have been express. It is contended that, where an express warranty is set out, the purchaser is not bound to examine the property, or to exercise any diligence to discover defects, but that if he does in fact examine the property, and discover defects before he accepts the property, and then goes ahead, makes no objection thereto, accepts it, and signs a contract, this amounts to a waiver of the defects, and he is bound by the contract; and this would be true, whether the effort was to rescind the contract for the fraud in the representation, or for damages for the breach of the express warranty. *Equitable Manufacturing Co. v. Biggers*, 121 Ga. 381, 49 S. E. 271; *Miller v. Roberts*, 9 Ga. App. 511, 71 S. E. 927. The defendant endeavored to avoid the effect of any information that he had as to the age of the horse by evidence that, while it is true he was told by the vendor that the horse was 8 years old, and was also told by a friend, who had examined the horse before the purchase, that she was from 12 to 14 years old, yet, when he told the plaintiff of this fact, he replied that it was not true, and in-

sisted that the horse was 8 years old, and that he would guarantee such to be her age. We are inclined to think that it was a question for the jury to determine whether the defendant had the right to accept this positive statement and guaranty made by the plaintiff and rely upon it, rather than rely upon the statement made to him by his friend, especially in view of the fact that the owner of the horse, as the evidence shows, was an experienced dealer in horses.

[3] While we have discussed these questions of law made under the evidence, we are impressed with the fact that, regardless of them, in the absence of any material error of law, the verdict, which in effect declared a rescission of the sale because of this fraud, was substantially just and fair to both parties. The undisputed evidence shows that the plaintiff sold the horse to the defendant for \$265, \$50 cash and the balance in the note sued upon. Plaintiff levied his attachment upon the horse for the purchase money, and had it sold under a short order of sale, and bought it in for \$185. This would make \$235 that he got for the horse, or \$30 less than the amount that the plaintiff had agreed to pay. Even if we concede that the plaintiff was entitled to a verdict for this \$30, resolving every issue in his favor and standing upon the strict letter of the law, yet when the evidence shows that the horse was in fact at least 14 years old, and not 8, we think the plaintiff got full value for his property. The jury, in allowing the defendant \$25 by way of recoupment, were probably moved to do so by the practical, common-sense view of what was right between the parties, and by the additional fact that the defendant should pay for the use of the horse for the time he had used it, and therefore only gave him back half of the cash which he had paid at the time of the sale. The verdict is manifestly substantially right and just, the trial judge approved it, and this court feels that no sufficient reason is shown why another trial should be granted. When substantial justice is reached in any case, litigation should end.

Judgment affirmed.

(10 Ga. App. 295)

STIMPSON SPECIALTY CO. v. PARKER.
(No. 3,409.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. SALES (§ 347*)—ACTION FOR PRICE—DEFENSE—FAILURE OF CONSIDERATION.

"Where machinery is brought for a particular purpose, and after its reception it proves, upon trial, not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be defeated upon a plea of total failure of consideration, unless the evidence shows that the machinery was

wholly valueless for any purpose." *Hardee v. Carter*, 94 Ga. 482, 19 S. E. 715.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

2. SALES (§ 359*)—ACTION FOR PRICE—EVIDENCE OF FAILURE OF CONSIDERATION.

A plea of total failure of consideration to a note given for the purchase price of a "sausage mill, # 40 coffee mill," is not supported, unless the evidence shows that the mill was entirely worthless as a sausage mill or coffee mill; and especially is this true where the written contract fails to disclose at the time of the purchase that the mill was intended to be used solely as a sausage mill, and not as a coffee mill, and the evidence also fails to show in what particulars the mill was defective, either as a sausage mill or coffee mill, and it does appear that it was worth as a coffee mill, the amount of the purchase price, for which the note was given and on which the suit was brought.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056-1059; Dec. Dig. § 359.*]

3. SALES (§ 355*)—ACTIONS FOR PRICE—ISSUES AND PROOF—FAILURE OF CONSIDERATION.

To support a plea of total failure of consideration to a suit on a promissory note given for the purchase price of machinery, the defendant must establish by evidence that the machinery purchased by him was entirely worthless for any purpose; and, there being no such plea, the jury would not be authorized to find a verdict for a partial failure of consideration, in the absence of any data from which a reduction could be made from the contract price, although a plea of total failure of consideration includes a plea of partial failure of consideration. *Grier v. Enterprise Stone Co.*, 126 Ga. 17, 54 S. E. 806; *Clegg-Ray Co. v. Indiana Sale & Truck Co.*, 125 Ga. 558, 54 S. E. 538.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025-1043; Dec. Dig. § 355.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by the Stimpson Specialty Company against C. L. Parker. Judgment for defendant, and plaintiff brings error. Reversed.

The Stimpson Specialty Company brought suit against C. L. Parker on a promissory note given by him for the purchase price of a "sausage mill, #40 coffee mill." The defendant filed a plea of total failure of consideration. The contract for the purchase of the machine was in writing. It described the machinery as a "sausage mill, #40 coffee mill." The purchase price was \$175—\$25 cash, and the balance evidenced by a promissory note. The contract reserved title until payment of the note, and provided that the note was to be paid in installments on designated dates. The contract nowhere discloses whether the mill was to be used exclusively as a sausage mill or coffee mill, or whether it was intended to be used for both purposes. In support of the plea of total failure of consideration the defendant assumed the burden, and admitted the making of the contract and the giving of the note. In support of his defense he testified that he bought the machine to be used solely as a

sausage mill; that he did not expect to use it as a coffee mill, and had not bought it for that purpose; that he endeavored to use it as a sausage mill, but was unable to do so, for when it was put in operation the "gear gave way," and he was unable to run it; that he had never run a machine of this kind before, and that it was not suited for the purpose intended; that about two weeks after the machine had been received he showed it to the agent who had sold it to him, and this agent agreed to write "to his house about it." He did not use the machine for the purpose of grinding coffee. It is not known whether it would have done that work or not. If the machine had been sold as a coffee mill for \$175, it was probably worth that amount. When the machine was delivered, it had no attachments for grinding coffee, although it was actually made for the purpose of grinding coffee, and the sausage attachments were subsequently put on. Another witness for the defendant testified that he was present when the machine was first received, and that he and the defendant put it up, but had never been able to use it for grinding meat; that the rawhide gear was not sufficient to run the mill; that it was worn completely out and mashed together. There is no evidence that any specific complaint was made to the principal as to the defects in the machine, and no evidence that the defendant, on discovering the defects, or that he was unable to operate it as a sausage mill, made any tender back to the plaintiff, or offered to rescind, but that he kept the machine in his possession from the time it was received until suit was filed, which was about seven months, during which time the only complaint that he made was that he "showed it to Mr. Blanton, the agent of the plaintiff," who had sold it to him. The judge, who tried the case without the intervention of a jury, found a verdict in favor of the defendant.

R. D. Smith, for plaintiff in error. Fulwood & Murray, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 233)

HANDLEY v. MERCHANTS' & FARMERS' BANK. (No. 3,594.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

CONTINUANCE (§ 51*)—GROUNDS—ILLNESS OF PARTY—DISCRETION OF JUDGE.

This was a claim case, in which the wife of the defendant in *fi. fa.* was the claimant. When the case was called for trial, a motion was made to continue because of the absence of the claimant on account of illness. The showing in support of the motion was the testimony of the husband and an unsworn statement of a physician. The case had been previously continued two or three times on ac-

count of the absence of the same witness, and it also appeared that her interrogatories could have been taken in the exercise of proper diligence. *Held*, that the trial judge did not abuse his sound legal discretion in overruling the motion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 79; Dec. Dig. § 51.*]

Error from City Court of Eastman; C. W. Griffin, Judge.

Claim by Sallie Handley to property levied upon by the Merchants' & Farmers' Bank. Judgment for the plaintiff in *fi. fa.*, and claimant brings error. Affirmed.

O. J. Franklin, for plaintiff in error. J. H. Roberts, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 338)

CHANDLER-BLACKSTAD MERCANTILE CO. v. E. A. PRICE & CO. (No. 3,597.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 434*)—PAROL EVIDENCE AFFECTING WRITING—INVALIDATING WRITTEN INSTRUMENT.

Testimony that one party to a contract was induced to sign the contract by false statements as to its contents, and that he was prevented from reading the contents before signing by the artifice and trick of another (fully stating in what the trick or artifice consisted), did not conflict with the elementary rule that parol testimony is not admissible to vary or alter the terms of a written contract, and was properly admitted in evidence in support of the plea of fraud in procuring the contract. *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, 61 S. E. 149, and citations; *Truitt-Silvey Hat Co. v. Callaway & Truitt*, 130 Ga. 637, 61 S. E. 481.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

2. NO ERROR—EVIDENCE SUFFICIENT.

No error appears, and the evidence supports the verdict.

Error from City Court of Eastman; C. W. Griffin, Judge.

Action by the Chandler-Blackstad Mercantile Company against E. A. Price & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

C. W. Atwill, for plaintiff in error. J. A. Neese, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 366)

HARRIS v. STATE. (No. 3,562.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 565*)—LIMITATIONS—CONCEALMENT BY ACCUSED.

The evidence showing that there was more than one occasion within the two years immediately following the commission of the alleged crime when the defendant was openly upon the

streets of a city in the county in which the crime was alleged to have been committed, and where he could easily have been arrested, and that at other times within the statutory period he was at work near by in the employ of a citizen of the same county, the fact that the defendant so concealed himself as to arrest the bar of the statute of limitations affecting the criminal prosecution was not established, and the prosecution was barred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1270; Dec. Dig. § 535.*]

Error from City Court of Houston; C. E. Brunson, Judge.

Sid Harris was convicted of crime, and brings error. Reversed.

R. N. Holtzclaw, for plaintiff in error. R. E. Brown, Sol., for the State.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 351)

COOPER v. P. P. MOST NURSERY CO.
(No. 3,527.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION OF PERIOD—ABSENCE OF DEFENDANT.

A suit for damages, which had been sustained by the plaintiff more than five years prior to the issuance of the attachment against a defendant nonresident throughout that period, was barred by the statute of limitations; and the demurrer presenting that defense to the suit was properly sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

2. LIMITATION OF ACTIONS (§ 87*)—COMPUTATION OF PERIOD—ABSENCE OF DEFENDANT.

The plaintiff's right to proceed by attachment depended upon the nonresidence of the defendant. The allegation that the defendant was a nonresident was not stricken by amendment, and could not have been stricken without resulting in the dismissal of the case; and the absence or nonresidence of a debtor who never resided in this state, is no reply to the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 456-462; Dec. Dig. § 87.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by M. A. Cooper against the P. P. Most Nursery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Geo. A. H. Harris & Sons, for defendant in error.

RUSSELL, J. Mrs. M. A. Cooper sued out an attachment against P. P. Most Nursery Company, alleging the nonresidence of the defendant as the ground of attachment. This attachment was served by the issuance and service of summons of garnishment on garnishee, residing in Floyd county, on June 7, 1910. Upon the plaintiff's filing her declaration in attachment, the defendant de-

murred, seeking to interpose the bar of the statute of limitations. The court sustained the demurrer, and dismissed the plaintiff's action, and thereupon the plaintiff sued out the present writ of error.

According to the allegations of the declaration, P. P. Most Nursery Company, whose name imports a corporation, is not a resident of the state of Georgia, and it is not alleged that the defendant, at any time, was ever a corporation of this state. If the defendant ever was a nonresident corporation, it must be presumed to have continued to be such, because it could only become a corporation of the state of Georgia by obtaining a charter here. The lower court allowed an amendment to the petition, setting up that at the time the cause of action accrued this nonresident corporation had as an agent residing in Floyd county one Maples, and it was sought by the amendment to relieve the bar of the statute of limitations by allegations to the effect that Maples represented that P. P. Most Nursery Company was a Georgia corporation, which was false, and the statement was made with the intent to defraud, and by the further allegation that, after the plaintiff's right of action accrued, she made every endeavor to locate Maples and the defendant, but failed to do so.

[1,2] The only question in the case is whether the amendments to the plaintiff's petition are such as would relieve from the bar of the statute of limitations a cause of action apparently almost six years old, in which the plaintiff sought to recover damages resulting from misrepresentation and deliberate breach of a contract to furnish certain specified varieties of peach trees for plaintiff's orchard. Under the allegations of the original petition the action is plainly barred, for it is alleged that the plaintiff ascertained in 1904 that she had not been furnished with the varieties of trees she had bought, and as far back as 1904 she knew she had been deceived by the agent of this nonresident corporation, and yet she took no step to recover her damages until 1910. The plaintiff attempts, by amendment, to relieve the defect in the action by allegations to the effect that she had made every effort to ascertain the residence of the defendant, but had failed, and allegations to the effect that Maples, up to the time that she discovered the fraud that had been practiced upon her, resided in Floyd county, and that Maples, at the time she purchased the fruit trees, told her that the P. P. Most Nursery Company was a Georgia corporation. It is the plaintiff's misfortune if she could not find out the defendant's whereabouts in six years, but the result of the delay cannot be affected by any of the circumstances alleged in the amendment to the plaintiff's petition. The law presumes that four years is a sufficient lapse of time for

a plaintiff to ascertain all the necessary facts upon which to predicate a suit, and mere inability to do this, which is not directly chargeable to the opposite party, is ineffectual to prevent the bar of the statute of limitations. Fraud on the part of the opposite party, where it is apparent that such fraud prevented the earlier assertion of one's rights, might relieve from the bar; but according to the allegations in the present petition all the fraudulent acts and sayings of Maples, the agent of the defendant, occurred before 1904, and in 1904, when the peach trees began to bear, and the fraud, if any, was discovered, the plaintiff knew just as much of Maples' fraud, and just as much of the whereabouts of the defendant, as she did in 1910, at the end of a six-year search for Maples and for the residence of the P. P. Most Nursery Company.

The allegations of the petition, as a whole, do not tend now to distinctly negative the inference that the P. P. Most Nursery Company may be doing business in Georgia, and that they may have now, and may have had for six years preceding the suit, agents in Georgia upon whom service could have been perfected; but, as we have previously remarked, the mere fact that the plaintiff was unable for six years, after the discovery of the fraud which had been perpetrated upon her, to ascertain the whereabouts of the defendant, affords no exception to the general rule which bars a cause of action which, like the present, is required to have been prosecuted in four years. The plaintiff could not amend her declaration, so as to strike the allegation that P. P. Most Nursery Company resides out of the state of Georgia, without destroying the only ground upon which the attachment rested, and the fact that Maples had moved from Georgia to Texas, or that she was unable to locate the defendant, or any of its officers or agents, or to find any property belonging to the defendant which might be seized by attachment, presents no legal reason for relieving the action from the bar of the statute of limitations. According to the allegations of her own petition, the plaintiff discovered the breach of the contract on July 15, 1904, and had the attachment served on June 7, 1910. The demurrer was properly sustained. The fact that Maples, the defendant's agent, told the plaintiff that his principal, the P. P. Most Nursery Company, resided in Georgia, is of no consequence.

The allegation which might have relieved the bar of the statute must have been that P. P. Most Nursery Company, as a matter of fact, did reside in Georgia, and yet, if the Nursery Company merely resided at some time in the past in Georgia, being a Georgia corporation, the removal of the corporation to another state would not of it-

self change its legal residence. In order to become a resident of another state, a corporation must be chartered in that state, or at least its principal office must, by its charter, be declared to be in that state, and as a corporation can have no legal residence, except as determined by its charter, the incorporation of a domestic corporation in another state would create it a corporation of that state as a new corporation, entirely apart from the fact that there may have been a previous incorporation in some other state, thus rendering the previous residence of the parties, who might be incorporators or stockholders in the corporation, whether in this state or in some other, totally immaterial. The plaintiff could not have made an allegation upon this subject which would have been of any value, because the residence of a corporation is fixed by its charter, and the absence or nonresidence of a debtor, who never resided here, is no reply to the statute of limitations. 9 Enc. Dig. Ga. Rep. p. 36; *Edwards v. Ross*, 58 Ga. 147. Judgment affirmed.

(10 Ga. App. 297)

JOWERS v. HIGH POINT FURNITURE CO.
(No. 3,419.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 208*)—REMEDIES OF CREDITORS—SUBSEQUENT CREDITORS.

Ordinarily only persons standing in the relation of creditors at the time of the transfer can attack a transfer of property on the ground that it was made to hinder, delay, or defraud creditors. If subsequent creditors desire to attack the transfer on that ground, they must show that at the time they extended credit they had no notice of the transfer, and that they were by some fraud, actual or constructive, induced to extend credit on faith of the ownership of the property. *First Nat. Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851; *Sims v. Albee*, 72 Ga. 751; *Horn v. Ross*, 20 Ga. 210 (3), 65 Am. Dec. 621; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732 and monographic note appended thereto.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

2. FRAUDULENT CONVEYANCES (§ 132*)—SALE OF PERSONALTY—RETAINING OF POSSESSION.

A sale of property, if otherwise bona fide made, is not void as to a pre-existing creditor of the vendor merely because he retains the possession after the sale.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 407-424; Dec. Dig. § 132.*]

Error from City Court of Fitzgerald; El. Wall, Judge.

Claim case between J. J. Jowers and the High Point Furniture Company. Judgment for defendant, and plaintiff brings error. Reversed.

Haygood & Outts, for plaintiff in error.
McDonald & Grantham, for defendant in error.

POWELL, J. [1] This is a claim case. The plaintiff in *fi. fa.* attacked the validity of a sale of the property in dispute by the defendant in *fi. fa.* to the claimant. The time of the creation of the plaintiff's debt does not appear. If it came into existence after the time of the sale, the judgment in the plaintiff's favor must be reversed, because the charge of the court in certain particulars complained of was contrary to the principle stated in the first headnote above. If it was pre-existing at the time of the sale, then the court should not have given the following instruction: "If you should find that T. M. Parsons [the defendant in *fi. fa.*] ever owned the personal property levied on, and if you find that he afterwards sold it, but he remained in possession of the property, and the plaintiff in *fi. fa.* had no actual notice of the sale, but relied upon Parsons' possession, then you would be authorized, if you find these facts to exist, you would be authorized to find the property subject."

[2] It is to be noticed that this instruction omits all reference to the element of fraud, or intention to hinder or delay the creditor, in the absence of which the sale might be valid as against the pre-existing creditor, notwithstanding the vendor retained the physical possession or custody of the property.

Judgment reversed.

(10 Ga. App. 355)

EDENFIELD v. COLEMAN & FLANDERS.
(No. 3,548.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

SALES (§ 428*)—GUARANTY—CONSTRUCTION.

In a note given for the purchase money of two mules, the following guaranty was inserted: "It is expressly understood that after said delivery the said Coleman & Flanders do not warrant the health, soundness, or life of said mules, but only the title thereto, and in case of death thereof, or loss in any way, I agree to sustain the loss and to pay said note." In a suit on this note a plea alleging in effect that at the time of the sale, and when the mules were delivered, they were afflicted with an incurable disease, the character of which was not known to the defendant, but was known to plaintiff, and from which disease the mules in question died in a few days after the sale, set forth a good defense, and was not in conflict with the well-established rule that parol testimony cannot be received to vary the terms of a written contract. *Pryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654. The above guaranty protected the guarantor from any unsoundness or disease and death which might arise or occur after the sale was made and after delivery of the mules to the purchaser. It is not broad enough to protect the guarantor from any latent disease or unsoundness which

existed prior to and at the time of the sale, and which was known to the seller and unknown to the purchaser.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by Coleman & Flanders against H. G. Edenfield. Judgment for plaintiffs, and defendant brings error. Reversed.

Saffold & Larsen, for plaintiff in error.
Williams & Bradley, for defendants in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 246)

BECKWITH v. MANSFIELD LUMBER & CONSTRUCTION CO. (No. 3,507.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 571*)—RES ADJUDICATA—PLEA IN ABATEMENT.

A judgment in favor of the defendant upon a plea in abatement not affecting the merits of the case cannot be successfully pleaded in bar of a subsequent suit on the same cause of action.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1046; Dec. Dig. § 571.*]

2. REVIEW ON APPEAL.

No error of law appears, and the evidence fully supports the verdict.

Error from City Court of Covington; W. H. Whaley, Judge.

Action by the Mansfield Lumber & Construction Company against W. B. Beckwith. Judgment for plaintiff, and defendant brings error. Affirmed.

Rogers & Knox, for plaintiff in error. R. W. Milner, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 246)

BECKWITH v. MANSFIELD LUMBER & CONSTRUCTION CO. (No. 3,508.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

RES ADJUDICATA.

This case is controlled by the decision of this court handed down this day in *Beckwith v. Mansfield Lumber & Construction Co.* (No. 3,507) *supra*.

Error from City Court of Covington; W. H. Whaley, Judge.

Action by the Mansfield Lumber & Construction Company against W. B. Beckwith. Judgment for plaintiff, and defendant brings error. Affirmed.

Rogers & Knox, for plaintiff in error. R. W. Milner, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 308)

CITIZENS' BANK OF FITZGERALD v. BENTON. (No. 3,449.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. PRINCIPAL AND AGENT (§§ 9, 61*)—EMPLOYMENT OF EXPERT—DISCRETION—CONSIDERATION OF CONTRACT.**

If an agent is employed in order to obtain the benefit of his expert knowledge or skill in any particular business or profession, he may be clothed with discretion as to the time, quantity, and nature of service to be rendered by himself, and in such case he is liable alone for the proper exercise of this discretion for the benefit of his principal. Where one agrees to exercise his skill as an expert in determining whether anything should be done, and, if so, what, or to decide that nothing is necessary to be done, as the case may be, this agreement is a sufficient consideration to support a contract obligating the opposite party to pay for such services, and the contract may be just as valid as if the duties to be performed were minutely specified.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 17, 96-98; Dec. Dig. §§ 9, 61.*]

2. CONTRACTS (§ 281*)—CERTAINTY.

In any contest over the performance or nonperformance of such a contract, of course, the legal maxim, "Id certum est quod certum reddi potest," would control.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1281-1283; Dec. Dig. § 281.*]

3. DEMURRER.

There was no error in overruling the demurrer.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by L. O. Benton against the Citizens' Bank of Fitzgerald. Judgment for plaintiff, and defendant brings error. Affirmed.

L. Kennedy, for plaintiff in error. O. H. Elkins, for defendant in error.

RUSSELL, J. The Citizens' Bank of Fitzgerald, on March 31, 1906, by a resolution of its stockholders, appointed L. O. Benton as financial agent of the bank for a term of five years, expiring March 31, 1911. In the resolution it was stipulated that Benton was to be paid \$500 a year for his services as financial agent. Benton's duties were prescribed as follows: "His duties as said agent shall be to examine and check the books, papers, and business of the bank at such times as he may see proper, either personally or by agent, to make financial connections and secure correspondents for said bank, and in general to do and perform all acts that he may deem necessary or expedient for the successful operation of said bank." Something over two years later the Citizens' Bank of Fitzgerald went into liquidation, its business being taken over by another bank, and on April 3, 1911 (the period for which the contract was made having expired), Benton brought suit for \$1,500, for the three years salary which he had not received.

To this suit the defendant filed a demurrer, in which it is insisted generally that the petition does not set forth any cause of action, and also that the alleged contract upon which the suit was predicated was unilateral, and void for want of mutuality and for lack of consideration. The demurrer also raised the point that it was not alleged that the plaintiff ever performed any service after March 31, 1908, or offered to perform any service. The court overruled the demurrer, and the present writ of error is brought to test the correctness of that judgment.

The only point worthy of serious consideration, raised by the demurrer, is the inquiry as to whether the contract is so lacking in mutuality as to avoid it. In the argument of counsel for the plaintiff in error it is stressed that "mutuality of contract means that an obligation must rest on each party to do something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." And the rulings in *Cooley v. Moss*, 123 Ga. 710, 51 S. E. 625, *Glessner v. Longley*, 125 Ga. 676, 54 S. E. 753, *Oliver v. Reeder*, 7 Ga. App. 276, 66 S. E. 955, and other authorities setting forth the same principle, are cited. That this principle is well settled cannot be controverted. However, the real question in this case is whether the mere fact that the character and quantity of service to be rendered by Benton was discretionary with him raises such an implication, that no services whatever would be performed, as would deprive the contract of mutuality and render the agreement void.

[1] To our minds the fact that the agent's duty was defined to be that "of examining and checking the books, papers, and business of the bank at such times as he might see proper, and to do and perform other acts [or not do and perform them] as he might deem necessary and expedient for the successful operation of the bank," does not necessarily relieve him from the necessity of performing duties which the law would assume to be of value. Though the occasions when service was to be rendered and the nature of such service were left discretionary with the agent, it is not to be implied from that circumstance that the contract was nudum pactum. The fact that he was clothed with a discretion involved the duty of exercising that discretion for his principal's best interest. It is rather to be inferred that the bank relied upon the skill and expertness and financial connections of the plaintiff to determine what was necessary to be done. And if at a particular time it was not necessary that anything should be done, then, at the option of the agent, a policy of inaction was to be pursued as most profitable. The agreement under consideration is not unlike a contract for the employment of a physician or attorney at law to do what-

ever may be deemed necessary for the patient or client, as the case might be, during a specified time. In such a case there is, of course, a reservation that, if it should be best that nothing should be done for the patient or client (as the case might be), the very determination of that fact would be such an element of value as would supply consideration to the contract. If I employed a physician by the year, it would not be essential to his compliance with the contract that he should compel me to take medicine when it was not necessary; but it would be his express duty to direct me to abstain from medical treatment if, in his professional judgment, medicine was unnecessary.

So much as to that portion of the contract which appears to leave the time and manner of performance of Benton's duty, as financial agent, discretionary with himself. However, the court properly overruled the demurrer in any event, for the reason that one duty was unequivocally assumed by the plaintiff (though, considering the contract as a whole, even its positive statement would have been qualified by an element of discretion lodged in the financial agent). That duty was the making of financial connections and securing correspondents for the bank. And this phrase, not being qualified with any such expression as "when he may see proper," or "as he may deem expedient," would have prevented the contract from being unilateral.

We do not place our ruling, however, on this portion of the contract alone, because, while it is in the power of the defendant to show any neglect of Benton's duty, due to a failure to exercise his discretion properly, where he was charged with discretion, nevertheless it is undoubtedly true that where one agrees to exercise his skill as an expert in determining whether anything should be done, and, if so, what, or to decide that nothing is necessary to be done, as the case may be, the contract is just as valid as if the duties to be performed are minutely specified. The courts have recognized the validity of contracts by which one agrees to exercise his inventive ability for another, and yet the inventor cannot agree to produce any definite results. *Emerson v. Pacific Coast Packing Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 448, 113 Am. St. Rep. 603; *Connelly Mfg. Co. v. Wattles*, 49 N. J. Eq. 92, 23 Atl. 123. See, also, *American Eng. Enc. L.* (2d Ed.) vol. 20, p. 49; 26 Cyc. 1021.

[2] 2. In any contest over the performance or nonperformance of such a contract, of course, the legal maxim, "Id certum est quod certum reddi potest," would control.

So far as the objection, urged by the demurrer, that Benton did not tender to perform any service after March 31, 1908, is concerned, it is stated in the petition that

the bank, without Benton's consent or approval, went out of business before that time, and, the bank itself having rendered performance on Benton's part impossible, the tender of an impossibility would have been nugatory, and is not required. There was no error in overruling the demurrer.

Judgment affirmed.

(10 Ga. App. 240)

NATIONAL DUCK MILLS et al. v. CATLIN & CO. (No. 3,223.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1178*) — DISPOSITION OF CAUSE—REVERSAL.

Where both general and special demurrers are filed to an answer, and the trial judge dismisses it on general demurrer, the reviewing court, in the event that it finds that the answer sets up any valid defense, though imperfectly pleaded, will reverse the judgment, with direction that the trial judge shall hear the special demurrers and cause the answer to be made more certain.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

2. ACCORD AND SATISFACTION (§ 2*) — CONTRACTS DISCHARGEABLE — SEVERABLE CONTRACT.

Though the parties may have made what appears to be an entire contract, resting on mutual obligations, still if the contract is of such a nature as to give rise to separate and distinct demands, or to create a number of separate obligations and cross-obligations, and a number of distinct breaches as to these separate obligations occur, the parties may make an accord and satisfaction, or what in law amounts to an accord and satisfaction as to one or more of these demands, without affecting the others.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 14-21; Dec. Dig. § 2.*]

3. SET-OFF AND COUNTERCLAIM (§ 21*) — ACTIONS—PLEADING—GENERAL DEMURRER.

Where the defendant in a suit upon a promissory note pleads that the note was given for advances which the plaintiff was to make to him under the terms of a contract, and that by reason of the plaintiff's refusal to continue to make advances in accordance with the terms of the contract the defendant has suffered damage, the amount of which he seeks to set off or recoup against the plaintiff's demands, the plea is properly stricken on general demurrer, where it also appears from it that all the items of damage which the defendant claims on this account were in existence and were known to him at the time he executed the note (in renewal of a previous existing note representing the same debt) and obtained an extension of time.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 25; Dec. Dig. § 21.*]

4. PLEADING (§ 142*).

A plea setting up as a cross-action that the plaintiff, being purchasing agent for the defendant, bought for him under contract a quantity of goods which contained concealed imperfections, which caused the defendant loss and damage, is properly stricken on general demurrer, where no act of infidelity or negligence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the plaintiff's part (that is, no breach of the contract of agency) is alleged.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 142.*]

5. PLEADING (§ 205*)—DEMURRER.

The pleas in the present case, so far as they set up neglect and breach of duty on the plaintiffs' part as sales agents of the defendants were subject to a number of special demurrers, on account of indefiniteness of allegation, but were not subject to be stricken on general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Catlin & Co. against the National Duck Mills, a corporation, and others. Judgment for plaintiffs, and defendants bring error. Affirmed in part, and reversed in part, with directions.

Catlin & Co. sued the National Duck Mills, a corporation, as maker, and certain others as indorsers, upon a promissory note for \$12,000, dated October 14, 1909, due six months after date. The defendants admitted the execution of the note, but set up, for defense, that on August 12, 1907, the defendant corporation entered into a contract with the plaintiffs, by which it employed them as exclusive sales agents for the product of its mills, as well as purchasing agent to buy yarns for use therein; that by the terms of the contract of agency the plaintiffs were to sell the entire output of the mills, and to give, in this particular, faithful and competent service, for a commission of 5 per cent. to include all their expenses, and were also, from time to time, to make advances of money to the defendant, charging interest therefor at the rate of 6 per cent. per annum; that this contract was extended and renewed in January, 1908, so as to expire on January 1, 1909, and was again renewed for the year 1909, and that on June 2, 1909, it was broken and repudiated by the plaintiffs; that on faith of the contract the defendant had begun operation of its mills and was engaged in manufacturing duck, etc., had purchased the necessary yarns, and was carrying on its business generally, expecting the plaintiffs to carry out their contract; that in the course of the relations between these parties the defendant became indebted to the plaintiffs in the sum of \$15,000 for advances, for which it had executed a promissory note, and that the note for \$12,000, sued on, was given on October 14, 1910, in renewal of the balance due for advances; that by reason of the fact that on June 2, 1909, the plaintiffs renounced the contract and refused to advance any further money, the defendant had been damaged in the sum of \$35,000. The plea set forth with more or less detail a number of different ways in which damage ensued by reason of the plaintiffs' failure to furnish the necessary money to carry on the business, all

of which damage had ensued before the date when the note sued on was given. It was also pleaded that the plaintiffs, as agents for the Duck Mills, purchased for the mills a quantity of yarn containing certain imperfections known as "slip knots," which caused the product manufactured from it to be rejected by the purchasers, to the defendants loss in the sum of \$1,800; also that the plaintiffs, as sales agents for the mills, negligently instructed the mills to make up goods for orders which in one case was not promptly forwarded, and in the other case not forwarded at all, so that in both cases, by a drop in the market, which came before the goods so ordered made up could be disposed of, the mills lost certain amounts of money, which are set forth. Certain other transactions, which need not be enumerated, are set forth, and damages are alleged.

For the purpose of a better understanding of the following opinion, it may be stated that the defenses are of three classes: (1) Pleas setting up damages because of the plaintiffs' failure to make advances; (2) a plea setting up damages because of the imperfections in a lot of yarn purchased for the mills by the plaintiffs as purchasing agents; (3) pleas setting up damages because of negligence on the plaintiffs' part in their conduct as sales agents of the mills. The major portion of the damages is asserted under the pleas setting up damages for failure to continue the advances. The plaintiffs filed both general and special demurrers to these pleas. The court did not pass upon the special demurrers, but passed an order sustaining the general demurrer to the entire defense, probably upon the ground insisted upon by counsel for the plaintiffs in error in this court, that the giving of the note sued on, after all these classes of defenses set up in the answer had arisen, prevented their being pleaded in set-off or recoupment, or otherwise, against the note.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. Shepard Bryan and W. R. Tichenor, for defendants in error.

PARK, J. [1] The trial judge must be sustained, if at all, upon the theory that the defenses set up were not good as against a general demurrer. He did not pass on any special demurrers, and the reviewing court is not even informed as to the nature of the special demurrers interposed. It has no jurisdiction to attempt to review a judgment not rendered by the trial court; so, if the general demurrer was improperly sustained, the case should be remanded to the trial court, with direction that the trial court do hereafter pass upon the special demurrers, whatever they may be. Any other course would be eminently unfair to the defendants; for, upon announcement by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trial judge that one or more of the special demurrers would be sustained, the defendants would have opportunity as a matter of right, to amend. A reviewing court cannot properly undertake to cut off this statutory right of amendment, by erroneously undertaking to sustain a judgment sustaining a general demurrer, upon the theory that the defendants' pleas might properly have been stricken upon timely and meritorious special demurrers. The defendants' pleadings were unquestionably open to special demurrer, on various grounds, but the reviewing court cannot arbitrarily assume that the proper objections were raised by the special demurrers actually filed.

[2] 2. As this court is about to hold that certain of the pleas were properly stricken on general demurrer and that certain were not, it is well enough for us to point out in the beginning why the defendants would be estopped by their conduct in giving the note from setting up some of these defenses, and is not estopped from setting up others. The plaintiffs say that the contract sued on was entire, and not several, and that whenever accord and satisfaction, or what in law amounts to accord and satisfaction, took place as to the matter covered by the notes, which represented a part of the contract, the whole matter was settled and ended. In the first place, it should be noticed that the plaintiffs do not sue upon the contract, but merely sue upon the note, which the demurrer to the plea admits to have represented the defendants' liability under only one phase of the contract—that is, the defendants' liability for advances to the plaintiffs. By a close examination of the case of *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787, it will be seen that the Supreme Court has recognized and held that there may be separable demands under a single entire contract, and that where, under such a contract, there is more than one distinct demand, an accord and satisfaction as to one of them will not conclude the rights of the parties as to the other demands. In that case, as in this, there was a single contract, but a number of obligations; the parties made an accord and satisfaction as to one of them, and, though receipt in full was given, it was held that this did not settle the cause of action arising for a breach of another obligation, although the breach had been consummated at the time the first settlement took place. The contract now before us involved, from the defendants' standpoint, three demands against the plaintiffs: (1) As to the plaintiffs' duty to advance money; (2) as to the plaintiffs' duty as sales agent; (3) as to the plaintiffs' duty as purchasing agent. The note sued on referred to that phase of the contract which relates to the advancing of money, and not to the other two. Under the *Armour Case*, supra, the rights of the parties under these separate

obligations may be treated as if each obligation constituted a distinct contract.

[3] 3. The contract set up in the answer is, certainly as to the obligation to make advances, an entire and not a severable contract, embracing mutual covenants. *Broxton v. Nelson*, 103 Ga. 330, 30 S. E. 38, 68 Am. St. Rep. 97; *Spalding v. Chamberlain*, 130 Ga. 654, 61 S. E. 533. And all the items of damages claimed by the defendants in paragraphs 10 and 11 of the answer grew out of breaches committed from time to time by the plaintiffs of their covenants under this very contract. It follows that these items of damages are not separable from the liability for money advanced to the defendants under the terms of the contract—both claims having arisen out of the transaction had under the same feature of the contract. The defendants' defense as to these items is one of recoupment, and not set-off. So, had they been sued on the notes falling due in October, 1909, they would have been compelled to urge their claims for these damages in defense to the suit, or have been forever barred from insisting thereon. Unlike a plea of set-off, which it is the privilege, but not the bounden duty, of a defendant to interpose to a suit based on an independent transaction, the defense of recoupment will not survive a recovery upon a cross-obligation urged by a plaintiff under the same transaction. By analogy to this estoppel by judgment (imposed upon a defendant who fails to file a timely plea of recoupment) is the rule of estoppel by silence, applied in cases cited by the defendants in error, where one party to a contract, when the day has come on which the other party can call him to a settlement, fails to set up any counterclaim under the contract, and (in order to get an extension of time of payment) makes an unqualified and unconditional promise to pay such other party the full amount of his claim. In each instance (in court or out of court) one party calls on the other for a settlement, and the latter should in good faith urge then, if at all, any counterclaim which he may have, arising out of the subject-matter of settlement. Certainly he should not be allowed to mislead the other by making an unconditional promise in recognition of a liquidated liability, which he then secretly intends to repudiate at a later date, when he is called on to perform that promise.

There is a rule of law to the effect that one party to a contract does not, by recognizing and performing all of his obligations under the contract, waive, renounce, or injuriously affect his right to exact like compliance on the part of the other party, and recover damages for a breach committed by such other party, prior or subsequent in point of time; so it would seem that the defendants might have paid off in full the notes due in October, 1909, without jeopardizing their right to bring suit against the plaintiffs

subsequently and recover the damages for breaches of the contract set forth in their present pleadings. But the defendants did not pay under and in compliance with their obligations of the contract alleged. On the contrary, instead of complying with their obligation under that contract to repay the money advanced when it became due, these defendants induced the plaintiffs to agree to a renewal of that contract, and to give them six months' additional time within which to pay the renewal note, without fail, when it should fall due. It is unthinkable that the plaintiffs would have consented to this novation, had the defendants in good faith put the plaintiffs on notice that they denied owing the plaintiffs one cent, that they had a counterclaim of far more than the plaintiffs' claim of \$12,000 for money advanced under the same contract, and that, when the renewal note fell due, they would refuse its payment, force the plaintiffs to sue on the note, and then set up this defense.

At the time this renewal note was given, the defendants had full knowledge of these defenses now urged for the first time. So they are not in a position to set up any equitable prayer for relief, based on fraud, accident, or mistake, or upon excusable ignorance, at the time they gave their renewal note, or to set up any counterclaim they had against the plaintiffs as to this feature of the contract. The plaintiffs repudiated the contract on June 2, 1909, which gave the defendants the right to treat the contract as at an end, and immediately to set up all their claims for damages up to that time sustained. *Smith v. Ga. Loan Co.*, 113 Ga. 975, 39 S. E. 410. The defendants could have elected to treat the contract as still subsisting, provided they held themselves in readiness to fully perform all of their covenants under the contract, including the payment of their outstanding notes for money advances made by the plaintiffs as these notes fell due. *Smith v. Ga. Loan Co.*, supra. But (perhaps from necessity, as indicated by the pleas) the defendants did not elect to treat the contract as still of force, but closed down the manufacturing business and sold out the stock on hand to whosoever would buy. The defendants did more than this: They induced the plaintiffs to grant indulgence, upon the faith of their promise to pay the renewal note at maturity. Six months gives exceptional opportunity, by way of disposal of assets, etc., in which to better prepare to spring a defense concealed under cover of silence until the other party to the contract has changed his position so that he cannot sooner bring suit.

The defendants do not by their pleadings bring themselves within the decision in *McLendon v. Wilson*, 52 Ga. 41, to the effect that when, on the day of reckoning, one party gives to the other his note, with the distinct understanding and agreement that it

is accepted, not in final settlement of mutual accounts, but subject to counterclaims against the payee which the maker expressly reserves the right to set up in the future, no waiver on the part of the maker can be implied, and no estoppel by conduct can be urged against him when he is sued on the note. This exception to the general rule certainly affords full opportunity to overcome by proper pleadings and competent proof the presumption of the law of waiver of counterclaims silently withheld and undisclosed on the day of settlement. We may further add that the general rule of estoppel by silent acquiescence, invoked by the defendants in error, has been of long standing, and has received repeated recognition by the highest courts of this state. Ignorance of this rule of law may occasionally lead one into error. But ignorance of law is, in and of itself alone, no sufficient excuse. Besides, one, to be injured, would ordinarily have to be likewise ignorant of the common dictates of honesty and fair dealing between men, which would of necessity deter the upright man from misleading the other party by an apparent acknowledgment of the righteousness of his claim, by promising to pay it at a future date, without any intimation of subsequent intention to repudiate his promise by setting up a counterclaim amounting to a practical denial of any indebtedness whatsoever. On the other hand, a relaxation of this general rule, based on good morals, would open wide the doors to fraud, concealment, and duplicitous conduct, calculated to deceive and mislead the other party, to his delay and injury in the prosecution of his legal rights, whatever they might be. So that the court did not err in sustaining the general demurrer to those portions of the defense which set up damages arising out of the breach of the obligation to make advances.

[4] 4. Paragraphs 12 and 16 of the answer are the ones that set up that the plaintiffs, as purchasing agents, bought for the Duck Mills a lot of yarn containing "slip knots." It is not alleged that the plaintiffs were in any wise negligent in their conduct as agents in this respect. Primarily the defendants' cause of action for the imperfections in the yarns furnished would be against the person from whom the plaintiffs purchased the yarn. The plaintiffs were not the opposite party to this contract of sale, nor to the express or implied warranties contained in the contract of sale. The only ground of liability against them would be that they were guilty of some breach of duty as purchasing agents; and no such neglect of duty is alleged. Therefore the court did not err in sustaining general demurrer to these paragraphs of the answer.

[5] 5. Paragraphs 18, 14, and 15 set up a breach of the plaintiffs' duty as sales agents, and allege an improper performance of services on their part, with consequent damage.

It is true that in a number of respects these paragraphs of the plea might be subject to special demurrer; but, as against a general demurrer, they set up a cause of action, or, as pleaded in the present case, a cause of defense. As the damages set up in these paragraphs do not relate to that obligation of the contract to which the plaintiffs' demand relates (that is, the demand for repayment of money supplied by them under their obligation to make advances), they were not included in the settlement represented by the giving of the note, and, under the doctrine in the *Armour Case*, supra, the defendants' right to insist upon them was not foreclosed by the giving of the note. Hence the court erred in striking these defenses on general demurrer.

The judgment is affirmed, so far as it relates to the defenses set up in paragraphs 10, 11, 12, and 16 of the answer. The judgment is reversed, so far as it relates to the defenses set up in paragraphs 13, 14, and 15 of the answer, but with the direction that the court shall still proceed to hear such special demurrers as may be filed to these paragraphs, or to the general portions of the answer upon which these paragraphs are dependent.

Judgment affirmed in part, and reversed in part, with direction.

Hon. FRANK PARK, Judge of the Superior Courts of the Albany Circuit, presiding by designation of the Governor in place of HILL, C. J., disqualified.

(10 Ga. App. 392)

GRANT v. GENERAL BAPTIST CONVENTION OF GEORGIA. (No. 3,635.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 169*)—PRESENTATION OF QUESTIONS IN LOWER COURT—NECESSITY.

Points not covered by the issue as presented in the trial court cannot be raised for the first time in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the General Baptist Convention of Georgia against Cornelius Grant. Judgment for plaintiff, and defendant brings error. Affirmed.

C. H. Hall, Jr., L. D. Moore, and B. J. Fowler, for plaintiff in error. Lane & Park and R. D. Feagin, for defendant in error.

POWELL, J. An action of bail trover was brought in the city court of Macon; the value of the property being alleged as

\$75. The plaintiff elected to take a verdict for damages, instead of a verdict for the specific property, and the jury, finding in the plaintiff's favor, gave \$1 damages, whereupon the court entered up judgment for the plaintiff and against the defendant for the costs, amounting to about \$40. The defendant filed a motion in the city court to vacate the judgment, so far as the feature of costs was concerned, and to retax them; the insistence being that they should have been taxed against the plaintiff, instead of against the defendant. The defendant's written motion was based specifically on two grounds: (1) That the action is a personal action for damages, and the jury returned a verdict for the plaintiff for less than \$10; (2) that the plaintiff, by his election at the trial to take damages in lieu of the specific property, converted the action into a personal action. The defendant's insistence in the trial court was plainly based on the provisions of Civil Code 1910, § 5984, which provides: "In actions of assault and battery, and in all other personal actions, wherein the jury upon the trial thereof shall find the damages to be less than ten dollars, the plaintiff shall recover no more costs than damages, unless the judge, at the trial thereof, shall find and certify on the record that an aggravated assault and battery was proved." The judge overruled the motion, and to this judgment the present writ of error was sued out.

Before the case was reached for argument in this court, the plaintiff in error doubtless realized that the section of the Code on which he relied did not apply to an action of trover, for the only point insisted upon here is one that is entirely new, so far as the record is concerned, namely, that under the act creating the city court of Macon (Acts 1884-85, p. 470, § 2) it is provided that, in all suits brought in that court in amounts of \$100 or less, the plaintiff shall receive only justice's court costs. This court cannot consider the point thus raised. The trial court has passed on no such point. The decision we are reviewing involved the consideration of no such question. Counsel for the plaintiff in error very ingeniously argue that the greater includes the less, and that, since they sought by motion in the trial court to relieve themselves of all the costs, they ought now to be allowed to diminish their claim, and to relieve themselves of any portion thereof illegally taxed against them. Ingenious as this argument is, it is not well taken. In the lower court they planted their right to have these costs diminished on two specific grounds. The trial court acted upon these grounds, and this court cannot now allow this motion to be amended by the insertion of a new ground.

The original grounds not having been well taken, the judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(10 Ga. App. 333)

BEASLEY, COUCH & CO. v. ROGERS & RAWLINS. (No. 3,596.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.**

No error of law is complained of. The evidence is in conflict, and the solution of that conflict by the jury is binding on this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Eastman; C. W. Griffin, Judge.

Action by Beasley, Couch & Co. against Rogers & Rawlins. From the judgment, Beasley, Couch & Co. bring error. Affirmed.

R. L. J. Smith & Son and Roberts & Smith, for plaintiffs in error. W. M. Clements, for defendants in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 394)

HAYGOOD v. STATE. (No. 3,719.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. ASSAULT AND BATTERY (§ 66*)—JUSTIFICATION—ABUSIVE LANGUAGE.**

In a prosecution for assault and battery, the accused cannot give in evidence as a justification opprobrious or abusive language written and published of him by the person upon whom he made the assault and battery. The question was concluded by the decisions of the Supreme Court in *Mitchell v. State*, 41 Ga. 527, and *Berry v. State*, 105 Ga. 683, 31 S. E. 592. In the present case this question was certified by request of counsel for plaintiff in error to the Supreme Court, in order that the decisions in the above-cited cases might be reviewed and overruled. The Supreme Court reaffirmed these decisions. *Haygood v. State*, 137 Ga. —, 73 S. E. 81, decided December 12, 1911.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 94, 95; Dec. Dig. § 66.*]

2. CRIMINAL LAW (§§ 575, 598*)—TERMS FOR TRIAL—WAIVER OF OBJECTION.

The act of the General Assembly creating the city court of Fitzgerald (Acts 1907, p. 157) was amended by the act approved August 12, 1910 (Acts 1910, p. 175), as follows: "That the court shall hold twelve terms per year, on the fourth Monday in each month, the terms convening on the fourth Monday in August, November, February, and May to be known as quarterly terms. The jurisdiction of the court shall be the same at all terms, monthly and quarterly. * * * And criminal cases in which jury trial is not waived by defendant, shall be triable only at a quarterly term. For the purpose of disposing of the criminal business of said court, the same shall always be open without regard to terms." The plaintiff in error requested in writing the judge of the court to hold a monthly term, and at the term so held appeared in court, made a demand for a jury trial, was tried by a jury, and convicted. *Held:* First, the court had jurisdiction of the case at the monthly term; second, the accused, under the facts stated, waived his statutory right to be tried at the quarterly term, and

consented to be tried at the monthly term. He cannot be heard, after conviction, to question the jurisdiction of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1294; Dec. Dig. §§ 575, 598.*]

3. CRIMINAL LAW (§ 99*)—JURISDICTION—CONSENT OF PARTIES.

The court, having jurisdiction of criminal cases at both quarterly and monthly terms, was authorized, by the consent of the accused, to try his case at the monthly term, and the facts of the present case distinguish it from those decisions of the Supreme Court which hold, in effect, that, where a court has no jurisdiction of the subject-matter, jurisdiction cannot be conferred by consent. The express terms of the statute give the court in the present instance jurisdiction of the subject-matter, and the term of the trial could be properly waived. *Dean v. State*, 43 Ga. 218; *Osgood v. State*, 63 Ga. 791; *Wiggins v. Tyson*, 112 Ga. 744, 38 S. E. 86; *Smith v. Ferrario*, 105 Ga. 51, 31 S. E. 38; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 197; Dec. Dig. § 99.*]

4. NO ERROR—FORMER DECISIONS CONCLUSIVE.

The other questions raised by the record, so far as verified by the trial judge, are entirely without substantial merit, involve no novel questions, and have been settled by frequent decisions of this court and the Supreme Court, and need not again be passed upon.

5. NO ERROR—EVIDENCE SUFFICIENT.

No error of law appears, and the evidence supports the verdict.

Error from City Court of Fitzgerald; E. Wall, Judge.

J. W. Haygood was convicted of assault and battery, and brings error. Affirmed.

J. T. Hill, for plaintiff in error. A. J. McDonald, Sol., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 279)

BRIDGES v. PHILLIPS. (No. 3,354.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 537*)—NEGOTIATION AND TRANSFER—ACTIONS—NONSUIT—"TAKE UP THE NOTE."**

The court erred in granting a nonsuit, for the reason that it was, to say the least of it, issuable as to whether the plaintiff in error paid the note for the principal debtor, or whether he bought it and held it as a bona fide purchaser. The phrase "take up the note" does not any more strongly imply that the debt evidenced by the note in question is to be finally discharged than that the person "taking up" a note will assume the place of the original payee or holder, with the privilege in that event of being subrogated to all pre-existent rights of the former holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

For other definitions, see Words and Phrases, vol. 8, p. 6850.]

2. BILLS AND NOTES (§ 395*)—NOTICE OF NON-PAYMENT—PROTEST.

The defendant was not entitled to notice of nonpayment or of protest. So far as appears

from the papers sued upon, the note was not made for the purpose of negotiation, nor intended to be negotiated, at a chartered bank; and it is evident, from the form of the transfer or assignment of the note, that the indorser was not an accommodation indorser, but that he sold the note to the bank, and stood, so far as it was concerned, in the position of the original maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 998-1021; Dec. Dig. § 895.*]

Error from City Court of Miller County; C. C. Bush, Judge.

Action by R. L. Z. Bridges against D. Phillips. Judgment for defendant, and plaintiff brings error. Reversed.

Bush & Stapleton, Russell & Custer, and W. O. Fleming, for plaintiff in error. P. D. Rich, for defendant in error.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 280)

GEORGIA AUTOMOBILE CO. v. MERCHANTS' NAT. BANK OF SOUTH BEND, IND. (No. 3,358.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—REVIEW—DISCRETION OF TRIAL COURT—QUESTIONS CONSIDERED.

The presiding judge being dissatisfied with the verdict, and having granted a first new trial, one of the grounds of the motion, among others, being that the verdict was contrary to law and evidence, this court will not control his discretion in so doing; nor will this court consider assignments of error predicated upon errors of the lower court in the charge, or upon its refusal to direct a verdict, the presumption being that on the second hearing the judge will correct his own errors, if any.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8871-8873; Dec. Dig. § 979.*]

Error from City Court of Forsyth; T. B. Cabaniss, Judge.

Action between the Georgia Automobile Company and the Merchants' National Bank of South Bend, Ind. From the judgment, the Georgia Automobile Company brings error. Affirmed.

Persons & Persons, for plaintiff in error. Willingham & Willingham and Tye, Peeples & Jordan, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 395)

WILLIAMS v. STATE. (No. 3,780.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

FALSE PRETENSES (§ 7*)—ELEMENTS—CHECK—OVERDRAWING ACCOUNT.

The giving of a check on a bank, without any representation by the drawer that he had funds in the bank upon which the check was drawn, or that the check would be paid by the

bank when presented in payment of the debt, does not, of itself, constitute the offense of cheating and swindling, under the statutes of this state defining that offense. An accusation charging the accused with cheating and swindling the payee of a check, in that he gave to the payee the check in payment of a debt, without further charging that some false representation was made by the accused to induce the payee to take the check, sets forth no offense, and a motion in arrest of judgment should have been sustained.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12; Dec. Dig. § 7.*]

Error from City Court of Albany; D. F. Crosland, Judge.

J. L. Williams was convicted of cheating and swindling, and brings error. Reversed.

D. H. Redfearn and R. J. Bacon, for plaintiff in error. J. W. Waters, Jr., Sol., for the State.

HILL, C. J. Judgment reversed.

(10 Ga. App. 355)

CROWDER v. STATE. (No. 3,541.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

ANIMALS (§ 102*)—TRESPASSING ANIMALS—MALICIOUSLY KILLING.

There was no evidence that the killing of the hog was malicious. The only evidence from which malice could be inferred was that the accused did not have a fence at least 4½ feet high around his crop, to prevent the destruction of which the animal was killed. In stock-law counties, land lines supply the place of the statutory fence.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 102.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Charlie Crowder was convicted of maliciously killing a hog, and brings error. Reversed.

W. E. Armistead, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 347)

GREENE COUNTY v. WALKER.

(No. 3,514.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—QUESTIONS OF FACT—VERDICT—CONCLUSIVENESS.

The issue as to whether the county was negligent in its maintenance of the bridge in question, as well as the inquiry as to whether it is contributory negligence on the part of the owner of a colt 3½ months old to permit so immature a specimen of the equine genus to accompany the maternal mare in public places, both present questions as to the existence and degree of negligence which are peculiarly for the determination of a jury. Consequently a verdict awarding damages to the owner of such a colt for injuries inflicted upon it by reason of its falling through a hole in a

public bridge, which is supported by evidence and which has been approved by the trial judge, will not be set aside as being contrary to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1006.*]

Error from Superior Court, Greene County; B. F. Walker, Judge.

Action by M. F. Walker against Greene County. Judgment for plaintiff, and defendant brings error. Affirmed.

Noel P. Park, for plaintiff in error. J. G. Faust, for defendant in error.

RUSSELL, J. Walker brought a suit against Greene county for damages alleged to have been sustained by him as the owner of a colt, which it was alleged was injured by getting caught in a hole in one of the public bridges of the county. Upon the trial the evidence was undisputed that the value of the colt had been diminished by reason of the casualty, and that there was a hole in the public bridge, which had existed for such a length of time as to authorize the jury to infer that the proper county authorities had knowledge of its existence. It developed that the plaintiff was driving a mare, and that the colt, which was injured, was accompanying its mother. The defendant county pleaded that, if the colt was injured as alleged in the petition, the injury was caused by the negligence of the plaintiff, and therefore the defendant was not liable in any sum, and that, if the plaintiff had used ordinary care and diligence, the injury could have been avoided. Under the first ground of the defense, it is contended that even if knowledge of the defect in the bridge can, under the evidence, be presumed as against the county authorities, still there was proof that vehicles could cross with safety, for the reason that the hole was towards the edge of the bridge, and was not large enough for a grown horse to get its foot through, and for this reason it is contended that the bridge was in a satisfactory condition for all ordinary purposes. The decision of this court in *Stamps v. Newton County*, 8 Ga. App. 230 (5), 68 S. E. 947, is cited as authority to sustain the contention that the use of the bridge by the colt gave rise to an extraordinary occasion.

As to the second ground of defense, it is insisted that the owner of the colt knew that the hole was in the bridge, and that the defendant should not be held liable, because in the exercise of ordinary care and diligence the owner should either have left the colt at home, and not permitted it upon the public highway, or he should have made a special effort to see to the colt's safety while it was crossing the bridge. Without making any comparison between the case at bar and the *Stamps Case*, supra, it is enough for us to say that whether the presence of a

colt upon a public bridge gave rise to such an extraordinary occasion as cannot be foreseen by the county authorities, and as may relieve the county from liability for damages, is a question purely for determination by a jury. It is possible that there might be instances in which the circumstances of the accident might authorize the jury to conclude that the occasion was extraordinary. The presence of a colt which had strayed away from home, and which appeared upon a bridge containing such a hole, unaccompanied by its mother, or even if accompanied by its mother, if the mare was running at large, might afford such an instance; but at last it would be a question for the jury, as in the *Stamps Case* (and not for the court), after a consideration of all of the surrounding circumstances. No court can arbitrarily say that under no circumstances can the owner of a colt be recompensed for injuries due and traceable to defects in a public highway, because of the fact that the colt was of no service upon the public highway, or because the presence of the colt created extraordinary occasion.

Likewise the question as to whether the owner of a colt, in the exercise of ordinary care and diligence, should, in any particular instance, keep the colt at home, and not permit it to follow its mother, as is frequently the custom, is one also peculiarly of fact, and to be determined by the jury. All of the circumstances illustrating the alleged negligence of the county in this case, as well as the contributory negligence, if any, of the owner, were fully submitted for the consideration of the jury, and jurors are so much better qualified than judges to say when and where and under what circumstances a young colt can safely accompany its mother, that we are not prepared to say that there was any error in the verdict in the present case.

It is not contended that any error of law was committed by the trial judge. The only error assigned is the refusal of the motion for new trial based upon the general grounds, and, as we doubt not that the ruling of the trial judge was based upon the same considerations as those which affect us, the judgment must be affirmed.

(10 Ga. App. 238)

DOUGLAS, A. & G. RY. CO. v. PENNINGTON & EVANS. (No. 3,385.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1194*)—DISPOSITION OF CAUSE—OPERATION AND EFFECT.

The effect of the rulings of this court upon the bill of exceptions and the cross-bill when the case was here before was to finally dispose of the case then pending; and consequently all the orders of the lower court looking to the perfecting of service by publication, subse-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quently to the judgment making the remittitur the judgment of that court, were nugatory and void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4660; Dec. Dig. § 1194.*]

Error from City Court of Douglas; Jno. C. McDonald, Judge.

Action by Pennington & Evans against the Douglas, Augusta & Gulf Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Wm. H. Barrett and Quincey & McDonald, for plaintiff in error. Atkinson & Born and Hendricks & Christian, for defendants in error.

RUSSELL, J. This case came to this court at the October term, 1907, upon a writ of error, and the decision will be found in 3 Ga. App. 665, 60 S. E. 485. Afterwards the case came again on bill and cross-bill of exceptions, and the adjudication of this court thereon will be found in 6 Ga. App. 854, 65 S. E. 1084. In the writ presented by Douglas, Augusta & Gulf Railway Company v. Pennington & Evans, the judgment of the court below was reversed, because we held the action should have been dismissed for lack of service. The cross-bill was dismissed because of the dismissal of the main bill. In the latter judgment, upon motion of counsel, this court directed that, since the trial court was without jurisdiction on account of lack of service to deal with the case in any way, the order of the lower court, sustaining the demurrer and dismissing the action, should for the same reason be vacated. There is nothing in the ruling upon the cross-bill in conflict with the ruling upon the main bill. In ruling upon the main bill, we ruled that the lower court should have dismissed the action because of lack of service, and, of course, if the action should have been dismissed for lack of service, any ruling on demurrer in advance of service of the petition was nugatory and void. The sole purpose of giving the direction which was entered was to allow the plaintiffs, if they desired, to recommence their suit, "without prejudice to the parties as to the questions of law involved," and these words were so used in the formal judgment of the court.

After the remittitur of this court were returned and made the judgment of the lower court, the court ordered service to be perfected by publication, and thereafter passed other orders to that end; one extending the time in which publication might be completed, and another declaring that service had been perfected by publication. The effect of our decisions was to give the plaintiffs, if we could, an opportunity of commencing a new suit which would not be prejudiced by any prior ruling upon any of its features; but so far as the judgments of this court themselves

are concerned it is very evident that they resulted in putting the case then pending entirely out of court and finally disposing of it. For this reason the court erred in holding that service had been legally perfected. No case was pending in which service could be perfected. The judgment of the city court of Douglas itself, making the judgment upon the remittitur the judgment of that court, had ordered the action dismissed.

Judgment reversed.

(10 Ga. App. 363)

SALANT & SALANT v. DANNENBERG CO.
(No. 3,313.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

SALES (§ 178*)—PERFORMANCE OF CONTRACT—WAIVER OF DAMAGES — ACCEPTANCE OF GOODS.

A. bought from B. goods according to samples exhibited. When the goods were subsequently delivered, A. on inspection notified B. that the goods were not according to contract, and were rejected, and were held subject to B.'s order for reshipment or other disposition. B. declined to retake the goods, insisting that they were in accordance with the warranty. A., therefore, placed the goods in his storehouse, and, B. continuing his refusal to retake them, the goods being of a perishable character and liable to deteriorate in value by being kept on hand, A. sold them in the market. *Held:* (1) A.'s conduct did not amount to an acceptance of the goods, or a waiver of his right to recover damages for breach of the contract. (2) It was A.'s duty to use due care in preserving the rejected goods after B.'s refusal to retake them, and also to minimize the eventual damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-455; Dec. Dig. § 178.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Dannenberg Company against Salant & Salant. Judgment for plaintiff, and defendants bring error. Affirmed.

The Dannenberg Company sued Salant & Salant, alleging that the defendants sold the plaintiff 100 dozen shirts at \$3 per dozen, to be shipped from New York to Macon, and to correspond with a sample dozen shirts left with plaintiff when the contract was made; that subsequently the contract was mutually rescinded, except as to 78 dozen shirts; that when the 78 dozen shirts were received by the plaintiff it refused to accept them, because they were inferior and wholly unlike the samples; that immediately upon discerning this fact shirts like the samples were demanded of the defendants, and they refused to ship any others; that thereafter they were notified that the plaintiff refused to accept the shirts because of their inferior quality and failure to come up to samples, and that they were held subject to their order and without insurance; that the market value of the shirts, according to the sample dozen, was \$4.50, instead of \$3, per dozen,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and the suit was for the difference in the market price and contract price. The answer admitted a sale of 100 dozen shirt and the subsequent mutual rescission, except as to the 78 dozen. It was denied that the sale was by samples, or that the 78 dozen delivered were inferior, or that there was any breach of warranty. The answer also averred that the defendants had sued the plaintiff in New York for the purchase price of the 78 dozen shirts, that the suit was pending, and that the defense thereto was based upon the same allegations as made in the plaintiffs' declaration here.

The evidence was in conflict on the issues made by the pleadings, and therefore the finding of the judge, who by consent acted without a jury, must be considered as conclusive on these issues. The evidence further showed that the shirts were shipped from New York on March 8th, and received in Macon on March 20th. On March 24th the plaintiff wrote to the defendants, complaining of the condition and quality of the shirts, that they were not up to the samples, and that they were held subject to defendants' order, without insurance. On March 29th the defendants wrote to the plaintiff: "We will have to ask you to keep the goods shipped to you, as they are certainly what was sold to you." On April 1st, plaintiff wrote to the defendants, again notifying them that the goods were held subject to their order, uninsured, and asking for shipping instructions. On April 4th the defendants wrote, positively declining to accept a return of the shirts, or to make any disposition of them. On May 14th the plaintiff began suit by attachment, and some time thereafter the defendants sued the plaintiff for the purchase price in New York. Subsequently to this correspondence and the filing of suit, the shirts were being injured by being kept in stock, "getting dusty and rat-eaten," deteriorating in value, and, in order to prevent further loss in the shirts, the plaintiffs sold as many of them as they could.

The judge, without the intervention of a jury, tried the case and found in favor of the plaintiff the sum of \$117, and the defendants' motion for a new trial was overruled.

Lane & Park, for plaintiffs in error. Hardeman, Jones, Callaway & Johnston and Richard Curd, for defendant in error.

HILL, C. J. (after stating the facts as above). Assuming that the finding of the judge on the issues of fact is conclusive, one question of law is presented: Did the conduct of the Dannenberg Company in receiving the shirts, placing them in their store, and subsequently selling them to prevent further deterioration in value, for the purpose of lessening the loss, amount to an acceptance of the shirts and a waiver of its right to sue Salant & Salant for a failure to

deliver in accordance with the contract? It is well settled that, where goods are sold by samples exhibited, an express warranty arises that the goods subsequently to be delivered will be of the same quality as the samples, and that upon receipt of the goods the buyer is not bound to inspect before acceptance; but if, upon receipt, he does inspect, and discovers defects before acceptance, it then becomes his duty to reject them. If, after knowledge of the defective quality, he retains the goods and deals with them as his own, such conduct will amount to an acceptance and will be a waiver of the defects so discovered. *Christian v. Knight & Co.*, 128 Ga. 501, 57 S. E. 763; *Carolina-Portland Cement Co. v. Turpin*, 126 Ga. 677, 55 S. E. 925, and citations. Here the proof is that the purchaser, before acceptance, discovered the inferior quality of the shirts as compared to the samples, and immediately notified the seller of the fact, and that the shirts were held subject to the seller's order and directions as to disposition or shipment. While he placed the shirts in his store, he did not treat them as a part of his stock by selling any of them to customers. But when the seller absolutely refused to take the shirts back, or to give any directions as to disposition, and when the shirts were deteriorating in value by dust, the depredation of rats, etc., the purchaser sold them for the purpose of lessening the eventual damages. This conduct did not amount to an acceptance of the shirts, for when the purchaser at once notified the seller of their inferior condition and offered to reship them, and that they were held subject to the seller's order, he did all he could do; and when, after the refusal to rescind, the shirts were deteriorating in value, it was his duty to sell in order to diminish the damages.

It is insisted by the plaintiffs in error that the purchaser, by selling the goods, made it impossible for the seller to retake the goods, and therefore, that he cannot claim a rescission. The answer to this contention is obvious. The seller had previously absolutely refused to retake the goods, and there was nothing left for the purchaser to do, except to hold the goods as the involuntary bailee of the seller. Civil Code 1910, § 3496. If as such bailee there was a breach of duty, it should have been set up by plea. In this case the defendants' only plea was that the shirts were as warranted. There was no plea that the plaintiff had accepted the shirts, nor was there any effort to set off or recoup the value of the rejected shirts. If the seller had claimed that he was entitled to the amount for which the shirts had been sold, the claim would doubtless have been allowed. Under the pleadings and the evidence, we think the finding of the judge was correct.

Judgment affirmed.

(10 Ga. App. 280)

SIMS v. WILLER MFG. CO. (No. 3,617.)
(Court of Appeals of Georgia. Jan. 15, 1912.)
(*Syllabus by the Court.*)

NO ERROR—SUFFICIENCY OF EVIDENCE.

No error appears, and the evidence demands the verdict rendered for the plaintiff.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by the Willer Manufacturing Company against J. H. Sims. Judgment for plaintiff, and defendant brings error. Affirmed.

Whitaker & Dukes, for plaintiff in error.
Denmark & Griffin, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 280)

THOMAS v. MONTICELLO VEHICLE CO.
(No. 3,286.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. JUSTICES OF THE PEACE (§ 124*)—PROCEDURE—JUDGMENT.

In a suit in a justice's court on an account, where the judgment was in favor of the plaintiff, for principal and interest, it was not erroneous for the justice to enter a judgment for the amount of interest, as well as the principal, due on the account, at 7 per cent. from the date when the account was due; nor to enter also a judgment against the defendant for the costs, including the jury fee (paid by plaintiff, on reception of the verdict), when the case was appealed to a jury in the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 124.*]

2. APPEAL AND ERROR (§ 1094*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS.

No error of law appears, and there is some slight evidence to support the verdict in the justice's court; hence the judgment of the superior court in overruling the certiorari must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4822-4852; Dec. Dig. § 1094.*]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Action by the Monticello Vehicle Company against Kyer Thomas. Judgment for plaintiff, and defendant brings error. Affirmed.

A. Y. Clement, for plaintiff in error. Doyle Campbell, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 416)

FARMERS' OIL & GUANO CO. v. E. W. ROSENTHAL & CO. (No. 3,406.)

(Court of Appeals of Georgia. Dec. 19, 1911.
Rehearing Denied Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. GAMING (§ 11*)—CONTRACTS INVALID—INTENT OF PARTIES.

The principle of law is well settled that a contract which is valid on its face cannot be

held void by showing that one of the parties understood and intended it to be a wagering contract. The evidence must show that this understanding and intention was mutual, to render a contract, otherwise legitimate, invalid on that ground. *Forayth Mfg. Co. v. Castlen*, 112 Ga. 205, 37 S. E. 485, 81 Am. St. Rep. 28; *Stewart, Morehead & Co. v. Postal Telegraph & Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Watson v. Hazelhurst*, 127 Ga. 298, 56 S. E. 459; *Embry v. Jamison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 19-21; Dec. Dig. § 11.*]

2. GAMING (§ 12*)—CONTRACTS INVALID—SALES FOR FUTURE DELIVERY.

Executory contracts for future delivery of personal property, which the vendor does not possess or own at the time, but which he expects to obtain by purchase or otherwise before or by the date when the contract is to be executed by delivery of the property, are valid, if at the time of making the contract an actual transfer and sale of the property is contemplated by the parties to the transaction. *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.*]

3. EVIDENCE (§ 244*)—ADMISSIONS—STATEMENT BY AGENT.

Letters written by the president of a corporation, apparently within the scope of his duties and pertinent to the issue under investigation, are admissible in evidence against the corporation. *L. & N. R. Co. v. Tift*, 100 Ga. 87, 27 S. E. 766; *Merchants' Bank v. State Bank*, 10 Wall. 644, 19 L. Ed. 1008.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 244.*]

4. SUFFICIENCY OF INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

The contentions of the defendant were fully and fairly presented in the charge, and his requests to charge, so far as pertinent and sound, were covered by the general instructions. The evidence strongly supports the verdict, and no reason whatever is shown why another trial should be had.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by E. W. Rosenthal & Co. against the Farmers' Oil & Guano Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John R. Cooper and A. R. Wright, for plaintiff in error. Garrard & Gazan and Evans & Evans, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 280)

SMITH v. WORLEY. (No. 3,359.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. GARNISHMENT (§ 29*)—PROPERTY REACHED.

Where a creditor of a nonresident of this state sued out an attachment, and caused an ordinary garnishment to be served upon a resident of this state, and on the trial of an issue formed upon the garnishee's answer it appeared that before the summons of garnishment had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been served the defendant in the attachment suit had transferred the fund which was owing to him by the garnishee to another nonresident creditor as security for a claim less in amount than that due from the garnishee to the defendant in attachment (the transfer, however, being a total, and not a partial, transfer of the fund), *held*, that such garnishment, unaided by any equitable pleadings, was ineffectual to reach the surplus coming to the defendant in attachment after satisfying the creditor holding the transfer as to the debt due him.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 47; Dec. Dig. § 29.*]

2. VENDOR AND PURCHASER (§ 213*)—LIEN—PRIORITY.

A deed of bargain and sale does not, by failure to record it, lose its priority over a creditor of the vendor subsequently obtaining lien by attachment or common-law judgment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 400; Dec. Dig. § 213; Attachment, Cent. Dig. § 151.]

3. EVIDENCE (§ 370*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—DEED.

Lawful registration entitles a deed to admission in evidence without proof of its execution, in the absence of an affidavit of forgery, though the registration be not made until after suit is pending.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559-1579; Dec. Dig. § 370.*]

Error from Superior Court, Elbert County; B. F. Walker, Judge.

Action by B. F. Smith against J. N. Worley, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

A. G. Worley died testate, leaving J. N. Worley as his executor; the will being probated in November, 1907. By the will the widow took an estate for life, and after her death the estate was to be equally divided between the testator's seven children, except that G. A. Worley was to account for a difference of \$150.91. The part of the estate which would have come to G. A. Worley amounted to \$3,150.91. Prior to December 1, 1910, the widow died, and G. A. Worley, one of the children, on that date executed and delivered to S. G. Worley, his brother, a deed in ordinary form, in which was conveyed the grantor's "whole interest, as an heir, in and to the estate of A. G. Worley, of Elbert county, Ga., for and in consideration of the sum of \$2,500." This conveyance was executed before two witnesses, and acknowledged by G. A. Worley before a justice of the peace at Miami, Fla., and was recorded in the office of the clerk of the superior court of Elbert county on February 27, 1911. On the back of the conveyance was written: "Accepted the within deed December 7, 1910. J. N. Worley, Executor Estate of A. G. Worley." This deed was reacknowledged in due form of law before the clerk of the circuit court of Dade county, Fla., a court of record, on March 2, 1911, and was re-recorded in the clerk's office of the superior court of Elbert county, Ga., on March 10, 1911.

On January 31, 1911, the plaintiff, Smith,

sued out an attachment before a justice of the peace in Elbert county against G. A. Worley, on the ground that he was a nonresident of the state, and caused it to be executed by service of summons of garnishment upon J. N. Worley, who, as has been stated above, was the executor of the estate of A. G. Worley. S. G. Worley, to whom the defendant in attachment, G. A. Worley, had conveyed his interest in the estate by the deed mentioned above, testified that the consideration of the deed was to the effect that G. A. Worley owed notes aggregating \$2,500, on which he, the witness, was indorser, and which he at time of the execution of the deed agreed to pay and did pay. He admitted that there was a tacit understanding between him and G. A. Worley that, if he received from the executor more than enough to reimburse him, he would give the overplus to G. A. Worley. It further appeared that at the time this conveyance was made the estate of A. G. Worley consisted of lands, but after its execution, and before the levy of the attachment, it had been converted into money as the result of an executor's sale. The executor answered that he had no assets in his hands belonging to G. A. Worley, and the issue was raised upon a traverse of this answer. Upon the facts appearing, as has been stated, the court directed a verdict in favor of the garnishee.

Z. B. Rogers, for plaintiff in error. Worley & Nall, for defendant in error.

POWELL, J. (after stating the facts as above). [1] 1. Unless the deed by which G. A. Worley conveyed his interest in his father's estate to his brother was void, or for some reason ineffectual as against the rights of the attaching creditor, the judgment of the trial court is correct, irrespective of any equitable rights that may have existed owing to the fact that the interest of the defendant in attachment may have been greater than the amount represented in the consideration of the deed by which he conveyed his interest to his brother. This is settled in principle by the case of Howard v. Porter, 99 Ga. 649, 27 S. E. 725, where it is held that, in this class of cases, garnishment, unaided by any equitable pleadings, is ineffectual to reach the surplus coming to the defendant in attachment after his transferee, though holding for security only, has been satisfied.

[2] 2. The deed as first executed was not properly attested or acknowledged. Its first record was ineffectual. The plaintiff contends, therefore, that it was void, and that it took no precedence over his rights as an attaching creditor. Our registry law, as contained in Civil Code 1910, § 3320, does not apply as to contests between deeds and liens, other than liens obtained by contract. A valid deed, though unrecorded, is superior to a subsequent judgment or attachment against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the same property. *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 966. The proposition is too well settled in this state to require an enlargement of discussion, or a citation of authorities to the effect that a deed is not invalid for lack of registry or recordation.

[3] 3. The filing and recording of a deed upon proper attestation or acknowledgment gives it two advantages over an unrecorded deed. The one is to prevent its postponement to the rights of third persons acquiring subsequent conveyances or contract liens binding against the same property; and the other is to authorize its introduction in evidence without further proof of its execution. We have just shown that there was no need for record, so far as this plaintiff was concerned, as affecting the question of priority; but the further point is made here that the court erred in admitting this deed in evidence, since it was not properly recorded until after the suit was pending. It will be recalled, from the statement of facts prefacing this opinion, that, it having been discovered that the prior attestation and record were ineffectual, the grantee caused the deed to be properly acknowledged, and to be re-recorded shortly prior to the time of the trial. It was upon this reacknowledgment and re-recordation that the judge admitted it in evidence without further proof of its execution. The point is made that a case is to be tried according to the rights of the parties at the commencement of the suit. This is generally true, so far as relates to substantive rights of the parties, but has no reference to mere matters of evidence. The competency of evidence and the methods of making proof are determinable as of the time of the trial, and not as of the time the suit is filed. For instance, a deed less than 30 years old at the date of the filing of the suit, which becomes as much as 30 years old during the pendency of the suit and prior to the trial, may be introduced in evidence at the trial as an ancient deed, and without proof of its execution. We find no error.

Judgment affirmed.

(10 Ga. App. 334)

HARRIS v. PAULK. (No. 3,481.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF (§ 31*)—CONTRACT TO ANSWER FOR DEBT OF ANOTHER.

The plaintiff having failed to prove his case as laid, the court did not err in awarding a nonsuit. The facts in the present case differentiate it from the case of *Evans v. Griffin*, 1 Ga. App. 327, 57 S. E. 921. In that case, the undertaking of the defendant to assume the obligation of the original debtor, and the absolute release of the latter by the creditor in connection with the assumption of the original debtor's debt by the defendant, created an original undertaking on the part of the latter; in the present case, as the original debtor was not released, the obligation of the defendant

was merely one of suretyship, and therefore was required to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 47, 48; Dec. Dig. § 31.*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Action by T. B. Harris against A. Paulk. Judgment for defendant, and plaintiff brings error. Affirmed.

Glessner & Park, for plaintiff in error. B. B. Collins, for defendant in error.

RUSSELL, J. Harris sued Paulk on an action of complaint, alleging that the latter, moved by a good consideration set forth in the petition, approached him, and after certain negotiations assumed individually certain indebtedness due by one Thompson to Harris. It was further alleged that Harris agreed to release Thompson from the indebtedness due to Harris. The contract, as set up in the petition, was identical in general details with the one passed upon by this court in *Evans v. Griffin*, 1 Ga. App. 327, 57 S. E. 921, and the petition was not demurrable for any reason.

Upon the trial the plaintiff did not prove his case as laid. Instead of proving that Thompson was released, and that Paulk assumed Thompson's debt as an original undertaking, the testimony in behalf of the plaintiff merely tended to show that Paulk became surety for the payment of the indebtedness due by Thompson to Harris. The defendant made a motion for a nonsuit, and, though the court overruled this motion when it was first made at the conclusion of the plaintiff's testimony, the court reconsidered this ruling, and later on in the course of the testimony for the defendant awarded a nonsuit.

The facts of the instant case clearly distinguish it from the case of *Evans v. Griffin*, supra. In that case "Evans came to Griffin and told him he had hired Jordan for the year 1906, to which Griffin replied it would be all right, but that Jordan owed him \$39.42, and Evans said, 'Well, I will pay it before I move him.' At the time he moved Jordan, Evans told Griffin he had not sold his cotton, but that he would pay the amount as soon as he sold the cotton. He did not pay the same as promised; the promise was oral. The plaintiff testified that, while he had not marked the account on his books against Jordan settled, yet he no longer considered or claimed that he still retained the indebtedness against him."

In the present case, Harris testified: "I told him he would have to pay me my money if I released the negro from his agreement to work for me. But he would not agree to that, but said he would pay me half of the amount in the fall of the year, and if the negro remained on his place for the year

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1908 he would see that I got the balance in the fall of that year. I agreed to this, and let him have the negro." Upon cross-examination he testified: "I charged the negro's account to Joe Jenkins, by 'Louis Thompson,' and I look to Joe Jenkins to pay me. * * * I did not release Joe Jenkins. I did not release the negro from his indebtedness to me, but never called on him for payment of it. I may have turned my account against this negro over to a collection agency to collect; but, if I did, I don't remember it. It is true that, after I made this contract with the defendant, I looked to all of them for payment—Joe Jenkins, Louis Thompson, and Mr. Paulk. I expected to get my money out of one of them. I did not care who paid me, so long as I got my money."

We think the court was right in construing this testimony as creating nothing more than a contract of suretyship, which, under the statute of frauds, must have been in writing to be enforceable. Even if in a sense the plaintiff proved his case in his direct testimony, yet on cross-examination, construing his testimony by the rule laid down in *Evans v. Josephine Mills*, 119 Ga. 448 (2), 46 S. E. 674, he disproved his right to recover. Consequently the award of a nonsuit was not error. In the case of *Evans v. Griffin*, the creditor accepted the substitution of the defendant in lieu of the original debtor, and absolutely released the latter. In the case at bar, as the creditor testified himself that he had neither released the original debtor nor a former surety, it cannot be said that he agreed to an assumption by Paulk of Thompson's liability as an original undertaking on Paulk's part in entire substitution for Thompson's prior liability.

Judgment affirmed.

(10 Ga. App. 306)

PATTERSON v. GEORGIA, F. & A. RY. CO.
(No. 3,440.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 26*) — ACTION FOR BREACH—EVIDENCE.

The action being for breach of contract, and the evidence not authorizing the conclusion that the minds of the parties (who negotiated with each other by correspondence) ever met upon the same thing in the same sense, and, therefore, there being no proof that a contract ever existed between the parties, judgment was properly rendered in favor of the defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by A. J. Patterson against the Georgia, Florida & Alabama Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. G. Hartsfield, for plaintiff in error. J. R. Pottle, for defendant in error.

RUSSELL, J. This case was submitted to his honor, Judge Harrell, of the city court of Bainbridge, for his determination without the intervention of a jury, and, after a consideration of the evidence, the court rendered a judgment in favor of the defendant.

The action was one for damages which the plaintiff claimed he had suffered by reason of the breach of a contract of sale, under which he became the purchaser of a certain canning plant. The negotiations were between Patterson, the plaintiff, who resided in Greenville, Tenn., and O'Dell, who was the general manager of the defendant at Bainbridge, Ga., and were all carried on by correspondence, which is contained in the record. The plaintiff testified by interrogatories, from which it appears that the parties had never met in person. Numbers of letters were exchanged, and several telegrams. The correspondence began by a letter from O'Dell to Patterson on February 5, 1908, and continued without intermission of more than two or three days until April 5, 1908. It cannot serve any useful purpose to detail its contents. It may be said that Patterson first took an option. He did not comply with that option, and still the correspondence was continued, and the contract might have been created, even after the expiration of the option, if it was not apparent that the minds of the parties never did meet upon the same thing in the same sense. There was disagreement as to what was actually to be delivered, and much correspondence over this, without any definite understanding. There is likewise apparent all through the correspondence a determination on the part of each party to insist upon his own preference as to the method of payment. O'Dell insisted, each time that he referred to it, that payment should be made at Bainbridge, and Patterson as often insisted that O'Dell should draw on him through either bank in Greenville, and gave references as to his complete solvency.

It would be fruitless to refer to the number of minor matters in the correspondence which indicate continual contention, rather than fixed concurrence of opinion, in regard to the details of the proposed bargain. If the statement of O'Dell that the canning plant was complete could have been insisted upon by Patterson (and, of course, the delivery of a complete plant could have been demanded if the other terms of the first proposal had been complied with), still there had been no definite acceptance by Patterson of O'Dell's offer prior to the time that O'Dell notified Patterson that some of the machinery or equipment was missing, and, of course, after that time, if the parties had traded at all, O'Dell's first offer of a complete canning factory must be deemed to have been withdrawn, and is qualified by the later statement that some of the accessories of the canning factory had been stol-

en. As Patterson did not know what parts were missing, and continually expressed a desire for transportation to come and investigate, it could not thereafter be said that the minds of the parties had agreed, or could agree, on what was actually to be sold by the one and purchased by the other. Judgment affirmed.

(10 Ga. App. 334)

DUREN v. LAYTON. (No. 3,642.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. CERTIORARI (§ 70*)—REVIEW—APPEAL FROM INTERMEDIATE COURT — PRESENTATION OF QUESTIONS IN TRIAL COURT.

Questions not made before the magistrate when the case was tried, nor before the superior court on certiorari to review the magistrate's judgment, cannot be raised for the first time in this court.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 195-208; Dec. Dig. § 70.*]

2. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR—DECISION CORRECT ON MERITS.

The finding of the justice in favor of the plaintiff being right under the evidence, and being approved by the judge of the superior court on certiorari, will not be interfered with by this court because of merely technical objections or immaterial errors of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by John Layton against D. C. Duren. Judgment for plaintiff, and defendant brings error. Affirmed.

Snodgrass & MacIntyre, for plaintiff in error. H. J. MacIntyre, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 350)

NUNEZ GIN & WAREHOUSE CO. v.

MOORE. (No. 3,524.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§§ 399, 408*)—EVIDENCE (§ 419*)—POWERS OF CORPORATION—REPRESENTATION BY OFFICERS—PAROL EVIDENCE AFFECTING WRITINGS.

Where a gin and warehouse company holds out a person as its general manager, the title implies power to make any contracts ordinarily necessary for the conduct of its business. Authority to execute a promissory note for the purchase of an engine and boiler, and to bind the corporation for its payment, would be presumed to be within the scope of the general manager's authority. But neither the general manager nor any other officer of a corporation has power or authority to purchase its capital stock, and to bind the corporation for the payment therefor by promissory note or otherwise. Parol evidence is always admissible to

show the consideration of a note, and consequently the court erred in striking the plea of the defendant, and in excluding testimony offered by it tending to show that the note in the present case was given to pay for \$250 of the amount of stock subscribed by the defendant, and especially as the payment, if made, would result in the purchase of that amount of stock by the corporation itself, or the reduction of the capital stock in that amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1602-1610, 1677, 1678; Dec. Dig. §§ 399, 408.* Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by Mrs. Z. O. Moore against the Nunez Gin & Warehouse Company. Judgment for plaintiff, and defendant brings error. Reversed.

T. N. Brown, for plaintiff in error. Smith & Kirkland, for defendant in error.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 352)

LACKEY v. OLD KENTUCKY MFG. CO.

(No. 3,593.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 208*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a suit on an account, in a justice's court, where the account was verified by the affidavit of the plaintiff, and a counter affidavit was filed by the defendant, while the justice was not authorized to enter a judgment in favor of the plaintiff on his verification of the account, without other proof, yet it was harmless error to admit the affidavit of verification in evidence, where, in addition to the affidavit, other proof was submitted in support of the correctness of the account, which was sufficient for that purpose, irrespective of the affidavit of verification. Civil Code 1910, § 4730.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 817; Dec. Dig. § 208.*]

2. APPEAL AND ERROR (§ 1094*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

This case involves only \$12. There was evidence to support the finding of the jury in the justice's court in favor of the plaintiff, and no material error of law appears. The judgment of the superior court, overruling the certiorari, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4822-4852; Dec. Dig. § 1094.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by the Old Kentucky Manufacturing Company against S. W. Lackey. Judgment for plaintiff, and defendant brings error. Affirmed.

C. D. McGregor, for plaintiff in error. F. M. Richards, for defendant in error.

HILL, C. J. Judgment affirmed.

(113 Va. 41)

DUDLEY v. LEWIS SHOE CO.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. LANDLORD AND TENANT (§ 169*)—INJURIES TO TENANT FROM DEFECTS—SUFFICIENCY OF DECLARATION.

The declaration in an action by a tenant of a lower floor against the landlord for injuries to plaintiff's goods by water coming through the ceiling from pipes negligently permitted to freeze and burst held, when construed with the bill of particulars, to sufficiently describe the pipes and allege the acts constituting defendant's negligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

2. LANDLORD AND TENANT (§ 169*)—INJURIES TO TENANT—ACTIONS—INSTRUCTIONS.

In a tenant's action against his landlord for injuries to a stock of goods by negligently permitting a water-closet pipe on the second floor to freeze and burst, an instruction that if it was defendant's duty to repair the pipes, and plaintiff had no control over them, then it was defendant's duty to use ordinary care in inspecting the pipes so as to prevent them from freezing, bursting, and overflowing, and if, under the lease of another tenant who used the water-closet which burst, it was defendant's duty to care for the pipes therein, she was bound to use ordinary care to prevent them from freezing, bursting, and discharging water on plaintiff's goods, and the fact that such other tenant called attention to needed repairs in the closet would not affect the responsibility which defendant owed to other tenants, was misleading where the evidence showed that the other tenant had exclusive control of the closet, and that defendant could not gain access thereto without obtaining the key from such tenant, and the only duty assumed by defendant in respect to plumbing was to unstop all waste pipes which became choked by the carelessness of those using them, and to repair all water pipes that burst from freezing because of failure to turn the water off.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

Requested charges fully covered by charges given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-665; Dec. Dig. § 260.*]

4. TRIAL (§ 250*)—INSTRUCTIONS—REQUESTS—ABSTRACT INSTRUCTIONS.

Instructions consisting of abstract propositions of law which were immaterial were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

Error to Corporation Court of City of Danville.

Action by the Lewis Shoe Company against Lucy E. Dudley. Judgment for plaintiff, and defendant brings error. Reversed.

The following is the declaration and bill of particulars:

"Declaration.

"E. T. Lewis, doing business as the Lewis Shoe Company, plaintiff, complains of Lucy E. Dudley, defendant, of a plea of trespass on the case, for this, to wit: That on a certain day, to wit, on the 30th day of Decem-

ber, 1909, and before that time, said defendant was the owner of a certain lot of land in the city of Danville, on the northern side of Main street, at or near its intersection by Union street, with a large three-story brick building thereon, commonly known as 'The Dudley Block.' That said building was and is used by defendant for letting the same to sundry tenants for certain rents charged therefor, the lower or ground floors thereof being rented, or let, to merchants for the storage and sale of sundry kinds of goods and merchandise, while the upper or second, and third stories thereof are let by defendant to sundry tenants, who use the same for offices, clubrooms, etc., with access thereto by means of stairways and halls. That plaintiff as tenant of defendant occupies one of the ground floor rooms of said building, designated as No. 440, together with the basement room thereunder, for which he pays said defendant a certain rent in monthly installments, which he uses as a shoe and hat store, and in which two rooms, on December 30, 1909, he had a large and valuable stock of shoes, hats, hosiery, and like merchandise, neatly packed in boxes, cases, and drawers, in good condition for exhibition and the sale thereof to purchasers. That in the second story of said building and immediately over the said storeroom and basement occupied by plaintiff are water-closets for the use of the tenants of the rooms and offices on said second floor, which said water-closets are furnished with water, conducted thereto in pipes connecting with a large reservoir owned by the city of Danville. That said pipes connecting with said closets, over plaintiff's said storeroom as aforesaid, were under the control of defendant, and were negligently and carelessly erected and maintained by defendant, exposed to the action of the weather, without any protection against freezing and without any device for carrying off water which might overflow from said closets, or otherwise escape from said pipes and descend upon the plaintiff's goods in the room beneath the same. That it was the duty of defendant to use due and proper care in erecting and maintaining said water pipes and to keep them in repair for the protection of plaintiff, and his property, against the freezing of the water therein and the consequent bursting and flooding of his said merchandise with water. That plaintiff had no right of control over, or of access to, said water pipes, but his protection against water which might flow therefrom depended entirely upon the due exercise of care over them by defendant, under whose control they were. That after having negligently erected said water pipes in said closets over the store occupied by plaintiff for the purpose and use aforesaid, so that they were exposed to the weather and liable to be burst by freezing of the

water therein, and having failed to make any provision to protect plaintiff from water which might escape from said pipes and descend upon his merchandise, defendant negligently and carelessly failed and refused to inspect, look after, and cause the water in said pipes to be cut off. And during a certain time, to wit, during December, 1909, defendant carelessly allowed the water to remain in said pipes for several days and nights, exposed to very cold weather, without cutting the same off, or making any attempt to prevent the freezing therein of the water, the bursting of said pipes, and flooding of plaintiff's merchandise by water, so that on a certain day or night, to wit, on December 30, 1909, said pipes, after having been frozen, burst in the nighttime, in one of the said water-closets over plaintiff's storeroom, and the pressure of the water in said reservoir forced the water in great quantities through the said burst pipe, and thence, passing through the unprotected floor of said water-closet into plaintiff's storeroom, flooded his said stock of shoes, hats, hosiery, shoe boxes, cases, leather goods, etc., greatly disordering, defacing, and damaging the same. Also, by nature of the premises, plaintiff was then and there put to much expense in endeavoring to save his said stock from further damage, and to repair said damaged goods and make the same as worthy as possible; and of advertising said damaged merchandise, all of which created much disorder and confusion in his said store, and for a long time prevented the usual carrying on of his business, by reason of all of which plaintiff was greatly damaged, to wit, to the amount of \$4,000.

"Therefore he brings this suit."

"Bill of Particulars.

"Bill of particulars showing location of and the particular pipe on defendant's premises, which, so far as plaintiff can discover, bursted, as alleged in the declaration, and from which the water escaped and descended on plaintiff's merchandise.

"(1) The water-closet which contained the pipes complained of is situated on the second floor of defendant's said building, immediately over the rear corner of plaintiff's said storeroom, being the nearest rear corner to Union street.

"(2) The particular pipe which was allowed to freeze and burst as alleged in the declaration was a certain pipe, to wit, a pipe called a supply pipe, in that particular department of said closets set apart and designated by defendant for the use of Dr. Julian M. Robinson."

The demurrer was on the ground that the declaration failed to state with sufficient certainty what water pipes and their location, the bursting of which is claimed to have inflicted damage upon plaintiff's goods, and also upon the ground that the allegation,

"that said pipes connecting with said closets over said storeroom as aforesaid were negligently and carelessly erected and maintained by defendant," does not state of what such negligence consisted with sufficient definiteness to advise defendant of what acts of negligence she is charged with.

R. W. Peatross and Harris & Harris, for plaintiff in error. Julian Meade, for defendant in error.

HARRISON, J. The defendant in error was a tenant of the plaintiff in error, occupying one of several stores in the "Dudley Block," situated on the corner of Main and Union streets, in Danville. The second and third stories of the building, which cover all the stores in the block, were occupied by numerous tenants as offices, lodgerooms, clubrooms, etc., the landlord occupying no part of the building, and retaining no portion thereof for her own use. The building was supplied throughout, for the convenience of the tenants, with water pipes, taking water to the respective apartments. The building was not supplied with heat, and was not attended to or looked after by a janitor or any other person in the employment of the landlord; the respective tenants having their own servants, and furnishing the heat for their respective apartments. A water-closet was situated on the second floor, over the store of the defendant in error, which was in the exclusive occupation and use of Dr. Robinson, one of the tenants on that floor. On the night of December 30, 1909, the pipe in this closet burst as a result of freezing and thawing, and the water overflowed the closet, ran through the floor and ceiling into the store below of the defendant in error, flooding and greatly damaging its stock of goods. Thereupon this suit was brought by the Lewis Shoe Company to recover damages for the loss sustained. There was a verdict and judgment for the plaintiff, to which judgment this writ of error was awarded.

[1] There was no error in the court's refusal to sustain the demurrer to the declaration. The material facts are distinctly alleged, leaving no need for conjecture as to any fact upon which the right of recovery was based. The declaration, together with the bill of particulars filed therewith, gave full and sufficient notice of the nature and character of the plaintiff's claim, pointing out the particular pipe which burst and its location.

In the case of *Keoughtan Lodge v. Steiner & Kaufman*, 106 Va. 589, 56 S. E. 569, where the building was under the superintendence and control of a janitor, who was the employé and agent of the landlord, quoting from *Farnham on Waters and Water Rights*, it is said: "If the injury is caused by leakage from pipes in other portions of the building than that occupied by the in-

jured tenant, the question of the landlord's liability will depend upon his connection with the injury. He is liable for all injuries resulting from his own negligence, and an exemption clause in the lease will not include such injury."

We find a full and very helpful discussion of the duties and liabilities of landlord and tenant in the case of *McCarthy v. New York County Savings Bank*, 74 Me. 315, 43 Am. Rep. 591. In that case the room occupied by the tenant was furnished with a water basin the apertures of which were not sufficient to carry off all the water that was delivered by the faucet when left open. The tenant left the faucet open, and the water overflowed and injured the goods of another tenant occupying rooms on a lower story. It was held that the landlord was not liable, the court saying: "There is nothing to indicate that his (the tenant's) control of the faucet which he negligently left open overnight, thereby causing the damage alleged, was not as exclusive of any rightful exercise of authority by the landlord in regard to its use as was his possession of any part of the leased premises. The bowl supplied with water was in the room when Fiske began his tenancy under the defendants. He used it and paid the rent. He was tenant of the bank as to the bowl and its appurtenances, as of the other parts of the room, and with such rights of possession and control as pertained to the tenancy. These fixtures were leased to him, and as lessee he was the actual occupant of them." Again it is said: "That water was introduced into the building by the bank, that they caused the pipes to be laid and maintained and paid the water rates, are not facts which tend to show their direct and present control of faucets within the rooms of their tenants. They may enter, if necessary, to change or repair the pipes, but, while the room with its fixtures is in the possession of a tenant, it is he who sustains to third persons the liability of an occupant, as the landlord sustains that of owner." And, further, it is said: "The liability of the landlord does not follow from the fact that the building does not contain the latest and most improved system of water pipes. He does not insure against the negligence of his tenants, nor is he bound to construct his building so as to reduce the possibilities of damage from such negligence to an absolute minimum."

In 2 *Shearman & Redfield on Negligence*, § 723, it is said: "If the landlord provides pipes and other plumbing of good quality and surrenders possession, the tenant only is responsible for the mode in which these things are used, and for any overflow caused either by neglect to turn off the water, or by such misuse of the works as deprives them of power to stop the flow of water."

In the case at bar, the uncontradicted evi-

dence shows, in addition to what has been already stated, that the building in question was planned and erected under the supervision of a competent architect, that the plumbing work was done by an experienced plumber, and the material used the best the market afforded; that the water-closets were properly located; and that each of them, including the one used and occupied by Dr. Robinson, was provided with a stop cock on the supply pipe which ran up to each tank, and was within easy reach of any one who desired to turn off the water, and thereby prevent its escape in the event of freezing; that Dr. Robinson was the sole occupant and had the exclusive use and control, in connection with the offices rented by him, of the water-closet in which the pipe froze and burst; that the key hung in his office, where the landlord could and did get at it when repairs were to be made; that whenever the water-closet became stopped up, or in any way out of order, he notified the agents of the landlord, and they always repaired it or put it in order; that four days prior to the bursting of the pipe which did the damage complained of, when it was very cold, he tried to turn the stop cock and stop the flow of water in his tank, but it was frozen and would not turn, and that it remained frozen for four days; that he did not tell the tenant below of the frozen pipe above him and did not notify the agents of the landlord that the pipe was out of order, because it had frozen before and always melted, and he thought it would do so again.

[2] The plaintiff asked for two instructions, which were given, over the protest of the defendant, as follows:

"(1) The court instructs the jury that if they believe from the evidence that it was the duty of the defendant to look after and keep in repair the water pipes in the water-closet used by Dr. J. M. Robinson in connection with the office let to him by the defendant, and that plaintiff had no right or control over said pipes, then the court instructs the jury that it was the duty of defendant to use ordinary and reasonable care in inspecting and caring for said pipes so as to prevent them from freezing, bursting, and overflowing the premises of plaintiff, situated under them.

"(2) The court instructs the jury that if they believe from the evidence in this cause that under the rental contract or agreement between defendant and Dr. Julian Robinson it was the duty of defendant, Lucy E. Dudley, to look after, care for, and keep in order the water pipes in the closet rented to and occupied by Dr. Julian Robinson, that then it was her duty to use ordinary and reasonable care to prevent said water pipes from freezing, bursting, and discharging water on the goods of the plaintiff, and the mere fact that the tenant, Dr.

Robinson, may have called attention to needed repairs to the pipes in his closet, and requested the defendant to enter and make such repairs, does not shift the responsibility or duty which she may have owed to other tenants in her building to him."

These instructions were misleading, without evidence to support them, and were well calculated to impose upon the defendant, as landlord, responsibility for duties she was under no obligation to perform. There is no evidence tending to show that it was the duty of the defendant to look after and care for the pipes in Dr. Robinson's office with a view to keeping them from freezing and bursting. On the contrary, the evidence shows that Dr. Robinson had been placed in the exclusive possession and control of the water-closet to which no one, not even the landlord, had access, except by procuring from him the only key that opened the door to the closet; that the only duty devolving upon the landlord in connection with the closet was to repair it or put it in order whenever notified that it was out of order, which she had always done promptly. The evidence on this point is uncontradicted and conclusive, and shows that the defendant's sole duty with respect to this closet was exactly the same that she assumed under her written lease with the plaintiff, which provides, as her obligation in this matter, "that she will unstop all waste pipes that may become choked by negligence or inattention on the part of those using them, and will repair all water pipes that may burst from freezing because of failure to turn the water off."

The instructions erroneously told the jury that the duty of the landlord to repair the pipes when out of order imposed upon her the duty of preventing them from getting out of order; in other words, that it was her duty to inspect and care for the pipes in Dr. Robinson's closet so as to prevent the water in them from freezing and the pipes from bursting. There is no evidence in support of this proposition. The instructions ignored the difference between the duty of the landlord in the matter of repairing and keeping pipes in order and the duty of the tenant in his use of the premises to avail himself of the precautions provided to prevent the escape of water in the event of the pipes freezing and bursting.

[3, 4] The defendant asked for 14 instructions, 10 of which were given, and objection is taken to the action of the court in refusing to give the remaining 4. In this there was no error. The 10 instructions given for the defendant fully submitted her case to the jury. The 4 rejected instructions were either fully covered by the 10 which were given, or contained an abstract proposition of law which was immaterial.

For the error pointed out in the two in-

structions given for the plaintiff, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(113 Va. 24)

BETTMAN v. SKINNER.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. TRIAL (§ 260*)—INSTRUCTIONS COVERED BY OTHERS.

In an action for injuries by falling from a stepladder, the court instructed that it was the duty of defendant to provide plaintiff with a reasonably safe stepladder with which to perform his work. *Held*, that the omission of the qualification, that defendant's duty was "to use ordinary care" so to do, is not material where the omitted matter is fully covered by an instruction given by request of defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. APPEAL AND ERROR (§ 263*)—NECESSITY OF EXCEPTION—INSTRUCTIONS.

Omission in instruction cannot be urged on appeal where no exception was taken on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

3. MASTER AND SERVANT (§ 293*)—CONFLICTING INSTRUCTIONS.

In an action for injuries to a servant by a fall from a defective stepladder, an instruction that it was the duty of defendant to provide plaintiff with a reasonably safe stepladder, and that plaintiff, in the absence of notice to the contrary, had the right to rely on the performance of that duty by the defendant. At the instance of defendant, the court instructed that the jury must believe that the stepladder was defective; that defendant knew or ought to have known of the defect; that plaintiff did not know of it or, by the exercise of ordinary care, could not have known of it, and that although the stepladder was furnished to plaintiff by defendant with knowledge that it was unsafe and by reason thereof, plaintiff sustained the jury complained of, yet they must find for defendant, if the defects were obvious or were known or by the exercise of reasonable care could have been known by plaintiff. *Held*, that plaintiff's instruction is not in conflict with defendant's instructions, but that the latter qualified it so as to meet defendant's view of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

4. APPEAL AND ERROR (§ 197*)—NECESSITY OF OBJECTIONS—ADMISSION OF EVIDENCE.

An objection to an instruction which allowed the jury to award damages for loss of wages, doctor's bill and hospital expenses, under a declaration which claimed only general damages, cannot be urged on appeal where defendant, without objection, allowed evidence upon all these matters to be introduced, as defendant could have called for a bill of par-

ticalars, under Code 1904, § 3249, or an amendment of the declaration would have been permissible.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; * Pleading, Cent. Dig. §§ 1428-1441.]

5. TRIAL (§ 59*)—APPEAL AND ERROR (§ 970*)—ORDER OF INTRODUCING EVIDENCE—DISCRETION OF COURT.

The order of introducing evidence is always a matter largely in the discretion of the trial court, and affords no ground for reversal where the exercise of such discretion does not operate to the prejudice of appellant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-142; Dec. Dig. § 59; * Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

6. DAMAGES (§ 182*)—EXCESSIVE DAMAGES—PHYSICAL INJURIES.

Where a fall from a stepladder results in compound fracture of the lower portions of both bones of one leg and the injury is permanent and suppuration resulted, and a second operation was necessary to remove fragments of bone, and it was with difficulty that amputation of the leg was avoided, and the doctor's bill and hospital expenses at the time of the trial amount to \$367, a judgment for \$750 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 872-885; Dec. Dig. § 182.*]

Error to Law and Chancery Court of City of Norfolk.

Action by John L. Skinner against M. L. Bettman, for injuries received from falling from a stepladder. Under defendant's first instruction, the jury were told that in order to find for plaintiff, they must believe from the evidence that the stepladder was defective; that defendant knew or ought to have known of the defect; that plaintiff did not know of it or by the exercise of ordinary care, could not have known of it and that the injury resulted in spite of ordinary care on the part of defendant. Under defendant's second instruction, the jury were told that although they believe from the evidence that the stepladder was furnished to plaintiff by defendant with the knowledge on the part of defendant that it was defective, and by reason thereof plaintiff sustained the injury complained of, yet they must find for defendant if they believe from the evidence that the defects were open or obvious or were such that were known or by the exercise of reasonable care, could have been known by plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

A. B. Seldner, for plaintiff in error. J. Edward Cole, for defendant in error.

WHITTLE, J. This action, which resulted in a judgment for \$750 in favor of Skinner against Bettman, arose as follows: The defendant, through his manager Williams, kept a barroom in the city of Norfolk. On the morning of June 27, 1910, the manager,

who was late in opening up the saloon, finding himself short of help, gave a hurry order to the porter to hire a man to assist them. Skinner, who had never worked at the place before, was called in, and immediately on his arrival the manager told him to get out of his coat, and, having directed the porter to bring out the stepladder, hurried Skinner up the ladder, at the same time pointing out to him where he was to begin washing the windows. While Williams was giving these instructions, the plaintiff ascended the ladder to within two steps of the top, when the side pieces spread and the ladder collapsed, precipitating him to the pavement.

The ladder had been in use for many years, one of the cross-braces was missing, and it was tied with a piece of rope. The plaintiff testified that it seemed to be all right, and he knew nothing to the contrary until after he had gotten near the top and it began to spread. The fall resulted in a compound fracture of the lower portions of both bones of the left leg. The injury was serious and permanent, suppuration supervened, and a second operation was necessary to remove fragments of bone, and it was with difficulty that amputation of the leg was avoided. The doctor's bill and hospital charges at the time of the trial amounted to \$457.

Three errors are assigned: (1) To the action of the court in granting instructions Nos. 1 and 2 for the plaintiff; (2) to the admission of testimony as to the wages the plaintiff was earning when injured, after the evidence had been closed; and (3) to the overruling of the defendant's motion for a new trial.

[1-3] Plaintiff's first instruction told the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe stepladder with which to perform the work assigned to him; and that the servant, in the absence of notice to the contrary, had a right to rely upon the performance of that duty by the master. The only objection raised to this instruction is that it is said to omit the qualification that if the plaintiff knew, or in the exercise of ordinary care ought to have known, of the defective condition of the ladder, he cannot recover.

This restriction would have come with more propriety from the other side, and in point of fact is fully covered by the defendant's instruction No. 2.

In the first part of the instruction, in defining the duty of the defendant, the words "to use ordinary care" should have preceded the language, "to provide the plaintiff with a reasonably safe stepladder," etc. But the omission was not made the ground of excep-

tion, nor does it constitute reversible error under the evidence in this case.

Nor is the instruction in conflict with the defendant's instructions Nos. 1 and 2. The latter are complementary merely of the former, and qualify it so as to meet the defendant's view of the evidence.

[4] The objection to the plaintiff's other instruction, that it allowed the jury to award special damages (that is to say, for loss of wages, doctor's bill, and hospital expenses) in a case where the declaration claimed only general damages for the injury suffered, is without merit. We are not prepared to admit that loss of wages, doctor's bill, and hospital expenses are such damages as need to be specially pleaded to be recoverable in this action. It would seem more reasonable to suppose that all these items of damage would necessarily and ordinarily inhere in case of an injury of the gravity of that suffered by the plaintiff. But be that as it may, the defendant, without objection, allowed the introduction of evidence upon all matters covered by this assignment, and he cannot be allowed to make that objection for the first time in this court. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *N. N. & O. P. Ry., etc., Co. v. McCormick*, 106 Va. 517, 56 S. E. 281.

If a bill of particulars was desired, it could have been demanded under Va. Code 1904, § 3249; or, if the court's attention had been called to the objection at the proper time, a bar amendment of the declaration would have been permissible. *Wood v. Am. Nat. Bk.*, 100 Va. 306, 40 S. E. 931; *City of Richmond v. Wood*, 109 Va. 75, 63 S. E. 449.

[5] The second assignment involves the order of the introduction of evidence. That is always a matter largely in the discretion of the trial court, and rarely affords ground for reversal. In this instance the discretion, as exercised, has in no way operated to the prejudice of the defendant. *Norfolk, etc., Co. v. Norris*, 101 Va. 422, 44 S. E. 719; *Pocahontas Collieries Co. v. Williams*, 105 Va. 711, 54 S. E. 868; *Moore Lumber Corp. v. Walker*, 110 Va. 775, 67 S. E. 374.

[6] The third and last assignment of error is to the refusal of the court to set aside the verdict and grant a new trial.

The case was fairly submitted to the jury on instructions, and the evidence, upon the plaintiff's theory of the case, was amply sufficient to sustain their finding. Indeed, the damages awarded, considering the serious character of the injury and the expenses incurred by the plaintiff, were extremely moderate.

Upon the whole case, we are of opinion that the judgment is plainly right and ought to be affirmed.

(113 Va. 53)

GREENSBURG NAT. BANK v. C. SYER & CO. et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. BANKS AND BANKING (§§ 127, 159*)—DRAFTS—OWNERSHIP.

If a bank received a draft as a deposit to be treated as cash by the depositor, according to the intention of the bank and the depositor when it was deposited, the title thereto passed to the bank; but, if the intention was that the bank should only receive the draft for collection, title did not pass to it.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 804, 810, 547-553; Dec. Dig. §§ 127, 159.*]

2. APPEAL AND ERROR (§ 263*)—OBJECTION IN TRIAL COURT—INSTRUCTIONS.

An instruction not excepted to below is the law of the case, though erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

3. EVIDENCE (§ 235*)—ADMISSIONS—DRAWER OF DRAFT.

After the drawer of a draft has parted with the title thereto to his bank, no subsequent admissions or conduct of his can prejudice the bank's rights.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 873-875; Dec. Dig. § 235.*]

4. BANKS AND BANKING (§ 154*)—DEPOSIT OF DRAFT—TITLE—EVIDENCE.

Evidence held to show that a draft with bill of lading attached was deposited by the drawer in his bank for collection, and not so as to pass title thereto to the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 154.*]

Error to Law and Chancery Court of City of Norfolk.

Action, aided by attachment, by C. Syer & Co. against J. M. Hornung, in which the Greensburg National Bank intervenes as claimant of the attached funds. Judgment for plaintiff against the original defendant directed to be paid out of the fund, and the bank brings error. Affirmed.

Loyall, Taylor & White, for plaintiff in error. Jeffries, Wolcott, Wolcott & Lankford, for defendant in error.

KEITH, P. Syer & Co., of Norfolk, purchased of J. M. Hornung, of Greensburg, Ind., a car load of flour. When the flour was shipped, Hornung attached the bill of lading to a draft on Syer & Co. for \$1,062, and deposited the draft in the Greensburg National Bank of Greensburg, Ind. Upon arrival of the flour at Norfolk, Syer & Co. claimed that it was of inferior quality and refused to pay the draft which had been presented to them by the Citizens' Bank of Norfolk, through which the draft had come from the Greensburg National Bank. Syer & Co. notified Hornung of their dissatisfaction with the flour, and thereupon Hornung wired Syer & Co. to draw on him for the amount of the de-

preciation in the value of the flour. Syer & Co. did not take up the draft, but drew on Hornung for the depreciation, which draft Hornung refused to pay, and upon his refusal Syer & Co. went to the Citizens' Bank of Norfolk, took up the draft for \$1,062, and immediately brought suit against Hornung for the amount of the depreciation in the flour and attached the money in the hands of the Citizens' Bank of Norfolk as the property of Hornung.

The Greensburg National Bank was allowed to intervene as claimant of the fund held by the Citizens' Bank, and thereupon moved to quash the attachment on the ground that the fund was not the property of Hornung, but belonged to the Greensburg National Bank, and that the attachment was issued upon false suggestion. The matter was submitted to a jury, who found that the money in the bank was the property of Hornung and subject to the attachment of Syer & Co.; a judgment was entered in favor of Syer & Co. against Hornung for \$420, the amount of the depreciation in the flour, which was directed to be paid by the Citizens' Bank out of the fund which had been attached in its hands; and thereupon the Greensburg National Bank obtained a writ of error from this court.

Defendants in error urge several formal objections to the course of procedure in the trial court, which, in the view we take of the case, need not be here considered.

The draft deposited by Hornung in the Greensburg National Bank was listed on the following deposit slip:

Deposited in
Greensburg National Bank
of

Greensburg, Ind.

By J. M. Hornung, August 14, 1909.

Please list each check separately.

Dollars. Cents.

| | | |
|--------------------------|------|----|
| Currency | | |
| Gold | | |
| Silver | | |
| Draft, C. Syer & Co..... | 1062 | 00 |

Certain entries in Hornung's passbook were introduced in evidence, consisting of several items of cash during the month of August, 1909, then an entry on the 14th, "Syer & Co. \$1,062.00," followed several entries of cash during the same month.

The plaintiff proved by a witness, the vice president of the Seaboard Bank of Norfolk; that he had been engaged in the banking business for a number of years and was acquainted with the customs and usages among bankers throughout the country as to the manner of handling drafts for their customers; that it was the general usage and custom to permit a customer to deposit a draft with the bank for collection, and pass the amount thereof to the credit of the customer, and to permit the customer to check upon the amount so credited, the recognized understanding being that, when the draft is re-

ceived by the bank for collection, it may be charged back to the customer's account at any time if not paid; that this is recognized merely as a favor from the bank to the customer, at the option of the bank, dependent largely upon the confidence the bank has in the customer, and the extent of his dealings with the bank. On cross-examination this witness testified, further, that it was the custom of banks to purchase drafts as well as to take them for collection; that, from an inspection of the draft in this case, the deposit slip, and bank book, it was evident that the draft was discounted by the bank and that J. M. Hornung received cash for the same; that the draft shows on its face that it was deposited in the Greensburg National Bank as cash, and not for collection; that the indorsements on the back of the draft show it was handled by the banks whose stamps appear thereon for collection; and that the bank book shows that the bank had not been reimbursed by J. M. Hornung, or by the collection of the draft.

It further appears in the evidence on behalf of the Greensburg National Bank that it received from Hornung a draft with bill of lading on Syer & Co. for \$1,062 for credit to Hornung; that the draft was presented with the passbook of John M. Hornung, and the sum of \$1,062, was credited on Hornung's passbook, and the account of Hornung on the general ledger was credited with a like amount; that, in saying that Hornung was credited with that amount, the witness meant that for that amount the Greensburg National Bank became the debtor of Hornung and that he became the creditor; that the draft was forwarded by the Greensburg National Bank with instructions to collect and place the proceeds to its credit; that the amount of the draft was charged on its general ledger to an account as "due from other banks"; that it was the custom of banks, when drafts were received from strangers, or when presented by customers for collection only, to forward the drafts to the proper point for collection, and the proceeds when received were credited to the proper party, and in that case the draft would not become the property of the bank, but it would be acting as agent for the payee of the draft; that in such case in its indorsement on the draft there would appear the words, "for collection"; that the credit which was given Hornung for the draft in dispute had never been canceled or charged off on his account; that at the time the draft in question was received by the Greensburg Bank Hornung's account was overdrawn \$91.68; that after the deposit of that draft there was a balance to his credit of \$970.32; that Hornung had no authority or right from the Greensburg National Bank to instruct the Citizens' National Bank at Norfolk, or C. Syer & Co., or any one, to reduce

the amount of the draft in question in the payment thereof; that, when the draft was received by the Greensburg National Bank, it was the intention of the bank to purchase the draft for the sum stated therein and credit the account of John M. Hornung the same as if it had been that amount of actual money. The testimony of another witness introduced by the bank is substantially to the same effect.

[1] After the testimony was closed, the court gave to the jury the following instruction: "The court instructs the jury that the question as to whether or not the title to the draft deposited by Hornung with the Greensburg National Bank passed to the bank or remained in Hornung is one of the facts to be determined by the jury, under all the facts and circumstances of this case as proven by the evidence. If the jury believes from the evidence that the Greensburg National Bank received the draft as a deposit to be treated as cash, and that such was the intention of said bank and Hornung at the time said draft was deposited, then title to the draft passed to the bank and the jury should find in its favor; but if the jury believes from the evidence that it was the intention of the bank and Hornung, at the time of the deposit of the draft, that said draft should not be received as cash, but only by the bank as an agent for collection, then the title to the draft did not pass to the bank, and the jury should find for the plaintiff. Checks or drafts deposited or credited, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected."

[2] This instruction was not objected to by either party to the controversy. It is, we believe, a correct statement of the law, and, in any event, there being no exception to it, it is the law of this case.

Defendants in error rely upon the following propositions, which are shown in evidence, as being sufficient to maintain the verdict and judgment complained of: That the transaction was in line with the regular custom among banks in crediting such collections for the accommodation of their regular depositors; that Hornung was an old depositor of the bank of six or seven years standing; that the draft was not discounted, but the whole amount thereof was placed to Hornung's credit; that it was deposited as paper, and not as cash; that it was treated and dealt with by Hornung and his attorneys, in his correspondence with Syer, as his property and under his control; that the attorneys who appeared for Hornung in dealing with Syer & Co. also appeared for the bank in the taking of depositions; that, instead of requiring protest and notice of dishonor to be given or waived so as to hold the maker and indorsers liable in case of dishonor, the bank

directed that no protest should be made, showing that it did not look to the maker for recourse as such under the laws governing the transfer of negotiable instruments; but that the draft was regarded as being still Hornung's paper, which, under the custom and usage shown to exist, could be charged back to him at any time.

The jury, as we have seen, found a verdict for the plaintiff; the court entered judgment upon that verdict; there was no exception to the law, as stated to the jury by the court; and the case is before us upon a demurrer to the evidence. Our only province, therefore, is to consider whether or not there be sufficient testimony to sustain the verdict of the jury.

In *Lynchburg Milling Co. v. National Exchange Bank*, 109 Va. 639, 64 S. E. 980, the plaintiff in error, who was the plaintiff in the court below, brought an action of assumpsit against White & Rumsey Grain Company of Chicago, and issued an attachment upon the effects of the defendant in the possession of the National Exchange Bank. The bank answered, denying the suggestion, but stated by way of explanation that it had received from and on account of the Continental National Bank of Chicago a draft drawn by the defendant, the White & Rumsey Grain Company, on the plaintiff, the Lynchburg Milling Company, in favor of the Chicago bank for \$533.35 for collection, to which draft a bill of lading was attached for a car load of oats shipped by the defendant to the plaintiff; that the draft was paid by the plaintiff to respondent, and the amount placed to the credit of the Chicago bank, but the fund was not remitted because of the pendency of the attachment. And the question considered was to whom the money attached belonged—whether to the White & Rumsey Grain Company, or to the Chicago bank. It was held in that case to be the property of the latter, and that the attachment had been sued out upon false suggestion. A circumstance relied upon by plaintiff in error in that case was that the drawer waived protest and notice; but this court was of opinion that the circumstance was not inconsistent with the Chicago bank's bona fide ownership of the draft. The court did not hold that it was not a pertinent fact to be considered along with other circumstances in determining the question of ownership.

In the case of *St. Louis, etc., R. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, the court said, speaking of deposit of a draft in bank, that: "If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain." And in the same case it was said that the fact that the draft was entered at its full value indicated that it was not discounted but credited for

convenience and in anticipation of its payment.

In *Baillie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74, Chief Justice Simmons, speaking for the Supreme Court of Georgia, said: "In the absence of anything indicating a different understanding, a bank which in the ordinary course of business receives from a depositor a check upon another bank, and credits it on his deposit book, not as cash, but as a check, will not be held to be an absolute purchaser of the check. If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper."

[3] It is insisted by counsel for plaintiff in error that no importance should be attached to the correspondence between Hornung and his attorneys and Syer & Co. with respect to this draft after Syer & Co. had refused payment, upon the ground that before this correspondence took place Hornung had parted with all interest in the draft, the title to which had passed to the Greensburg National Bank, and that Hornung no longer had any interest in or control over it.

The trouble with this objection is that it assumes the truth of the very fact which is the subject of inquiry—the ownership of the draft in question. The introduction of the evidence was not objected to. It would have been proper, if the court had been requested so to do, for it to have stated to the jury that Hornung's admissions or conduct with respect to this draft could not prejudice the Greensburg National Bank after Hornung had parted with his entire interest in it; but no such request was made, and no such limitation imposed, and the jury, under the circumstances, might very well have thought that Hornung would not have authorized Syer & Co. to reduce the draft by the amount of the depreciation unless he had some control over the subject.

[4] Looking to the whole case as it was presented to the jury, the custom among bankers, the relation of Hornung to the Greensburg National Bank as a depositor of many years standing, that the draft was not discounted, that the whole amount thereof was placed to Hornung's credit, that it was deposited as paper and not as cash, that it was treated and dealt with by Hornung and his attorneys as his property in their correspondence with Syer & Co., and that protest was waived, it presents a case in which this court cannot say that the verdict of the jury, rendered upon proper instructions and approved by the trial court, was without evidence to sustain it, and therefore the judgment complained of is affirmed.

Affirmed.

(113 Va. 28)

BUTLER BROS.-HOFF CO., Inc., v. VIRGINIAN RY. CO., Inc.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. CONTRACTS (§ 170*)—CONSTRUCTION BY PARTIES.

In construing a contract, the court may look to the construction which the parties themselves have placed upon it in its execution.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

2. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION OF CONTRACT BY PARTIES—ACQUIESCENCE.

A railroad construction contract provided compensation ranging from 27 cents per cubic yard for "earth," to \$3 per cubic yard for "excavation in water," which the contract defined as foundation pits under water and the deepening of channels in running water. The railroad's engineer, on whose estimates and certificates of the work done the contractor was paid, at no time during the work classified any of it as excavation in water, nor the contractor ever claimed that any part of this work should be so classified, but during the work he concluded that it was excavation in water and intended upon completion to assert a claim for compensation on that classification, although no notice of this determination was given to the railway. *Held*, in the contractor's action for such further compensation, that the meaning of the term as used in the contract was doubtful, and the court would resort to the construction given to the contract by the parties, but that the contractor's undisclosed conclusion would not be considered, and that, as the contractor by his acquiescence had placed the same construction on the contract as the railway's engineer, that construction would prevail, so that there could be no recovery.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

3. APPEAL AND ERROR (§ 1099*)—REVIEW—FINDINGS—CONFLICTING EVIDENCE.

When the evidence in a contractor's action against a railroad for extra labor and materials rendered necessary in repairing a trestle, which fell because of defective plans furnished by the railroad, was conflicting and the contractor had the burden of proof, the Supreme Court of Appeals could not say that the trial court's refusal to allow therefor was error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1099.*]

4. INTEREST (§ 50*)—COMPUTATION AND TIME—SUSPENSION BY TENDER.

Where plaintiff obtained a decree for money with interest from the date when it was due, payable on the execution of a release from him, and defendant was willing to pay to the plaintiff the amount decreed on plaintiff's execution of the release, and moved to be released from payment of interest thereafter, without prejudice to his right to assign cross-errors on appeal, but did not actually tender the amount of the decree either to the plaintiff or to the court, and the plaintiff did not waive an actual tender, the motion was properly overruled, since upon payment into court the court could have protected defendant by ordering the execution of the release.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 114; Dec. Dig. § 50.*]

5. DAMAGES (§ 68*)—INTEREST—DELAY IN ISSUING CERTIFICATE.

Where a contract for railroad construction provided that, upon the completion and accept-

ance of the work, the railroad's engineer should issue a certificate of acceptance, upon which the entire balance due the contractor should be due within 20 days, and the engineer was notified of the completion and requested to issue the certificate, but delayed until nearly two months after the completion, the contractor, to whom a large sum was due, was entitled to interest thereon from the completion of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. § 68.*]

Appeal from Circuit Court of Campbell County.

Bill by the Butler Bros.-Hoff Company, Incorporated, against the Virginian Railway Company, Incorporated. From the decree, complainant appeals. Affirmed.

Braxton & Eggleston and J. T. Coleman, for appellant. H. T. Hall, E. W. Knight, and A. A. Phlegar, for appellee.

BUCHANAN, J. The principal controversy in this case is as to the amount of compensation which the appellant is entitled to receive for making a cut in the construction of the appellee's line of road, under a contract entered into between the appellant contractor and the railway company on the 9th of December, 1905, for the construction of about 6½ miles of the latter's roadbed. Upon that section of the road there is a cut known as "Terryville Cut." It is about 3,000 feet long and some 80 feet deep at its summit. There is no very material difference between the parties as to the number of yards of earth and stone removed in making the cut, but the principal controversy is over the classification of the material removed.

The contract or agreement between the parties is long, covering more than 20 pages of the printed record, and containing 34 sections.

Section 23 provides what compensation the contractor is to receive for its work, and, so far as is material to the work in the cut, is as follows:

"The contractor agrees to receive as full compensation for all material used and labor performed in the work and for completing the same in all respects according to the aforesaid mentioned plans and specifications and the requirements of the chief engineer under them, the prices enumerated below.

* * *

| | |
|---|-------------|
| "Classified Excavation. | |
| Earth per cu. yard..... | .27 (cents) |
| Loose rock per cu. yard..... | .40 (cents) |
| Solid rock per cu. yard..... | .85 (cents) |
| Excavation in water, per cu. yard | \$.3.00" |

In the general specifications for grading and masonry, which are expressly made a part of the agreement between the parties, all "excavation" is designated as "classified" or "unclassified," and what is meant by the terms "earth," "loose rock," "solid rock," and "excavation in water" is defined or divided as follows:

"(a) Earth includes clay, sand, gravel, loam, decomposed rock and slate, stones and boulders containing less than one (1) cubic foot, and all other materials, excepting those described below.

"(b) Loose Rock.—Includes all boulders and detached masses of rock measuring over one (1) cubic foot in bulk and less than one (1) cubic yard; also all slate, shale, soft friable sandstone and soapstone, and other rock, which in the judgment of the engineer, may be removed without continuous blasting, although blasting may occasionally be resorted to.

"(c) Solid rock will include all rock found in ledges, or masses of more than one (1) cubic yard which, in the judgment of the engineer, can only be removed by blasting. In rock excavations the 'bottom' must in all cases be taken down truly to subgrade; and, when so ordered by the engineer, ditches must be formed at foot of slopes.

"(d) Excavation in water will apply to foundation pits under water, which, through no fault of the contractor, cannot, in the opinion of the engineer, be ditched or drained, but require pumping, and the deepening of channels in running water; it must cover all classes of material and must include drainage, bailing, pumping and all materials and labor connected with such excavations; also the necessary benching and dressing of rock in foundations.

"Unclassified excavation includes all classes of material of every nature whatsoever, with the sole exception of 'excavation in water,' as described above."

The contention of the appellant is that the excavation in Terryville Cut, or a large portion of it, was "excavation in water," as defined in the contract, and that it was entitled to pay therefor as such. The railway company insists that under the contract the work in Terryville Cut was not, nor was any part of it, "excavation in water" under the contract, and that, if it were, the appellant has waived, and is estopped from setting up, such claim.

The first question, therefore, to be considered is, What is meant by "excavation in water," as used in the agreement and as defined in the specifications for grading?

The term "excavation in water," as is clear from the language quoted above, does not apply to all excavation in water, but only to two kinds, viz.: First, "to foundation pits under water," under certain circumstances; and, second, to "the deepening of channels in running water." It is not claimed by the appellant that its work in the cut was work in a foundation pit, but its contention is that it was work done in deepening a channel in running water.

That term, or the words thereof, if used in their primary or ordinary and popular sense, refer, as it seems to us, to work in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

making deeper the bed of a running stream, such as a creek or river, rather than to work in water in the construction of a railroad cut which collects therein from seepage, wet weather springs, or otherwise, during the progress of the work in opening or making the cut. At least it is not clear that the term was intended to include the latter kind of work. There is nothing in the agreement to show that the term or words were used in any other than in their ordinary and popular sense. This being so, viewing the language used in the most favorable light that it can be considered for the appellant, the most that can be said is that the meaning of the term is not clear, but doubtful.

[1] In construing a contract where there is a doubt as to its proper meaning, the court may look to the construction which the parties themselves have placed upon it in its execution, in order to ascertain its meaning.

[2] It appears that the work on the cut was commenced in April, 1906, and was completed in September, 1907. At no time during that whole period was the work done in the cut, or any part of it, treated or classified as "excavation in water" by the railway company or its engineers; nor was any claim made by the appellant to the railway company during that period that any part of the work in the cut was "excavation in water," or that there was any error or mistake made in the monthly estimates (some seventeen or eighteen in number) in not so classifying any part of the work done in the cut.

By section 80 of the agreement between the parties it is provided: "So long as the work herein contracted for is prosecuted agreeably to the provisions of this contract, and with such progress as may be satisfactory to the chief engineer, the said chief engineer will, on or about the first day of every month, make an approximate estimate of the proportionate value of the work done thereon and of acceptable material furnished and delivered upon the company's property at the site of the work, up to and inclusive of the last day of the previous month, based upon the price or prices hereinbefore specified; and the amount of said estimate certified to as being correct and in accordance with the terms of this contract after deducting ten (10) per cent. and all previous payments, shall be due and payable to the contractor at the office of the treasurer of the company, on or about the 20th day of the current month."

These estimates, as will be observed from the language of the section, were to be based upon the price or prices to be paid according to the provisions of the contract. It was a matter of the greatest consequence to both parties that the work should be properly classified in the monthly estimates, since they were the basis upon which payments were to be and were made from month to month, and it was to the interest of both parties that errors, if any, in classification,

should be promptly corrected, as the prices for the different kinds of excavation varied from 27 cents per cubic yard for "earth," to \$3 per cubic yard for "excavation in water," and because of the difficulties that would arise in making corrections after conditions in the cut had changed. The importance of correcting errors, whether in monthly statements or in other statements which the railway company directed its division engineers to furnish from time to time to contractors as to the work done by them, was fully recognized by the appellant, for in one of its letters written in March, 1906, in acknowledging the receipt of a circular requiring statements to be made by the division engineers, it says: "As a matter of equity, of course, we feel that we should be advised what the engineers allow us, so that we may take exception to same if we find they are incorrect at the time and the whole matter is fresh in everybody's mind." In June, 1906, the appellant wrote to the chief engineer of the company that "We desire to call your attention to the matter of wet excavation in Block D-2 of the Tidewater Ry. (now the Virginian Railway) for which we have the contract. We have not been allowed the proper amount of wet excavation. Especially would we call your attention to culvert located at station 1507x. The engineers' estimate is 60 yards; our estimate is 273 yards. The discrepancy you will notice is quite glaring."

On several other occasions during the progress of the work on the cut the appellant called the attention of the railway company or its engineers to errors as to the amount of wet excavation allowed on other parts of its work. In April, 1907, when the work in the cut was far on its way to completion, and long after the conditions had arisen which entitled the appellant, as it claims now, to have the work in the cut classified as wet excavation, it wrote that "our estimates have not for months furnished money enough to meet even the pay roll—to say nothing of supplies and materials. The cause lies largely in classification. In 'Terryville Cut' the rock we could see and bid on is called largely loose rock. The average of extreme hard and extreme soft would produce a hard rock. We hope you will rectify this in this month's estimate." In other parts of the letter complaint is made that wet excavation at other places of its work was not fully estimated. While the appellant complains that the rock in the cut is being classified as "loose rock" when it should be classified as solid, there is no suggestion that there is any error in failing to classify any of the work done as "excavation in water."

It clearly appears from the record that the railway company always placed the same construction upon the contract as to what was meant by wet excavation, and that the

appellant, by its acts and conduct, placed the same construction upon it during the whole time the work in the cut was being done, and that it never in its dealings with the railway company suggested even, much less claimed, the construction it now contends for until some time after the work was completed and after a final estimate was asked for.

But the appellant insists, notwithstanding its acts and conduct in placing the same construction upon the contract as did the railway company, that during the progress of the work it came to the conclusion on account of the gradual development of the water difficulties in the cut that the work therein, at least after that time, was excavation in water, and that it intended, as it believed it had the right to do, upon the completion of the work, to insist upon compensation for it as excavation in water.

The record shows that during the progress of the work the question of what was its proper classification was considered by the officials of the appellant company and its subcontractors, and the conclusion reached that the work in the cut was excavation in water; but it further appears that no notice of this conclusion, nor of the appellant's determination to assert a claim for a different classification when the work was completed, was given the railway company. On the contrary, the appellant deliberately determined not to give the railway company any notice of such conclusion and intention, but to postpone making any objection to such classification until after the work in the cut was completed, for fear, as it claimed, that, if it did so, the railway company might take the work away from the appellant under certain provisions of the contract, and have it done at prices that would be hurtful to the appellant. In other words, the appellant determined not to make objection to the classification of the work in the cut when in justice and fair dealing it ought to have done so, but to postpone the claim for a different classification until the work had been completed, when it would be too late for the railway company to exercise those rights under the contract which the appellant feared it might exercise if it (the appellant) made known its claim for a different classification earlier.

Whatever may have been the construction placed upon the contract by the appellant in secret and unknown to the railway company, it cannot be considered in determining either the practical construction placed upon it by the parties or the acquiescence of the appellant in the construction placed upon it by the railway company. *N. & W. Ry. Co. v. Mills*, 91 Va. 632, 22 S. E. 556. It is clear, therefore, that during the entire time the work in the cut was being done, the appellant, by its acts and conduct, placed the same construction upon the contract as to the matter now under consideration as did the railway company.

In *Kidwell v. B. & O. R. R. Co.*, 52 Va. 676, it was held that a railroad contractor for the construction of a bridge, having received the monthly estimates based upon a particular construction of the contracts without objection during the progress of the work, was held to have acquiesced in that construction. In that case, Judge Moncure, speaking for the court, after stating the facts and circumstances showing the conduct of the parties during the progress of the work (and which were at least as favorable to the contractor's contention in that case as are the facts and circumstances of this case to the appellant's contention), said: "Under all these circumstances, I am of opinion that, whatever may be the true construction of the contracts, the appellant acquiesced in the construction placed upon them by the appellees, and is concluded by such acquiescence from claiming a higher compensation for the masonry than the prices stipulated for in the contracts and allowed in the final estimates."

In *Knopf v. R. F. & P. R. R. Co.*, 85 Va. 769, 8 S. E. 787, it was held that the practical construction put by the parties upon the terms of their own contract was not only to be regarded, but, where there is any doubt, it must prevail, even over the literal meaning of the contract; citing among other authorities *District of Columbia v. Gallaher*, 124 U. S. 505, 510, 8 Sup. Ct. 585, 588 (31 L. Ed. 526), in which it was held "that the practical construction which the parties put upon the terms of their contract, and according to which the work was done, must prevail over the literal meaning of the contract according to which the defendant seeks to obtain a deduction in the contract price."

In *Knick v. Knick*, 75 Va. 12, 20, it was said by Judge Burks that, "when the meaning of an instrument is clear, an erroneous construction of it by the parties to it will not control its effect; yet, where there is doubt as to the proper meaning of it, the construction which the parties have put upon it is said to be entitled to great consideration. *Bank of Old Dominion v. McVeigh*, 73 Va. 530, 541, citing *Railroad Co. v. Trimble*, 10 Wall. 367, 377 [19 L. Ed. 948]."

In *Trigg Co. v. Bucyrus Co.*, 104 Va. 79, 86, 51 S. E. 174, 176, it was said: "If the terms of the contract were ambiguous and its proper construction doubtful, it could be subjected to another test which is always entitled to great weight under such circumstances; and that is the construction which the parties have, by their acts, placed upon it."

The president of the court, in delivering its opinion in *Northrop & Wickham v. Richmond*, 105 Va. 335, 339, 53 S. E. 962, 963, said: "It is the duty of courts to get at the true intent of the parties to the contract, and it is a recognized and accepted canon that, where the construction is doubtful, it is proper to look to the construction which the par-

ties themselves have placed upon the contract. What more natural, indeed, than that the courts, in order to ascertain the intention of the parties, should seek for light in the construction which the parties themselves have placed upon the language which they have seen fit to employ." In that case it was held that where the proper construction of the language of a contract is doubtful, and the parties themselves have in practice adopted a particular construction, the courts will adopt that construction.

We are of opinion that the practical construction placed upon the terms of the contract as to the classification of the work in the cut during the entire period in which the work was being done should prevail over the construction now insisted on by the appellant by which it seeks to obtain a new classification and a largely increased compensation for its work.

The action of the trial court in not allowing the appellant compensation for two items, aggregating \$572.42, for extra material and labor on Turnip creek trestle, is assigned as error. The contention of the appellant is that these two items of extra labor and material were rendered necessary by the defective plans of the railway company's engineers, in consequence of which the work, built in accordance with those plans, gave way, and had to be strengthened by the additional work and material for which these items were charged.

The railway company denies its liability upon two grounds: One, that the cause of the trestle's giving way was the improper use made of it by the contractor after it was constructed; and the other, that under section 18 of the contract the contractor assumed all loss resulting from the giving way of the trestle during the progress of the work.

Whether or not this latter contention be well founded need not be considered; for, if the appellant was not under the contract bound to bear the loss complained of, it does not satisfactorily appear that the trestle gave way on account of any defect in the plans furnished by the railway company.

[3] The evidence is conflicting as to whether the trestle gave way because constructed in accordance with defective plans furnished by the railway company's engineers, or from the improper use made of the trestle by the appellant after it was constructed. As the burden was upon the appellant to show that it was entitled to the items claimed, we cannot say that the trial court plainly erred in refusing to allow them as proper charges against the railway company.

Another error assigned is to the action of the circuit court in not allowing an item of some \$15,000, the difference in the value of the work done upon the whole of the appellant's section of road, as estimated by its supervising engineer (excluding wet excavation in Terryville Cut), and the value of the whole work as shown by the final estimate of

the chief engineer of the railway company. These different results as to the value of the work done seem to have followed largely from the difference in the data upon which they respectively based their calculations. It could serve no good purpose to discuss in detail the methods of measurement relied on by each as furnishing the correct data. It will be sufficient to say that, while there is a conflict in the evidence as to the correctness of the data used by each, the weight of evidence is clearly in favor of that upon which the chief engineer based his calculations and made his final estimate, an estimate the correctness of which upon the data used by him is clearly established.

We are of opinion that independent of any question as to the conclusiveness of the final estimate of the chief engineer under the provisions of the contract, the final estimate by him is fully sustained by the evidence, and that the trial court did not err in not allowing the item in question.

[4] The railway company assigns as cross-error the action of the circuit court in allowing interest from the 20th of October, 1907, on the amount adjudged to be due the appellant and decreed in its favor.

By section 31 of the contract it is provided, among other things, that upon the final completion and acceptance of the work to be done the chief engineer of the railway company shall issue a certificate over his signature that the whole work provided for in the contract has been completed and has been accepted by him under the provisions of the contract, whereupon the entire balance found to be due the contractor shall be payable within 20 days after the date of said final certificate, provided, however, that, if the railway company should require it before making payment of said final balance, the contractor shall execute a release to the railway company from all claims or demands whatsoever growing out of the contract.

The court by its decree of the January term, 1910, ascertaining the amount due the contractor from the Railway Company, provided that such sum should bear interest from the 20th day of October, 1907, until paid, and that principal and interest should be paid in 20 days from the date of the decree upon the delivery of the release required to the railway company by the contractor. The contractor having failed to deliver the release required, the following proceedings were had at the May term following:

"The parties consent that the motions hereinafter mentioned may be heard and determined by the judge of this court in vacation, to the same effect as if they had been made and passed upon at the last regular term of this court.

"And thereupon the defendant submitted a motion in writing (which is now filed) that the court so amend the decree entered in this cause at January term, 1910, as to provide that the amount decreed in favor of the

plaintiff shall not bear interest from the date of entry of the said decree until the plaintiff files with the papers in this cause the release required by the said decree to be delivered by the said plaintiff to the defendant, and that, upon the filing of such release, the amount so decreed in favor of the plaintiff shall bear interest as provided in said decree until the defendant pays the amount of said decree to the plaintiff, which motion the court doth overrule.

"And thereupon the defendant's counsel, stating in open court that the defendant was willing to pay to the plaintiff the amount decreed in its favor by the decree of January term, 1910, with interest thereon to this date upon the execution by the plaintiff of the release provided for by the said decree, but the said offer to be without prejudice to the defendant's right to assign cross-error in case an appeal is taken from the said decree by the plaintiff, and thereupon moved the court to release it, the said defendant from the payment of any interest that may accrue after this date on the amount decreed to the plaintiff by the said decree of January term, 1910, until the said release is executed and filed with the papers in this cause, and the court having considered said motion, and the defendant's counsel stating that he does not now actually tender the amount of the said decree either to the plaintiff or to the court, and the plaintiff not waiving actual tender, the court doth overrule the defendant's second motion."

We see no error in the action of the court in overruling either of these motions. If the railway company wished to stop the running of interest on the sum decreed against it, it could have paid the money into court, and the court would have required the release to be executed by the contractor before it could receive the money, and thus have fully protected the railway company.

[6] Nor do we think that the court erred in its original decree providing for interest on the sum decreed before the chief engineer had issued his certificate that the work had been completed and accepted. The work was completed on the 27th of September, 1907. The railway company was at once notified of that fact, and afterwards urgently requested to issue the required certificate; but it was not issued until the 23d of December, 1907. The delay in issuing the final certificate is not satisfactorily explained or accounted for. A large sum was admittedly due the contractor, and it ought not to be made to bear the loss resulting from the unreasonable delay of the chief engineer in issuing the certificate required.

Upon the whole case, the court is of opinion that the decrees complained of should be affirmed.

Affirmed.

(113 Va. 108)

**POCAHONTAS CONSOL. COLLIERIES CO.,
Inc., v. COMMONWEALTH et al.**

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. LICENSES (§ 1*)—RECORDATION OF CONVEYANCES—TAXATION.

A tax on the recordation of a deed of trust is a tax on the privilege of taking, on the terms prescribed by statute, the benefits of the registration laws, and not a tax on property, which is measured in its assessment and collection in the mode prescribed by statute.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. LICENSES (§ 7*)—PRIVILEGE TAX.

A tax on a civil privilege is fixed as to amount by the classification of the persons or subjects required to pay the tax, and the Legislature may impose such a tax and fix the amount thereof and classify the subjects on which the tax is imposed so long as the classification is reasonable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

3. LICENSES (§ 7*)—PROPERTY TAX—CONSTITUTIONAL PROVISIONS—"TAX."

Const. 1902, art. 168 (Code 1904, p. cclxii), providing that taxes on property shall be uniform on the same class of subjects within the territorial limits of the territory levying the tax, applies only to a direct tax on property, and not to license taxes which do not admit of a tax strictly equal and uniform.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6867-6888, 7813.]

4. LICENSES (§ 7*)—PRIVILEGE TAXES—STATUTES—CLASSIFICATION.

A statute, imposing a tax on the recordation of deeds of trust, assessed and paid on the amount secured thereby, and providing that on deeds of trust on the works of a railroad or other internal improvement company, partly within and partly outside the state, the tax shall be on such part of the consideration as the number of miles of line of the company in the state bears to the whole number of miles of the line of the company conveyed by the deed, places internal improvement companies, whose lines are partly within and partly without the state, in one class, and places all other grantors in trust deeds in another class, and the classification is reasonable, and, where the tax is uniform on the same class, the statute is valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

5. LICENSES (§ 29*)—PRIVILEGE TAXES—STATUTES—CONSTRUCTION.

Under a statute imposing a tax on the recordation of deeds of trust to be assessed and based on the amount of bonds secured thereby, the tax on a deed of trust executed by a mining corporation on property partly within and partly outside the state to secure bonds is properly assessed on the full amount of the bonds secured without deduction for the property outside of the state.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 63; Dec. Dig. § 29.*]

6. LICENSES (§ 29*)—PRIVILEGE TAXES—STATUTES—CONSTRUCTION.

Under the statute imposing a tax on the recording of deeds of trust based on the amount secured thereby, a tax on a deed of trust to secure bonds is properly assessed on the full amount of the bonds to be issued, and is not

required to be limited to the amount of the bonds actually issued and negotiated at the time of the recordation of the deed.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 63; Dec. Dig. § 29.*]

Appeal from Circuit Court of City of Richmond.

Action by the Pocahontas Consolidated Collieries Company, Incorporated, against the Commonwealth and another for the refunding of a part of a tax paid under protest. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry & Graham, for appellant. The Attorney General, for appellees.

CARDWELL, J. The Pocahontas Consolidated Collieries Company, Incorporated, filed its petition in the circuit court of the city of Richmond, to have refunded to it \$13,295.64, being a part of a tax of \$20,000 which the petitioner claims to have been erroneously demanded by, and which it paid to, the clerk of the circuit court of Tazewell county involuntarily and under protest.

The facts are as follows: The Pocahontas Collieries Company and the Pocahontas Collieries Co., Incorporated, corporations under the laws of the state of Virginia, on the 10th day of June, 1907, by joint agreement between the said companies, became merged and consolidated into one company under the name of the Pocahontas Consolidated Collieries Company, Incorporated. By the terms of the merger agreement, all of the property of both companies was conveyed to and vested in the new company, and it was therein provided that the new company should create a mortgage upon all of its real estate, including mineral and mining rights, etc., to secure an issue of \$20,000,000 of 5 per cent. gold bonds, of convenient denominations, payable in 40 to 50 years from July 1, 1907, and redeemable at the option of the corporation, in whole or in part, at 105 per cent. and accrued interest, on any interest day, upon the call of the trustee named in the mortgage.

Pursuant to said agreement of merger, the consolidated company executed a mortgage or deed of trust, bearing date the 1st day of July, 1907, conveying all of its property, rights, etc., to the New York Trust Company, as trustee, to secure the payment of an issue of bonds to the aggregate amount of \$20,000,000; the form of bond to be executed and issued under the deed being set out in the deed itself, and containing the declaration: "This bond is one of a series of bonds amounting in the aggregate of their principal to twenty million dollars (\$20,000,000), or 4,109,729 pounds sterling, 15 shillings, 8½ pence, or 103,626,943 francs, or 84,033.45 marks, all of which bonds are issued and to be issued under and equally secured by a deed of trust, dated the first

day of July, 1907, duly executed by the company to the New York Trust Company, as trustee, conveying all of its real estate, whether held as leaseholds or in fee, and the improvements and fixtures thereon, including machinery and tools, and said company's franchises, now owned or hereafter acquired, as therein described, to all which provisions of which deed of trust this bond is subject."

The deed of trust expressly provides, also, that all of the bonds therein mentioned are to be secured by the lien thereby created, and conveys the property, "in trust, nevertheless, for the equal pro rata benefit and security of all and every the persons, firms and corporations who may be or become the holders of the said bonds issued or to be issued and secured by and under this deed of trust, without preference, priority or distinction as to lien or otherwise, of any one over another by reason of priority in the time of issuing or negotiating the same, so that each and all of the said bonds issued and to be issued, as aforesaid, shall have the same right, lien and privilege under and by this deed of trust, and shall be equally secured thereby, with like effect as if they had all been made, executed, delivered and negotiated simultaneously on the date of the execution hereof."

Said deed, after being properly executed, was presented to the clerk of the circuit court of Tazewell county for recordation under the registry laws of the state, when the clerk ascertained and fixed the tax thereon at the sum of \$20,000, that being the amount prescribed by the statute on the full amount of \$20,000,000 face value of the bonds issued or to be issued under and secured by the deed. Objection was made to the amount of the tax so ascertained and fixed, and the parties in interest communicated both with the auditor of public accounts and the Attorney General of the state, as to the correctness of the tax required by the clerk, and upon being informed by these state officers that the ruling of the clerk as to the amount of the tax was correct, they afterwards, on the 9th of September, 1907, delivered the deed to the clerk for recordation and paid to him the said amount of \$20,000, which the clerk paid into the treasury of the state in the mode prescribed by law. Upon the payments of the amount of the tax to the clerk, the grantor took from him a receipt setting forth at much length the grounds of protest against being required to pay the said amount of tax. Subsequently demand was made upon the auditor of public accounts for the refunding to the grantor in said deed of trust the sum of \$13,295.64, a portion of the \$20,000 tax paid into the treasury through the clerk, and the right to have the amount demanded refunded being denied by the auditor, this proceeding was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instituted under the provisions of section 765 of the Code of 1904.

Upon the hearing of the cause upon the petition and exhibits therewith filed, the demurrer and answer of the auditor thereto, etc., the circuit court entered the order from which this appeal is taken, denying the prayer of the petition and dismissing the same.

We do not deem it necessary to decide whether or not the tax in question was in contemplation of law voluntarily paid by the appellant, or under protest, for if the tax, as held by the circuit court, was legally assessed and demanded, appellant is not entitled to have it or any part therefore refunded.

Nor do we understand appellant as contending that the state was without power or authority to impose a tax upon the recordation or registry in the several clerk's offices in the state of deeds of trust or other instruments securing the payment of money, and to fix the amount of the tax and how and when to be paid, but that its contention is: (1) That in requiring the payment of a tax upon a deed of trust securing bonds issued or to be issued under it, based upon the amount of the entire issue of bonds secured by the deed, instead of upon the amount of the issue of bonds presently to be made, section 168 of the Constitution of the state has been violated; and (2) that inasmuch as about two-thirds of the property of appellant conveyed in its deed of trust is located in West Virginia, and only about one-third in this state, to impose a tax fixed upon the entire issue of bonds secured by the deed, presently and thereafter to be issued, amounts pro tanto to a tax upon that part of the property conveyed which lies outside of this state and violates both section 168 of our Constitution (Code 1904, p. cclxii) and the fourteenth amendment to the Constitution of the United States.

[1] In the first place, this is not a tax upon property either within or out of the state, but a tax upon a civil privilege; that is, for the privilege of availing, upon the terms prescribed by statute, of the benefits and advantages of the registration laws of the state. Therefore the numerous authorities cited and ably presented and argued by the learned counsel for appellant in support of the contention, that the assessment and collection of the tax in question violated the said provision of the Constitution of the United States, have no sort of bearing upon the issue in this case.

While we have no decision by this court directly holding that a tax on the recordation of a deed is not a tax on property, in an analogous case (*Byre v. Jacobs, Sheriff*, 55 Va. 422, 73 Am. Dec. 367), the court held that a collateral inheritance tax upon the succession or transmission of property is a tax upon a civil right or privilege, and not a tax on property.

Whether the tax on the recordation of a deed conveying property to the United States was a tax on property that could not be enforced against the United States, or a tax upon a mere civil right which could be so enforced, was a question presented to Hon. A. H. Garland, the then Attorney General of the United States, in October, 1887, and he advised that the tax was not upon property, but upon a civil right, and directed the payment of the tax. *Opinions of Attorney General of U. S.*, vol. 18, p. 491.

The foregoing are all the authorities to which we have been cited, or that we have been able to find, having any bearing upon the question which we are now considering, and doubtless the dearth of authority, especially in this state, is due to the fact that the contentions of appellant with respect to this question have never before been seriously urged upon the court.

[2] A tax on property is measured in its assessment and collection in the mode prescribed by statute, while a tax upon a license or civil privilege is imposed and fixed, as to amount, by classification of the persons or subjects required to pay the tax; and the powers of the Legislature to impose the latter tax, to fix the amount thereof, and to classify the subjects upon which the tax is imposed, are well-nigh unlimited, so long as the classification is reasonable.

"The power of the state to distinguish, select, and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons and things." 1 *Cooley on Taxation* (3d Ed.) p. 79, and note.

The Supreme Court of the United States, in the case of *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. 522 (43 L. Ed. 786-794), said: "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. * * * If the classification be proper and legal, then there is the requisite uniformity in that respect."

[3] The constitutional provision in this state relative to taxation is as follows:

"Sec. 168. All property, except as herein after provided, shall be taxed; all taxes, whether state, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

This court held, in *Bradley v. Richmond*, 110 Va. 521, 66 S. E. 872, that the foregoing provisions in the Constitution requiring equality and uniformity of taxation apply only to a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal and uniform; and very clearly the privilege of recording deeds, wills, and other written instruments, and thereby secur-

ing the benefits and advantages of the registration laws of the state, like the privilege of conducting a business, is necessarily to be considered a proper subject of taxation with the only constitutional limitation upon the power of the Legislature to impose the tax that it shall be uniform upon the subjects of each class. *Slaughter v. Com.*, 54 Va. 774; *Eyre v. Jacobs*, *supra*; *Miller v. Com.*, 68 Va. 110.

[4] The statute under which the tax complained of in this case was demanded and paid, so far as applicable, is as follows: "And on deeds of trust or mortgages, the tax shall be assessed and paid upon the amount of bonds or other obligations secured thereby." And provided further that "on deeds of trust or mortgages upon the works and property of a railroad or other internal improvement company, lying partly in this state and partly in another state, the tax shall be upon such proportion of the consideration as the number of miles of the line of such company in this bears to the whole number of miles of the line of such company conveyed by such deed."

Here we have a classification made which puts internal improvement companies whose line is partly in Virginia and partly in some other state in one class, and all other grantors in trust deeds or mortgages in the other class. The rate of taxation is the same in all cases, and the tax is uniform upon the same class of subjects. That the Legislature intended to make the classification so plainly appearing in the statute is too clear to admit of discussion, and that the classification for the purposes of taxation is valid seems equally as clearly settled by the decisions of this court; in fact, it seems that appellant does not deny the right of the Legislature to make such classification, but denies that the classification has been made. As we have seen, the classification clearly appears upon the face of the statute, *supra*, and that similar classification of persons and subjects for the purposes of taxation have been held by this court valid and proper. See *Bradley v. Richmond*, *supra*; *Insurance Co. v. Winchester*, 110 Va. 451, 66 S. E. 84; *Woodall v. Lynchburg*, 100 Va. 318, 40 S. E. 915; *Ould v. Richmond*, 64 Va. 464, 14 Am. Rep. 139; *Eyre v. Jacobs*, *supra*.

[5] The reasonableness of the assignment in the statute of railroads and other internal improvement companies to a special class for the purpose of taxing the recordation of their deeds and mortgages, given as security for the payment of indebtedness, and all other grantors in such conveyances to another class, is made very plainly to appear when we consider along with others the fact that it is made by statute a matter of public record the number of miles of railroad, or of a telephone or telegraph line, and the value of each mile thereof for taxable purposes, lying within this state which is owned by a grantor in a deed of trust or mortgage and

conveyed thereby; while there would be no way of ascertaining even approximately the value or location of the property, rights, etc., of a mining corporation such as the appellant company, conveyed by it to secure the payment of its indebtedness.

[6] It is, however, urged upon us by the learned counsel for appellant that only \$6,000,000 of the bonds secured by the deed in question were to be presently issued, and the remaining \$14,000,000 were only to be issued and negotiated for the purchase of property and certain specified purchases of the company at a future time; and therefore the tax required on the recordation of the deed should have been computed only upon the \$6,000,000 of bonds to be immediately issued.

Not only is there no language employed in the statute which could be so construed as to afford a foundation for such a contention, but the deed prescribed the form of the bond to be issued, and it was upon its face to be stated: "This bond is one of a series of bonds amounting in the aggregate of their principal to \$20,000,000," etc.; and the conveyance of the property, etc., of the company was expressly in trust "for the equal pro rata benefit and security of all and every the persons, firms and corporations who may be or become holders of the said bonds, issued or to be issued," etc. So that each and every bond in the series aggregating the \$20,000,000 was, within the contemplation of the statute secured by the deed; and therefore the tax properly to be assessed and received by the clerk as a condition precedent to the admission of the deed to record was the amount prescribed by the statute upon the aggregate amount of the bonds secured by the deed, to wit, \$20,000,000, making the tax thereon \$20,000, as the clerk demanded and received.

If the view of the statute taken by appellant be correct, and the clerk had demanded and received a tax measured by the bonds secured but only presently to be issued, and the remaining \$14,000,000 secured by the deed or any part thereof were thereafter issued, how and when would the tax on the deed with respect to the bonds issued subsequent to its recordation be collected, and by whom? Certainly there is no provision in the statute for the assessment or collection of such a tax and no hand appointed to receive it, even if a voluntary payment thereof were offered. On the contrary, the statute imposes imperatively upon the clerk to whom the deed is presented for recordation the duty to assess and collect a tax thereon, and as a condition precedent to the admission of the deed to record, fixed only by the amount of bonds or other obligations secured thereby.

We are of opinion that the judgment of the circuit court complained of is right, and it is therefore affirmed.

Affirmed.

(113 Va. 1)

ADAMS EXPRESS CO. v. SCOTT.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

A common carrier is not an insurer of animals from injuries arising from their vicious nature and propensities, and which could not have been prevented by the exercise of foresight, vigilance, and care, so that an express company was entitled to limit its liability in that respect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.*]

2. CARRIERS (§ 213*)—CARRIAGE OF LIVE STOCK—LIABILITY FOR INJURIES.

No recovery can be had for injury caused by delay in shipment of an animal by an express company, where such delay was caused by the refusal of the owner to accept freight movement.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 213.*]

3. CARRIERS (§ 215*)—CARRIAGE OF LIVE STOCK—LIABILITY FOR INJURIES.

No recovery can be had for injuries to a horse delivered for shipment, caused by the horse hitting his feet, legs, and body against the sides and back of the stall upon becoming excited and frightened by the usual and ordinary movements and noise of the train.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 215.*]

4. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—LIABILITY FOR INJURY.

In an action for injuries to a horse delivered for shipment, evidence held to show that the injury was caused by the inherent vice of the animal, and by the culpable negligence of the agents of the shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

Error to Circuit Court, Accomack County.

Action by John L. Scott against the Adams Express Company. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

W. R. Meredith and John S. Parsons, for plaintiff in error. Westcott & Turlington, Mapp & Mapp, and O. F. Mears, for defendant in error.

WHITTLE, J. The plaintiff in error, Adams Express Company, brings this writ of error to review a judgment for \$1,213.70, recovered against it by the defendant in error, John L. Scott.

The litigation arose out of a written contract between the company and Daugherty, agent for the plaintiff, for the transportation of a race stallion, Signet Prince, from Tasley, a station on the New York, Philadelphia & Norfolk Railroad, in Accomack county, Va., to Pocomoke City, in the state of Maryland, a distance of 27 miles. Ten race horses and traps were included in the shipment, all of which with the exception of Signet Prince reached their destination in safety.

The contract, among other provisions, stip-

ulated that the company should not be liable for the conduct or acts of the animals to themselves or to each other, "such as biting, kicking, goring or smothering, nor for loss or damage arising from the condition of the animals themselves or which results from their nature or propensities, which risks are assumed by the shipper." The shipper, moreover, released the company from liability "for delay, injuries to or loss of said animals," unless caused by the negligence of its agents or employés. Also, upon the arrival of the animals at destination, the shipper agreed forthwith to receive them, paying the charges due thereon; in default whereof the company, as agent of the shipper, might have the animals put in a suitable place, at his cost and risk. When the animals were accompanied by the owner or an attendant in his employ, as in the instant case, it was his duty to load and unload them at his own risk; the company furnishing necessary laborers to assist in the work, and to take care of them in transit, such caretakers to be transported upon the same car with the animals free of charge.

[1] That it is permissible for an express company to stipulate with the shipper for such limitations upon its liability in a contract for the carriage of live stock is well settled.

In 1 Hutchinson on Carriers (3d Ed.) § 336, distinguishing between the liability of a carrier with respect to the transportation of live animals and ordinary goods, the learned author observes: "The liability of the common carrier of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage, except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care. In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its vitality. Animals may injure or destroy themselves or each other, they may die from fright or starvation, or they may die from heat or cold. In all cases, therefore, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, the carrier is relieved from responsibility, if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires"—citing opinions of Pollock, C. B., and Martin, B., in *Pardington v. Railway Co.*, 1 H. & N. 396;

Erle, J., in *McManus v. Railway*, 4 H. & N. 347; Parke, B., in *Carr v. Railway*, 7 Exch. 711.

The rule is thus stated in *Boehl v. Railway Co.*, 44 Minn. 191, 46 N. W. 333: "Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability from such causes, if he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury. Of course, the carrier is relieved from special care and oversight of the animals when the owner or agent accompanies them for that purpose." *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 288, 33 S. E. 606; *N. & W. Ry. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

These rules are said to obtain, even where there is no special contract limiting the carrier's liability in respect to injuries resulting to animals from such causes.

Bearing in mind, then, these fundamental principles, let us briefly consider the alleged grounds of negligence and the evidence relied on to sustain the recovery.

[2] First. It is alleged that the injuries sustained by Signet Prince were due to unnecessary delay in transportation. There is no evidence whatever to connect the animal's injuries with the alleged delay. Besides, it plainly appears that the delay was due to the refusal of Daugherty to accept freight movement. When told that his car load of horses would be attached to an extra freight, used in transporting other horses, which was to leave about 10 o'clock a. m., he refused to allow his horses to be carried by that train, and demanded express shipment. Accordingly, in deference to his wishes, his car was taken up by the first express train that passed Tasley, and left that station about noon.

[3] Second. It is said that during the delay at Tasley the company suffered the car "to be switched around, backward and forward, on the railroad track and switches, and jarred, jerked, and kicked up to and against other cars"; and, consequently, the horse became greatly excited and frightened, and hit his feet, legs, and body against the sides and back of the stall, and against a radiator installed therein, and was injured, etc.

It was shown that the movements of the car at Tasley, complained of in this specification, were all necessary movements in the ordinary course of railroading.

Third. This allegation of negligence is germane to the second, namely, that the horse was frightened and injured by the puffing of smoke and noise from passing engines. These acts were done, not wantonly, but in the customary manner, and were unavoidable in the operation of trains.

Fourth, and lastly, it is charged that the company negligently failed to provide and maintain a safe car, stall, and appliances for the shipment of the animal. Under this specification, it is also alleged that the company negligently suffered a radiator to be in the stall in which Signet Prince was placed, which was uncovered, and against which he hit his feet and legs, and injured himself.

The car in question was a Pennsylvania express car, in which Daugherty had shipped a load of horses from Cape Charles to Tasley a few days previously. The car had, at that time, been stalled in accordance with his wishes, and at his special request was again furnished to him by the company for the shipment to Pocomoke City.

As observed, the shipment consisted of 10 horses, and they were accompanied by 9 attendants. The car contained 14 stalls. The agreement required the shipper to load and unload the stock, the company furnishing necessary assistance, and Signet Prince was either the first or second horse loaded, so that there were 12 or 13 stalls besides the one containing the radiator, in any one of which he might have been safely bestowed. It was also shown that a radiator is a permanent fixture and necessary part of the outfit of a car used in shipping high-grade horses in cold weather. But in this instance the shipper could have obviated all risk of injury to the animal from that source simply by placing him in, or removing him to, another stall (and three vacant stalls still remained after accommodating all the other horses), or by covering the radiator with a horse blanket. Signet Prince was, however, made fast in the stall with the radiator by ropes on either side of his head, tied to an iron bar above, extending across the car. He became frightened, presumably from passing engines, before the car left Tasley, and in his efforts to escape sustained some injury by kicking and plunging. He kicked down a mail box from the side of the car, and broke from their fastenings several half-inch iron bars that protected the car window. His fright continued, and before the train reached its destination (just how long before does not appear) he forced the radiator from the side of the car, and broke the regulator wheel from the valve, leaving exposed a half-inch copper tube of considerable length, and was finally discovered astride of the radiator, with the valve tube embedded in the inner side of his left thigh. The

injuries thus inflicted were of a serious and permanent character. The attendants made no effort to release the animal from his perilous position, and the shipper refused to unload or receive him at Pocomoke City. The company thereupon placed him in the care of a suitable person, where he remained from August 8 to November 18, 1908, when he was delivered to the plaintiff, on payment of charges for his care and keep.

There was also an effort to prove that the company negligently refused to unload the horse at Tasley and other stations after his car fright became manifest, or to side-track the car at Parksley; but the evidence on that subject was wholly unsatisfactory and insufficient. Indeed, Daugherty, the shipper and agent of the owner, seemed possessed of the erroneous idea that he was under no obligation whatever to care for the safety of the horse, but could stand idly by and suffer the animal to destroy himself, and hold the express company liable for the loss.

[4] There are a number of other assignments of error in the petition for a writ of error, but the court is of opinion that the failure of the shipper to make out a case of actionable negligence against the express company is controlling; and it is therefore unnecessary to notice subordinate assignments. The injury to Signet Prince was due to no fault of the defendant, but was traceable rather to the inherent vice or propensity of the animal itself, coupled with the culpable negligence of the agents of the shipper to whom its safety had been confided.

For these reasons, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

(113 Va. 61)

JEFFERSON et al. v. GREGORY et al.
(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. APPEAL AND ERROR (§ 1136*)—AFFIRMANCE—GROUND.

The decree of the circuit court dismissing a bill on the ground that complainants failed to establish the case as alleged will be affirmed, if the dismissal can be sustained on that or any other ground relied on by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1136.*]

2. JUDGMENT (§ 303*)—CORRECTION OF MISTAKES.

Relief may be had from mistakes in judgments and decrees by original proceedings, where the mistake is one of fact.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 303.*]

3. JUDGMENT (§ 455*)—EQUITABLE RELIEF—MISTAKES—JURISDICTION OF COURT.

A court which has jurisdiction of the parties and subject-matter has jurisdiction to relieve them from a mistake in a decree entered by a different tribunal, for the mistake is not corrected by reviewing the judgment or decree of the original tribunal, but by restraining

the parties from taking advantage of it, and compelling them to execute proper papers to correct it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 860-862; Dec. Dig. § 455.*]

4. QUIETING TITLE (§ 12*)—POSSESSION.

Where the removing of clouds and quieting of title is only incidental to other equitable relief, which is properly invoked, the complainant need not be in possession, despite the rule that makes possession a condition precedent to the maintenance of a suit to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.*]

5. WITNESSES (§ 141*)—COMPETENCY—AGENT.

Where a commissioner who judicially sold land has died since the sale, and the amount of land sold has come into controversy, complainant's agent who conducted the negotiation with the commissioner is competent as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. § 141.*]

6. WITNESSES (§ 140*)—COMPETENCY—INTEREST OF PARTIES.

One who is not a party, and has no present interest in a suit, is competent to testify, even though he was once interested in the land which is the subject-matter of the litigation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

7. JUDGMENT (§ 324*)—SETTING ASIDE—MISTAKE.

In an action to correct a mistake in a decree which misdescribed land judicially sold, evidence held to show the mistake, and that there has been no such delay in discovering it, and bringing suit to remedy as to bar complainant.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 324.*]

Appeal from Circuit Court, Amelia County.

Bill by George C. Jefferson and others against D. Gregory and another. From a decree dismissing the bill, complainants appeal. Reversed and remanded, with directions.

McGuire, Riely & Bryan and J. G. Jefferson, Jr., for appellants. R. G. Southall, for appellees.

BUCHANAN, J. This is an appeal from a decree dismissing a bill filed by the appellants in the circuit court of Amelia county to correct a mistake in a deed and a plat as to the dimensions of a small parcel of land or town lot lying in Amelia county sold under decrees entered in the consolidated causes of the Union Bank of Richmond, etc., against John B. Harvie, and the same plaintiff against Lewis E. Harvie, etc., pending in the chancery court of the city of Richmond, to restrain the appellees from interfering with the appellants' possession of the said lot, and to quiet their title.

[1] The circuit court dismissed the bill upon the ground, as stated in its decree, that the appellants had failed to establish the case alleged. But if the action of the court

can be sustained upon that or either of the other grounds relied on by the appellees, viz., that the court was without jurisdiction, or that the bill did not state a case entitling the appellants to the relief sought, the decree appealed from must be affirmed.

[2] Upon the case made, the circuit court had jurisdiction. The land as to which the alleged mistake was made lies in Amelia county, and the appellees are residents thereof. It appears that at the time (1908) the alleged mistake was discovered the consolidated causes in which the sale of the land was made had been stricken from the docket, and that it was then too late to apply for relief in those causes.

It is well settled in this state, and in many if not most jurisdictions, that relief from mistakes in judgments, decrees, or other court proceedings may in an otherwise proper case be had if the mistake is not judicial but one of fact. *Anderson v. Woodford, etc.*, 35 Va. 316, 323, 329; *Rust v. Ware*, 47 Va. 50, 52 Am. Dec. 100; *Byrne v. Edmonds*, 64 Va. 200; *Fore v. Foster*, 86 Va. 104, 9 S. E. 497; *Epes v. Williams*, 89 Va. 794, 17 S. E. 235; *Prince's Adm'r v. McLemore*, 108 Va. 269, 61 S. E. 802.

[3] There is no valid objection to proceeding by original bill to obtain relief from such a mistake in a court (having jurisdiction of the parties and the subject-matter) other than that in which the mistake was made when it cannot be corrected in that cause, since such mistake is not corrected by reviewing the judgment or decree of that court, but by restraining the parties who may take advantage of it from doing so, or by compelling them to execute proper papers for the purpose of correcting it. *Barnesley v. Powell*, 1 Ves., Sr., 284; *Byrne v. Edmonds*, supra; *Loss v. Obrey*, 22 N. J. Eq. 52.

[4] The court also properly overruled the demurrer to the bill. Its allegations are sufficient, if proved, to entitle the appellants to relief from the alleged mistake. The fact that the bill also prays to have the cloud upon the appellants' title removed does not render it demurrable, even if it be conceded, as counsel of the appellees insists, that it is not distinctly charged in the bill that the appellants were in possession of the land in controversy when the suit was brought. While the general rule is that the holder of the legal title to land cannot maintain a bill to remove a cloud from his title unless he is in possession (*Otey v. Stuart*, 91 Va. 714, 22 S. E. 513; *Austin v. Minor*, 107 Va. 101, 57 S. E. 609), this rule does not and ought not to apply where the primary relief sought is upon another and well-established ground of equity jurisdiction, and the removal of the cloud is sought only as an incident to that relief. See *Booth, etc., v. Wiley*, 102 Ill. 84, 113, 114; *Swick v. Rease*, 62 W. Va. 557, 59 S. E. 510, 511; *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528, 531.

The next question to be considered is whether or not the mistake alleged has been clearly proved, as it is conceded and well settled it must be in cases of this character.

It appears that at the suit of his creditors the lands of the estate of Lewis E. Harvie, deceased, including those situated in Amelia county, were by decrees entered in the said consolidated causes pending in the chancery court of the city of Richmond ordered to be sold. The two special commissioners directed to make the sale reported that after due advertising they had offered the several parcels of land in that county for sale at public outcry, and, having failed thus to sell all of the lands, they had made sales privately of certain portions of them not sold at public auction. Among the private sales they reported that they had sold lot No. 1 (the lot in controversy in this case), containing "about one-fourth of an acre," to George C. Jefferson, and lot No. 2 (which adjoins), containing "one acre," to J. B. Bland. These lots are described as lots Nos. 1 and 2 as shown on plat of land at Chula depot, which was made by the surveyor of the county at the instance of the commissioners to sell. The commissioners stated that they regarded the sales reported (public and private) as good ones, and recommended their confirmation. They were confirmed, and subsequently conveyances were made to Jefferson and Bland for the said lots, respectively, in which they were described as lots Nos. 1 and 2 as shown by the plat of the lands situated at Chula depot. Immediately after his purchase, Jefferson or his agents took possession of the land, sold and conveyed to him as lot No. 1, to the full extent of its boundaries as now claimed by the appellants.

There are located upon lot No. 1, as taken possession of and claimed by Jefferson, a storehouse and shop. The lot contains about one-fourth of an acre, as described in the report of sale and the deed of the commissioner. By recent survey made in accordance with the calls in the plat referred to in the report of sale and the commissioners' deed, the shop is not within the boundaries of the lot, and it contains only about one-sixth of an acre. To correct this alleged mistake this suit was instituted.

The facts relied on by the appellants to show the mistake, briefly stated, are as follows: W. O. Harvie, who represented Jefferson in his negotiations with Haskins, one of the special commissioners, for the purchase of the said property, testifies that said negotiations were solely between him, as the agent of Jefferson, and Haskins, special commissioner of sale; that both of them were familiar with the property purchased by Jefferson; that the land negotiated for and purchased by him for Jefferson had located upon it the said shop as well as the storehouse; that the object of the purchase was to conduct a business on the land for which the use of both buildings was neces-

sary; that the purchase was not by a plat, but that the plat was subsequently made, and that he never saw it until this controversy arose; that after the purchase the witness was present when Mr. Childress, the surveyor who made the plat of the lands at Chula depot surveyed the land purchased by him, and that he ran the lines and fixed its boundaries as they are now claimed and held by the appellants; that immediately after his purchase Jefferson took possession of the whole premises, including the shop; and that he and those who claim under him have since held continuous and exclusive possession of the same until just before this suit was instituted.

[5, 6] The competency of this witness to testify as to what passed between him and Haskins, special commissioner, in negotiating the purchase and sale of the property, is objected to by the appellees, upon the ground that Haskins was dead, and the witness was not only a party to the original transaction by reason of his conducting the negotiations as the agent of Jefferson, but was also deeply interested in the purchase of the property.

It clearly appears that in negotiating the purchase for Jefferson the witness was merely his agent, and in no legal sense one of the "original parties" to the contract. The witness is not a party to this suit, and, if he ever had any pecuniary interest in the purchase, it is clear that he had no such interest in it or in this controversy when he testified. He was clearly a competent witness. *Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 610, 22 S. E. 504; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 448, 28 S. E. 594, and cases cited; *Reynolds v. Calloway*, 72 Va. 439, 440; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869.

[7] It is proved beyond a reasonable doubt that when the county surveyor, Childress, laid off or surveyed the lots at Chula depot, the boundary lines of lot No. 1 included the land upon which the said shop is situated, and that its boundaries were run and staked off as claimed by the appellants. There were three persons present at that time besides the surveyor, and all three of them so testify positively, and the surveyor does not recollect whether or not the shop was on the lot as surveyed by him. One of those witnesses is Bland, the purchaser of lot No. 2. He testifies that he was present at said survey; that, as the lots were surveyed, the shop was on the Jefferson lot, and not on his lot No. 2, which adjoins it; that after his purchase he built a fence around his property between Jefferson and himself, except back of the old shop which had double doors; that he built his fence by the surveyor's stakes, and that this line was recognized as the true line between him and Jefferson; that he never claimed the shop; and that he

leased it from Jefferson during a portion of the time he was the owner of lot No. 2.

It further clearly appears that Jefferson repaired the shop, had both it and the storehouse insured, leased the shop to different persons, and that no one during a period of nearly 19 years ever questioned his ownership of the shop and the land upon which it is built, except appellee Gregory, and the evidence is overwhelming that he did not make any adverse claim to it until just before the institution of this suit, when it was first ascertained by a survey made preparatory to a sale of the property by the appellants that the description of the lot as contained in the plat of the Chula depot lands and in the deed from Haskins, commissioner, to Jefferson, was not a correct description of the lot as actually run by the surveyor making the survey and plat, and as occupied and held by Jefferson and those who claim under him.

It further clearly appears that lots Nos. 1 and 2, as thus actually surveyed and held, contain almost the exact area which they are described as containing in the report of sale and conveyances to the original purchasers, while, according to the said plat of the Chula lands, lot No. 1 contains much less (nearly one-third), and lot No. 2 more, than they were described as containing when sold and conveyed.

While there is some slight conflict in the evidence, the court is of opinion, after a careful consideration of all the facts and circumstances disclosed by the record, that the alleged mistake is clearly proved, that there has been no such delay in discovering the mistake or bringing suit to remedy it as deprives the appellants of the right to the relief sought.

The decree of the circuit court dismissing the appellants' bill must, therefore, be reversed and the cause remanded, with directions to the circuit court to require the appellee Gregory, or one of its commissioners, to execute a proper deed releasing and conveying to the appellants all interest claimed by said Gregory, under his deed to lot No. 2, in lot No. 1, as described and bounded in plat "B" filed as an exhibit with the appellants' bill, and to perpetually enjoin him (Gregory) and his agents from trespassing upon or interfering with the appellants' possession of said lot.

Reversed.

(113 Va. 145)

VIRGINIA BREWING CO. v. COMMON-WEALTH.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

INTOXICATING LIQUORS (§ 96*)—LIQUOR DEALER'S TAX—RECOVERY—INVOLUNTARY PAYMENT.

Under Code 1904, § 567, which provides that any person aggrieved by an assessment of

taxes may apply to the courts for redress, the tax must have been involuntarily paid under protest; and where, on the refusal of a brewing company's application for a license to establish a distributing house, with advice of the court that the license could not be issued without the payment of a wholesale malt liquor dealer's tax, and that the conduct of the business, without such a payment, would render the company and its agents liable to criminal prosecution, the company paid the tax without a seizure of its property, or the adjudging of a penalty against it, there was no such compulsion as is necessary to justify the recovery.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 102; Dec. Dig. § 96.*]

Error to Corporation Court of Lynchburg.

Action by the Virginia Brewing Company against the Commonwealth. From a judgment dismissing the petition, plaintiff brings error. Affirmed.

Harper & Goodman, for plaintiff in error.
Attorney General, for the Commonwealth.

KEITH, P. The Virginia Brewing Company filed its petition in the corporation court of the city of Lynchburg to have refunded to it a tax with which it claims to have been erroneously assessed, and which it paid involuntarily and under protest. The commonwealth's attorney for the city of Lynchburg appeared and made defense to the petition, and the case was heard upon facts agreed between the attorneys for the petitioner and the commonwealth, and thereupon the corporation court dismissed the petition, a bill of exceptions was taken to the ruling, and the case is before us upon a writ of error.

The agreed facts are as follows: That the Virginia Brewing Company is a corporation engaged in the business of manufacturing and selling malt liquors in the state of Virginia; that for the years 1910 and 1911 it was assessed and paid to the state of Virginia, in the city of Roanoke, where its manufactory is located, a license tax for the privilege of manufacturing malt liquors and selling the products of its brewing in quantities of two dozen pints or more at any place within the state of Virginia; that on the 22d day of April, 1911, it applied to the corporation court of the city of Lynchburg for a license giving it the privilege to establish a distributing house for selling the products of its brewing in quantities of two dozen pints or more through an agency, said agency and business to be conducted in Lynchburg, Va.; that it presented to the court proof of the payment to the state of Virginia, at Roanoke, Va., of the tax for the privilege of manufacturing and selling its products, as aforesaid; that upon consideration of said application the court declined to grant the license applied for, and advised the said applicant, through its counsel, that in the opinion of the court, such business could only be legally conducted in the city of

Lynchburg upon the payment of an additional wholesale malt liquor dealer's license tax to the state of Virginia, and that the conduct of such business, without the payment of such additional tax, would render the company and its agents liable to criminal prosecution, with its attendant fines and penalties; that thereupon the said Virginia Brewing Company was assessed with and involuntarily paid, under protest, to the state of Virginia, at the city of Lynchburg, the sum of \$500 as a license tax for the privilege of conducting a wholesale liquor dealer's business in the said city of Lynchburg, and upon due application to the corporation court, and upon proof of all facts essential to the granting of such license, the corporation court of the city of Lynchburg, at the May term, 1911, did grant to the said Virginia Brewing Company a wholesale malt liquor dealer's license for the conduct of said business in said city; that it was not the desire or intent of said Virginia Brewing Company to conduct a wholesale malt liquor dealer's business, but to establish and maintain a storage and distributing warehouse in the city of Lynchburg for the sale thereof of its products; and that it was assessed with and involuntarily paid under protest the license tax, and accepted the said privilege only because of the advice of the corporation court of the city of Lynchburg that the establishment and maintenance of said storage or distributing warehouse in the said city for the sale of its products thereat, without the payment of said wholesale malt liquor dealer's license, would render the said company and its agents liable to criminal prosecution, with its attendant fines and penalties, and to avoid the liability of such criminal prosecution.

In the agreed facts, it is stated that the tax was paid involuntarily, and yet the facts themselves show that it was in all respects a voluntary payment. The brewing company, of its own motion, applied for a license giving it the privilege of establishing a distributing house in the city of Lynchburg for selling the products of its brewing in quantities of two dozen pints or more; the corporation court advised the petitioner that this could only be done by granting to it a wholesale malt liquor dealer's license for the conduct of its business in the city. It did not require the brewing company to take out the license; its property was not seized; no penalty had been adjudicated against it; and there was no element of that compulsion which the law contemplates when it says that a tax involuntarily paid, under protest, may be recovered. Certainly there was no erroneous assessment under section 567 of the Code of 1904. The brewing company took out a wholesale malt liquor dealer's license, for which it was required by law to pay \$500, and it did so of its own free will.

In *Burroughs on Taxation*, at page 443, it is said that: "Where the party, of his own motion, procures his license and pays the tax, if the tax be afterwards judicially decided to be illegal, he cannot recover. Such payment is not under compulsion, although the pursuit of the occupation, without the payment of the license tax, would subject the party to fine and imprisonment."

The same author says, at page 266: "It is a well-settled principle of law that a voluntary payment of money under a mistake of law lays no foundation for an action to recover back the money so paid."

The compulsion contemplated by law exists where the party called upon must pay, or suffer his property or person to be taken.

As was said by Judge Campbell, in *Atwell v. Zeluff*, 28 Mich. 118: "Where an officer demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under process at all he will make it effectual. The demand is equivalent to the service of a writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force, and he cannot be held to expect that the officer will desist after once making demand. The exhibition of the warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion."

The principles thus stated in *Burroughs* are fully sustained by the adjudicated cases.

In *Town Council of Cahaba v. Burnett*, 34 Ala. 400, it was held that a payment of money to the clerk of a town council, as the price of a license for retailing spirituous liquors, under an ordinance afterwards declared void by the Supreme Court, cannot be considered to have been made under compulsion, because the ordinance imposed a fine and imprisonment as the penalty for retailing without license, and consequently the money cannot be recovered by action.

In *Taylor v. Board of Health*, 31 Pa. 73, 72 Am. Dec. 724, it was held that payment of a tax is not compulsory, because made under a threat, express or implied, that legal remedies for it will be resorted to. *Cook v. City of Boston*, 9 Allen (Mass.) 393.

"Where a person, with full knowledge of the facts, voluntarily pays a demand unjustly made upon him, though attempted or threatened to be enforced by proceedings, it will not be considered as paid by compulsion, and the party thus paying is not entitled to recover back the money paid, though he may have protested against the unfounded claim at the time of payment made. Where money has been paid under a mistake of the facts, or under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld

from the party paying the money, an action may be maintained for the money wrongfully exacted. But such action is not maintainable in the naked case of a party making payment of a demand, rather than resort to litigation, and under the supposition that the claim, which subsequently turned out to be unauthorized by law, was enforceable against him or his property." *Lester v. Baltimore*, 29 Md. 415, 96 Am. Dec. 542.

The payment in the case in judgment was made with full knowledge of all the facts—unwillingly, it is true—but not under such compulsion as the law contemplates; and the judgment of the corporation court must be affirmed.

Affirmed.

(113 Va. 94)

BOARD OF SUP'RS OF NORFOLK COUNTY et al. v. DUKE et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. STATUTES (§ 90*)—CONSTITUTIONAL LAW (§ 61*)—MUNICIPAL CORPORATIONS (§ 12*)—DIVISION OF GOVERNMENTAL POWER—EXERCISE OF LEGISLATIVE POWER—EXERCISE BY JUDICIARY—INCORPORATION OF TOWN.

Const. 1902, § 5, and article 3 (Code 1904, pp. ccix, ccxvii), required the legislative, executive, and judicial departments to be separate; and section 117 (page cccxxviii) provides that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided by article 4, and then only by a two-thirds vote. Laws 1908, c. 308, provides that whenever a petition, signed by 20 electors of an unincorporated town or a thickly settled community, shall be presented to the circuit court of the county, stating the boundaries, population, etc., and the court shall be satisfied that it will be to the best interest of the inhabitants of the said town, that the prayer of the petition is reasonable, that the general good of the community will be promoted, that the number of inhabitants exceeds 200, and does not exceed 5,000, and that the area embraced therein is not excessive, it shall decree that the town be incorporated. *Held*, that section 117 required the Legislature to provide by general laws for the creation of municipal corporations, and it could not be said that Laws 1908 delegated legislative powers to the circuit court, contrary to the Constitution.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 90; *Constitutional Law*, Dec. Dig. § 61; *Municipal Corporations*, Dec. Dig. § 12.*]

2. CONSTITUTIONAL LAW (§ 14*)—CONSTRUCTION.

The language of the Constitution should be construed according to the ordinary meaning of the words used therein, not being ambiguous.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 11; Dec. Dig. § 14.*]

3. WORDS AND PHRASES—"ORGANIZE."

"To organize" means to arrange or constitute in parts; each having a special function or relation.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5053, 5054.]

4. MUNICIPAL CORPORATIONS (§ 7*)—ORGANIZATION—REASONABLENESS.

Laws 1908, c. 808, authorizes the circuit court of a county, on petition of the electors of any thickly settled community to have it incorporated as a town; if the court be satisfied that the petition is reasonable, and that the general good of the community will be thereby promoted, to order the town to be incorporated. The community sought to be organized as a town is a part of a continuous settlement which is divided by a railway, and the two parts of the settlement are contiguous and homogeneous in population and interest, and some of the streets pass through both towns. *Held*, that it was not reasonable, or for the best interest of the community, that the part of the community in question be incorporated as a town.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 7.*]

Error to Circuit Court, Norfolk County.

Petition by John T. Duke and others against the Board of Supervisors of Norfolk County and others to have territory incorporated as a town. Order granting the petition, and defendants bring error. Reversed, and petition dismissed.

Sale, Mann & Tyler, J. W. Hopper, and T. J. Wool, for plaintiffs in error. Jno. N. Sebrell, Jr., for defendants in error.

KEITH, P. Certain persons, claiming to be electors, filed their petition in the circuit court of Norfolk county, in which they state that a certain thickly settled community, known as "Pinners Point," in the county of Norfolk, described by metes and bounds in the petition, containing 1,250 inhabitants, being of opinion that it was to their interest to be incorporated, and that the general good of the community would thereby be promoted, asked the court to incorporate them as a town, under the name of "Pinners," by virtue of an act approved March 14, 1908, entitled "An act to provide for the incorporation by the courts of towns of more than 200 and less than 5,000 inhabitants, and conferring upon said towns, when incorporated, certain powers of taxation," to be found in the Acts of 1908, at page 552.

Upon their motion, the board of supervisors of Norfolk county and certain individuals were made parties to this petition, and filed their demurrer in writing, which was overruled, and thereupon they filed their answer, to which the petitioners replied generally; and the court having heard the evidence entered an order in accordance with the prayer of the petition, to which order a writ of error was awarded, and the case is before us for review.

By the terms of the act referred to, it is provided that the case shall be heard in the appellate court "without reference to the principles of demurrer to evidence, the evidence to be considered as on appeal in chancery cases."

Certain formal objections were taken in the circuit court by the respondents, and are insisted upon here, which, in the view we shall take of this case, need not be determined. We shall assume that the number of electors contemplated, duly qualified as provided by law, united in the petition to the circuit court; that the description of the territory proposed to be embraced in the incorporation is correctly given; that due publication was made in accordance with the statute; and, in fine, that all matters of form were complied with.

[1] The first question which we shall consider arises upon the demurrer. It is insisted that the act of Assembly of the 14th of March, 1908, is unconstitutional, because it violates section 5, art. 1, of the Constitution of 1902 (Code 1904, p. ccix), the first paragraph of which declares that the legislative, executive, and judicial departments of the state shall be separate and distinct, and article 8 (page ccxvii), which declares that, "Except as hereinafter provided, the legislative, executive, and judicial departments shall be separate and distinct so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

By section 117 of article 8 of the Constitution (page ccxxviii), it is provided that: "General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article 4 of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house."

Plaintiffs in error contend that the act in question delegates to the circuit courts legislative functions, in deciding (1) whether the proposed incorporation is for the interest of the inhabitants of the proposed town; (2) whether the general good of the community will be promoted by incorporation; (3) whether or not the prayer of the petitioners is reasonable; (4) that it permits the courts to alter the boundaries named in the petition, and to fix others; and (5) that it vests absolutely in the court the discretion to dispose of the matter as to it may seem best.

This general subject was before this court in *Henrico County v. City of Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001. That, it is true was a case involving the constitutionality of an act authorizing the annexation of territory to an existing municipal corporation.

By section 126 of the Constitution (page ccxlii), it is declared that: "The General Assembly shall provide by general laws for the extension and contraction from time to time of the corporate limits of cities and

towns, and no special act for such purpose shall be valid."

When the Legislature came to deal with the duty imposed by that section, it passed an act which is to be found in the Code of 1904 as section 1014a. It imposes upon the courts substantially the same duties that they are required to exercise under the act called in question in the controversy before us.

The constitutionality of section 1014a was vigorously attacked upon arguments almost identical with those under consideration, and enforced by substantially the same line of authorities, though the industry of counsel in the case before us has added to the number. It was urged upon us in *Henrico County v. City of Richmond* that there was a commingling of legislative and judicial functions in the act, which rendered it null and void. It was pointed out that it was for the courts to determine the necessity for and expediency of annexation, and whether the terms and conditions set forth in the ordinance were reasonable and fair, and whether fair and just provisions were made for the future management and improvement of the annexed territory; that if the court or judge should be satisfied with the necessity for or expediency of such annexation, and that such conditions and provisions were reasonable and fair, an order should be entered providing for the annexation of the territory, but if of opinion that the annexation was unnecessary or inexpedient, then the motion for annexation should be dismissed; that it provided that if the court or judge should be of opinion that the annexation of only a part of the territory was necessary or expedient, or that the ordinance did not contain fair and reasonable terms, or that more territory should be annexed than was embraced within the metes and bounds originally set forth, it should enter a proper order, embodying what it deemed reasonable and fair terms upon which the annexation should be had, and how much of the territory should be annexed, and direct the annexation of such territory in conformity with the terms and conditions so prescribed. It was made the duty of the court to draw the lines of annexation, so as to have a reasonably compact body of land, and to see that no land should be taken into the city which was not adapted to city improvements, unless necessarily embraced in said compact body, and other provisions of a like character, all of which were claimed to be in their essence legislative functions; that the attempt to confer the exercise of such powers upon courts was in plain violation of those provisions of the Constitution intended to secure the complete separation of executive, judicial, and legislative departments, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time.

The opinion of the court deals with all of these subjects, and, after a full consideration reached the conclusion, as set forth in the syllabus, that: "An act of Assembly, providing for the extension of the corporate limits of cities and towns, and which confers upon the circuit courts of the counties in which the territory lies the power to ascertain and determine the boundaries to be embraced, and the necessity for and the expediency of extending the corporate limits of cities and towns, is not unconstitutional, on the ground of conferring legislative powers on such courts. Nearly or quite all of the questions of necessity and expediency submitted to the courts for their determination are questions of fact, and are to be ascertained judicially, and the limited legislative power conferred, if any, is not in violation of the Constitution. Governments could not exist if the inhibition on the intermingling of such powers in one person or body, were strictly, literally, and unyieldingly applied in every situation. The manifest purpose of the Legislature was to make a case to be tried in court, in which all the parties concerned are brought before the court and given an opportunity to be heard."

That case has been accepted as law, and has been acted upon in numerous instances, and is not now to be disturbed, except for the gravest and most convincing reasons. We shall not undertake to add anything to the reasoning of the court, and shall present but one authority in addition to those there considered.

In *Wayman v. Southard*, 10 Wheat. 3, 6 L. Ed. 253, Chief Justice Marshall, dealing with a kindred subject, uses language which strongly confirms the result reached by this court. Said he: "The difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."

In passing section 1014a, the Legislature was obeying the mandate of the Constitution, which requires it "to provide by general laws for the extension and contraction from time to time of the corporate limits of cities and towns, and no special act for such purpose shall be valid." In passing the law under consideration, it was acting in obedience to section 117 of the Constitution, which provides that "general laws for the organization and government of cities and towns shall be enacted by the General Assembly and no special act shall be passed in relation thereto, except in the manner provided in article 4 of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house."

Admitting the correctness of the decision

in Henrico County v. City of Richmond, its binding force as authority can only be avoided by differentiating the creation of a municipal corporation from the annexation of additional territory to an existing corporation. It may be conceded that the creation of a municipal corporation is in its essence a legislative act, and the true question is whether or not it was competent for the Legislature to delegate such a power to the courts.

[2, 3] The Constitution requires the General Assembly—does not merely permit, but commands that body—to enact general laws for the organization and government of cities and towns. This language is to be construed in accordance with the ordinary meaning of the words used. “To organize” means to arrange or constitute in parts, each having a special function, act, office or relation; it means something more in the connection in which it is used than to put into working order agencies already established, for that duty is more properly embraced under the word “government”; it is required to pass laws, both to organize and to govern; and it is plain to us that the language is sufficient, not only to permit, but to require, the Legislature to make provision for the creation and regulation, for the organization, and for the government of, municipal corporations. Certainly it cannot be said that the act passed in pursuance of the mandate here given is so plainly in excess of authority that the courts would be justified in holding it to be null and void, as in contravention of the constitutional provisions to which we have referred. It is not necessary to reiterate or to cite authorities in support of the proposition that, while courts possess power to declare acts of the General Assembly unconstitutional, they will not do so unless there is clear violation of some explicit provision of the Constitution.

We are of opinion that the same process of reasoning which, in the case of Henrico County v. City of Richmond, led to the conclusion that the act for the annexation of territory was valid leads inevitably to the same result in dealing with the act of March 14, 1908.

[4] It is assigned as error that the court found that the prayer of the petition was reasonable, when the evidence does not sustain that conclusion, and that it erred, because, while the act authorizes the incorporation of a “thickly settled community,” it does not justify the carving out of a part of a thickly settled community and its incorporation. We will consider these two together.

We have carefully considered the evidence in this case and the maps which are made a part of the record, from which it plainly appears that there is a continuous settlement fronting upon “Western Branch”; that

through this settlement there passes what is known as the “Belt Line” railway. That portion of the settlement to the west of the railway is known as “Finner’s”; that to the east is “Port Norfolk.” They are contiguous to each other, and appear to be homogeneous in population and in real interests, though there may be diversity of opinion between them. They are separated only by the tracks of a railway that is made one of the boundaries set out in the petition for the incorporation of “Pinner’s.” Some of the streets pass through Pinner’s and Port Norfolk without interruption; and we cannot think it reasonable, or to the best interests of that community, that they should be divided into parts, and considered and treated as two separate communities, when in truth they constitute but one continuous, contiguous, and homogeneous settlement. As the act requires that the town incorporated shall contain not less than 200 inhabitants, it is conceivable that such a community might be almost indefinitely subdivided and erected into municipal corporations, if a faction in one of the subdivisions chanced to obtain control. We do not believe that the act contemplates anything of the kind; and when it provides for the incorporation of a thickly settled community, it does not mean that that community shall be subdivided in accordance with the caprice and whim of a limited portion of the people constituting the entire community. Great and unnecessary burdens might be imposed, and great wrong and injury accomplished, under such a construction.

We are of opinion that the evidence does not justify the finding of the circuit court that the prayer of the petition is reasonable, and that the general good of the community will be promoted by the incorporation of the town of Pinner’s. The order appealed from is therefore reversed, and the petition is dismissed, with costs to the parties substantially prevailing.

(112 Va. 7)

ARMINIUS CHEMICAL CO. et al. v. LANDRUM et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. JUDGMENT (§ 251*) — APPLICABILITY TO PLEADINGS.

Plaintiffs’ amended declaration sought to recover for injury to land by an alleged nuisance committed and maintained by defendants prior to the commencement of the action, consisting of the pollution of a water course by which plaintiffs’ lands were subject to a deposit of iron pyrites and sulphurous substances from defendants’ mines. Defendants’ plea charged that any nuisance was permanent in character, and that all damages therefrom must be recovered in one action, and concluded with an averment that plaintiffs ought not to maintain a claim for temporary damages. Another plea raised the same question, and concluded

that the cause of action pleaded did not accrue within five years before suit. The replication to both pleas was general. The jury found defendants guilty of the trespass alleged in the declaration and that plaintiffs had been damaged to the extent of \$800. *Held*, that such verdict constituted an adverse finding on defendants' pleas and that a judgment for plaintiffs on such verdict was not objectionable as in conflict with the declaration and replication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

2. WATERS AND WATER COURSES (§ 76*)—POLLUTION OF STREAM—DAMAGES—MITIGATION—GENERAL BENEFITS.

In an action against upper riparian mine owners for the pollution of a stream by the waste from their mines which flowed down on and injured plaintiffs' lands, evidence of general benefits accruing to plaintiffs' lands, in common with all the land in the vicinity arising from the fact that operation of defendants' mines caused an increase in the population, was inadmissible in mitigation of damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 64; Dec. Dig. § 76.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—REJECTION OF SPECIAL PLEA—GENERAL ISSUE.

Defendants in trespass were not prejudiced by the rejection of a special plea alleging that the injuries complained of in the declaration were but the result of the natural, lawful, and reasonable use of their property by the defendants without malice or negligence, all the evidence admissible under such plea being equally admissible under the plea of not guilty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4094; Dec. Dig. § 1040.*]

4. WATERS AND WATER COURSES (§ 64*)—POLLUTION—RIPARIAN PROPRIETORS—RIGHTS.

All riparian proprietors on the same stream have the same right to the use and enjoyment of its waters, the rights of each being qualified by the right of the others to have the stream substantially preserved in its size and flow, and to be protected against any material pollution of its waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 55-57; Dec. Dig. § 64.*]

5. WATERS AND WATER COURSES (§ 67*)—RIPARIAN PROPRIETORS—POLLUTION—MINE-OWNERS.

The fact that defendants owned mines located on the stream on which plaintiffs were lower riparian proprietors, and that such mines were so situated that in their operation the pollution of the stream was a necessary consequence, did not prevent plaintiffs from recovering damages to their lower riparian land by such pollution, since the necessities of one man's business cannot be made the standard by which to measure another's right in a thing belonging to both.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 58; Dec. Dig. § 67.* Mines and Minerals, Cent. Dig. §§ 245, 246.]

6. EMINENT DOMAIN (§ 69*)—USE OF PROPERTY—INJURY TO OTHERS.

The private business of one man or class of men, however important its successful operation may be to the public or to the development of the country, does not give him or them the right to destroy or materially injure the property of another in a thing in which they have a common right, under the constitutional provision that private property cannot be taken or damaged for public use without compensa-

tion, and for the same reason cannot be damaged for private purposes without rendering the person causing the damages liable therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

7. WATERS AND WATER COURSES (§ 77*)—POLLUTION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for damages to a lower riparian proprietor by the pollution of a water course, whether plaintiffs had been guilty of contributory negligence in failing to take certain fallen trees out of the stream so as to minimize the overflow thereof, *held* for the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 77.*]

8. EVIDENCE (§ 542*)—EXPERTS—COMPETENCY.

Where a witness was a scientific and practical engineer of long experience and a member of the American Society of Mining Engineers, had been a city engineer, and had had experience in filtering and cleansing water for drinking purposes, it was not reversible error for the court to permit him to testify on the question, whether it was possible to operate certain iron pyrite mines without polluting the waters of a creek, though he did not claim to be a mining engineer and had had no experience in filtering or purifying waters from mines.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2355; Dec. Dig. § 542.*]

9. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—COMPETENCY OF WITNESSES.

Where upper riparian proprietors in the operation of mines had no right at all to pollute the waters of a creek to the injury of a lower riparian proprietor, they were not prejudiced by a ruling permitting an alleged incompetent witness to testify that the mines could be operated without polluting the stream.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1048.*]

10. APPEAL AND ERROR (§ 215*)—INSTRUCTIONS—RIGHT TO ALLEGE ERROR—NECESSITY OF OBJECTIONS.

Where in an action against several upper riparian proprietors for polluting the stream to the damage of lower proprietors, defendants did not except to an instruction that if it was possible to determine from the evidence what specific amount of damage had been caused by any one of the defendants, the jury should assess such defendant the amount for which it was responsible, but if it was impossible to determine in what proportion the defendants had contributed to injuries, then each who had contributed in any degree was responsible for the whole injury, though his act alone might not have caused the entire damage, and though without fault on his part the damages would have resulted from the acts of the other defendants, could not object for the first time on appeal on the ground that each defendant having acted independently, each was liable only for the damage done by its acts and not for the result of the acts of others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

11. APPEAL AND ERROR (§ 1001*)—EVIDENCE—REVIEW.

A judgment will not be reversed because the verdict is contrary to the evidence or without evidence to support it, except in a case of plain deviation from or palpable insufficiency of evidence and not in a doubtful case mere-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rev'r Indexes

ly because the court, if sitting as a jury, would have given a different verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

Error to Circuit Court, Louisa County.

Trespass by E. Landrum and others against the Virginia Carolina Chemical Company and others. From a judgment against defendants, the Sulphur Mining & Railroad Company and the Arminius Chemical Company, they bring error. Affirmed.

F. W. Sims, Gordon & Gordon, and Jas. R. Caton, for plaintiffs in error. W. C. Bibb and Harmon & Walsh, for defendants in error.

BUCHANAN, J. This is an action of trespass on the case brought by the defendants in error against the plaintiffs in error and two other corporations to recover damages for the pollution of the waters of Contrary creek, which flows through the lands of the plaintiffs, and for injuries to their lands caused by the deposit thereon of the washings of "iron pyrites" taken from the mines of the defendants.

Upon the trial of the cause the following verdict was found, and judgment entered, viz.: "We, the jury, find for the plaintiffs on the issues joined on the special pleas Nos. 1 and 2 against the Sulphur Mining & Railroad Co. and the Arminius Chemical Co. and fix the damages at the sum of eight hundred dollars, and we further find for the defendants to the United States Fidelity & Guaranty Co. and the Virginia Carolina Chemical Co. F. P. Smith, Foreman."

"And thereupon the defendants the Sulphur Mining & Railroad Company and the Arminius Chemical Company moved the court in arrest of judgment, to set aside the verdict of the jury, and for a new trial, because the verdict is contrary to the law and the evidence; the damages assessed are excessive and unsupported by the evidence, and for misdirection of the jury, which motion the court overruled, to which rulings of the court the said defendants excepted. Whereupon it is considered by the court that the plaintiffs recover of the said defendants to the Sulphur Mining & Railroad Company and the Arminius Chemical Company the sum of \$800, with legal interest thereon from this day until paid, and their costs in this behalf expended."

To that judgment upon the petition of the Arminius Chemical Company and the Sulphur Mining & Railroad Company this writ of error was awarded.

[1] The first assignment of error, made alone by the Arminius Chemical Company, is that "there is error apparent on the face of the record, in that the verdict of the jury and the judgment of the court are in con-

flict with the allegations of the plaintiffs' declaration and with their replication."

The defendants pleaded the general issue and offered three special pleas, all of which were objected to, but the court overruled the objections to special pleas Nos. 1 and 2, and permitted them to be filed, and to each of these the plaintiff replied generally.

For the purposes of this assignment of error it may be conceded that the amended declaration only states a case entitling the plaintiffs to damages resulting to them from the alleged nuisance prior to the institution of the action, as claimed by the petitioner. Special plea No. 1 avers that the nuisance complained of is permanent in its character and that all the damages resulting therefrom to the plaintiffs must be recovered in one action, and concludes with the averment "that the plaintiffs ought not to have or maintain their claim for temporary damages only in the declaration mentioned, but should sue for and recover all the damages they have suffered and will sustain, if any, by reason of the said injuries in one action." Special plea No. 2 contains the same averments as special plea No. 1, except its conclusion. No. 1 concludes as above mentioned, and No. 2 concludes as follows: "And the said defendants say that the several supposed causes of action in the declaration mentioned did not, nor did any of them, accrue to the said plaintiffs at any time within five years next before the institution of this suit." The general replications to these pleas put the averments of each in issue.

The effect of the finding of the jury, as we understand it, is that the petitioning defendants were guilty of the trespass alleged in the declaration—that the averments of neither of the special pleas Nos. 1 and 2 were true, and that the plaintiffs were damaged to the extent of \$800. The verdict of the jury was not, therefore, in favor of the petitioners upon special plea No. 1, as it insists, but against it. The judgment of the court is in strict accordance with the verdict of the jury.

[2] The next error assigned is to the action of the court in refusing to permit E. J. Haley and a number of other witnesses to testify, in mitigation of damages, "that all of the lands lying in the vicinity of the defendants' mines, including those of the plaintiffs, have been greatly enhanced in value as an incident of the operation of said mines; that the population in such vicinity had been increased twenty to one by reason of their operations, and as a consequence all lands close enough to furnish homes for the men working at the mines had risen in value since the year 1899 to a marked extent, possibly to as great an extent as the sum of the injury complained of."

It appears from the bill of exceptions tak-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

en to the action of the court and also from the assignment of error that the object of the evidence was not to prove any special benefit to the plaintiffs' lands by reason of the nuisance, but the general benefits which had resulted to all the lands lying in the vicinity of the mines of the defendants, including that of the plaintiffs.

Without considering the question, whether or not special benefits resulting to a landowner from a mining or manufacturing plant operated in such manner as to become a nuisance and injure the lands of such owner can be proved to mitigate the damages resulting from the wrongful act, it is clear, we think, that general benefits, like an increase in the market value of land, which may result or come to all the lands in the vicinity of such mining or manufacturing plant by reason of its establishment and operation, cannot be shown to mitigate the landowner's damages which result from the improper manner in which the plant is operated. These general benefits are mere incidents or accidents arising out of the existence of the mining or manufacturing plant. They give the owner of the plant no claim against the landowner. Their value cannot be treated by the plant owner as the purchase price, in whole or in part, of a right to so use or operate his plant as to injure the landowner, nor as a set-off against damages resulting from a wrongful act. See 1 Sutherland on Damages (3d Ed.) §§ 158, 1056; *Francis v. Schoelkopf*, 53 N. Y. 152; *Marcy v. Fries*, 18 Kan. 353, 355, 356; opinion by Judge (afterwards Justice) Brewer in *Gerish v. New Market, etc., Co.*, 30 N. H. 478, 485; *James River, etc., Co. v. Turner*, 36 Va. 313, 339-341.

[3] The next assignment of error is to the action of the court in rejecting special plea No. 3, and in refusing to give instruction No. 9, asked for by the defendants.

The defense sought to be set up by that plea was that the injuries complained of in the plaintiffs' declaration were but the result of the natural, lawful, and reasonable use of their property by the defendants without malice or negligence, and this being so they were not liable in damages for the alleged injuries.

By instruction No. 9 the court was asked to tell the jury that if they believed from the evidence that the averments of that plea were true, they must find for the defendants.

If it were conceded that the plea set up a good defense to the plaintiffs' demand, no prejudice to the defendants resulted from the rejection of the plea; for under the plea of not guilty in an action of trespass on the case in tort, the defendant has the right to give in evidence any matter which justifies or excuses the act or acts complained of in the plaintiffs' declaration. See *Stephens* on Pl. 157; 4 Min. Inst. 646; 1 Chitty on Pl.; 1 Barton's Law Pr. (2d Ed.) 503, 504; *Ridge-*

ley v. Town of West Fairmount, 46 W. Va. 445, 33 S. E. 235.

In their statement of their grounds of defense required and filed under the plea of not guilty, the same defense was relied on by the defendants as was set up in special plea No. 3, and they were permitted to introduce evidence tending to sustain it.

It appears from the uncontradicted evidence in the case that the plaintiffs are the owners of about 250 acres of land, through which flows Contrary creek. A portion of the tract is bottom land, subject to overflow in times of high water. The two defendants who have appealed in this case are upper riparian occupants, each in possession of a large tract of land upon which it operates large mines producing iron pyrites, and upon which it has erected washers to separate the ore from the slate or rock in which it is imbedded as it comes from the mines. The rock is crushed and then washed in water by some device which permits the valuable ore to settle and the refuse to pass off in the water. This refuse finds its way to the creek and in time of high water quantities of it are deposited on the plaintiffs' land. The refuse is in part iron pyrites. It contains, it seems, iron and sulphur, which upon being exposed to the air gives off sulphuric acid. This acid or noxious substance kills vegetation and injuriously affects the fertility of the soil. About 30 acres of the lowland of the plaintiffs are covered with said deposit, which has killed all, or nearly all, of the vegetation growing upon it, including trees, and rendered it almost, if not entirely, valueless for farming purposes.

The evidence further tends to show that the land covered by the deposit at times becomes soft and boggy, so that it is difficult if not impossible for stock to cross it from one part of the farm, which the creek divides into about equal parts, to the other; that the waters of the stream are unfit for use by domestic animals; that at times they will not drink it; and that the residue of the land has, by the acts of the defendants, been rendered much less valuable as a farm.

[4] Unless the said defendants had superior rights to the ordinary riparian proprietor, it is clear that the injuries complained of were not *damnum absque injuria*, and instruction No. 9 was properly refused; for the general principle of law is that all riparian proprietors upon the same stream have the same right to the use and enjoyment of its waters—the right of no one is absolute—but is qualified by the right of the others to have the stream substantially preserved in its size, flow, and purity, and to be protected against any material pollution of its waters. This is the common right of all. The use of one must not, therefore, be inconsistent with the rights of the others. *Trevett v. Prison Association*, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727;

Shoffner v. Sutherland, 111 Va. 298, 68 S. E. 996; *Shearman & Redfield on Neg.* §§ 733, 734.

[5] The contention of the defendants is that the general rule as to the rights of riparian owners does not apply in the case of mineowners, whose mines are so situated that in their operations the pollution of the stream is an inseparable and necessary consequence from the only use for which their property is valuable; in other words, if the pollution of the stream was the necessary consequence of the only method in which the said defendants could operate their mines, then the injury done to the plaintiffs was reasonable and lawful, and *damnum absque injuria*.

The case principally relied on to sustain this contention is that of *Penn. Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445, in which it was held that the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who had purchased their lands, built their houses and laid out their grounds before the opening of the mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must *ex necessitate* give way to the interests of the community in order to permit the development of the resources of the country and to make possible the prosecution of the lawful business of mining coal. That case had been before the Supreme Court of Pennsylvania twice before, when the decision was in favor of the lower riparian owner. On the third appeal the decision relied on was made by a divided court—four judges to three. The conclusion reached on the last appeal is not in accord with principles which have for centuries applied in determining the common interests and rights of riparian proprietors, and the case has received but little approval outside of the jurisdiction in which the ruling was made. That decision, as it seems to us, is based upon two grounds, neither of which is sound, viz.: That the rights of one riparian owner are to be determined by the necessities of another and by the importance of the latter's business to the community or public.

"The necessities of one man's business cannot," as has been well said, "be the standard by which to measure another's rights in a thing which belongs to both." *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 637; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643; *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 65, 33 Atl. 288.

[6] Neither can the private business of one man or class of men, however important its successful operation may be to the public or to the development of the country, give such person or class of persons the right to destroy or materially injure the property of another in a thing in which they have common rights. If, under our Constitution and

laws, private property cannot be taken or damaged for public uses without just compensation, a fortiori it cannot be done for private purposes. See *Townsend v. Norfolk Ry. Co.*, 105 Va. 49, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842; *Shoffner v. Sutherland*, supra, 111 Va. 301, 68 S. E. 996.

In *Young v. Banking Distillery Co.* (1893), 1 App. Cas. 691, 701, 702, Lord Shand, in commenting on the *Sanderson Case*, after stating what it decided, said: "The case had been twice previously before the court, and on both occasions the judgment was given against the mineowners. On the third occasion, which occurred in consequence of a third trial to assess damages, the jury found a very large sum due to the lower owner, but the verdict was quashed and the whole case reconsidered with reference to the legal rights of the parties, and with the results I have stated. In a court of seven judges there were three who dissented from the judgment, including the chief justice of the state. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight." After stating the grounds upon which the decision was placed, he continues: "The case has no application to the present because the decision was based upon special circumstances as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than interpreting the law so as to give effect to sound, just, and well-recognized principles as to the common interest and rights of upper and lower proprietors in the running water of a stream."

In the same case (page 699), Lord McNaughton, in commenting upon the *Sanderson Case*, said: "Then the appellant urged (precisely as the defendant here) that working coal was the natural and proper use of their mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulates in their mine. They added that this water course is the natural and proper channel to carry off the surplus water of the district. All that may be very true, but in this country, at any rate, it is not permissible in such case for a man to use his own property so as to injure the property of his neighbor."

In the case of *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, it was held that the doctrine of the *Sanderson Case* was not the law of the state of New York, and in commenting upon it the Court of Appeals of that state said: "We have never adopted that rule in this state, and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for protection of property of small value in the interest of some business required to develop the resources of the state and in which much cap-

ital had embarked, giving employment to a great number of people. There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream as an incident to his ownership of the soil and to have it transmitted to without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water he has right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all. The use by each must, therefore, be consistent with the rights of the others, and the maxim, *sic utere tuo*, observed by all. The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by necessity or convenience of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

In *Beach, etc., v. Sterling Iron Co.*, 54 N. J. Eq. 65, 83 Atl. 286, the Supreme Court of New Jersey said: "Several matters are urged in defense to this case: First, but faintly, that the doctrine finally established by a bare majority of a divided court in Pennsylvania, in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. St. Rep. 445, should be adopted here. * * * The doctrine of that case is shown * * * to be inharmonious with a long line of previous decisions in Pennsylvania, and has not been, so far as we can learn, followed in any other state—certainly not in this state. It was repudiated in Ohio, whose mining interests are quite large, in the recent and well-considered case of *Columbus, etc., Coal, etc., Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528. * * * It was not suggested on the argument that the doctrine ever had the least foothold in this state."

In *Columbus, etc., Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528, in which the Supreme Court of the state of Ohio disapproved of the doctrine of the *Sanderson* Case, it was said: "The further claim of the company that it has the right to make the deposits in the places complained of, because it was necessary to the successful conduct of its own business to so place them, seems to us wanting in substance. The effect is to measure the rights of the

plaintiff in his lands and in the waters of Monday creek by the convenience or necessity of the company's business. An owner of land in Ohio is not subject to any such narrow and arbitrary rule.

In discussing the *Sanderson* Case the Supreme Court of Alabama, in *Drake v. Lady Ensley Coal Co.*, 102 Ala. 501, 14 South. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77, after referring to some of the later decisions of the court which decided the *Sanderson* Case, said: "The case in 113 Pa., 6 Atl., is not overruled, but is commented upon, and the distinction is drawn that in the latter case (113 Pa., 6 Atl.), the ore was being mined by the owner of the soil and in the two later cases, the coke was not mined on the land upon which it was manufactured. It seems to us that if in the case where the coal was mined on the land of the owner he was exempt from damages, upon the ground that the individual or minor interest must yield to the greater and paramount interest of the public, it would make but little difference where the coke was mined. The manufacturing of the coke from the ore was what contributed to the paramount and public interest. On the other hand, if the owner is to be exempted from liability because the ore was mined on his own land and not because of the public benefit then the doctrine of '*sic utere tuo ut alienum non lædas*' would be abolished and the rights of lower riparian proprietors, almost universally recognized and protected, would be destroyed. * * *

Under the provisions of the Constitution, private property cannot be taken for public uses or for corporations without just compensation made to the owner except by his consent. The courts—and it was never intended to be otherwise understood—are not the 'masons' to 'chisel' away vested rights of property of private individuals, however humble and obscure the owner, for the benefit of the public or great corporations." See, also, *Tennessee Coal, etc., Co. v. Hamilton*, 100 Ala. 252, 14 South. 167, 46 Am. St. Rep. 48.

In *Day v. Louisville Coal & Coke Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167, the principles of the *Sanderson* Case were invoked, and it was contended that the injury complained of was *damnum absque injuria* because consequent upon and necessary to the transaction of the defendant company's lawful business. In reply to that contention the Court of Appeals of West Virginia said: "This case involves principles, very important everywhere, but especially important in this state at present and in the future; but those principles are old and have been called into requisition through many, many years in actions for the pollution of streams, and casting into them hurtful things, and depositing them upon lands of riparian owners on the stream below. The defendant contends that, as it was using its property in carrying on a lawful business

very useful to the public, it is exempt from liability, as it was only exercising its rights. We are told by the able brief of the defendant's counsel that the affirmance of this judgment will be vastly hurtful and disastrous to the mining and coke interests of West Virginia, and have a tendency to detract from the value of our land, and hinder the development of the great wealth of coal and iron in the bowels of our mountains, and will be subversive of great public policy, which demands the development of our wealth therein and tends to the weal of the whole people of the state; and that a few individuals injured thereby must be without redress. We cannot accede to this broad proposition. The established maxim of centuries is *sic utere tuo ut alienum non ledas* (so use your own property that you do not injure another). That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society. A man has land upon a stream. He is its sole lord. No one has a right to injure that land. It is protected by the Constitution. If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal or public weal, do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption as it passes through his land, the man up the stream must answer in damages. One man without fault is injured by another. That is enough for liability. This is the general principle of the common law. One man cannot thus injure another. Especially is this so in this state, where the Constitution says that private property shall not be damaged for public use without compensation. How, then, can it be damaged for private interests or to promote a supposed public policy? The authorities are ample on this subject to sustain this position."

In the case of *Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A. (N. S.) 923, the Supreme Court of the state of Tennessee, in refusing to follow the *Sanderson* Case, said: "We are of opinion that the doctrine announced in *Pennsylvania Coal Co. v. Sanderson*, supra, is opposed by the great weight of authority in this country and England, and is, in our judgment, subversive of fundamental private rights, while it discards * * * the honored principles of the common law embodied in the maxim, *sic utere tuo ut alienum non ledas*."

In a note to this case in 10 Ann. Cas. p. 587, where it is also reported, many cases, English and American, are cited sustaining the general rule that where an upper riparian owner pollutes a stream by mining operations rendering the water unfit for domestic, manufacturing, or agricultural purposes, or causing refuse to be deposited on the lower

riparian owners' lands materially injuring the same; he is responsible in damages.

We are of opinion that instruction No. 9 did not correctly state the law as applied to the facts of this case, and the court did not err in refusing to give it.

[7] The next assignment of error is to the action of the court in refusing to give the defendants' instruction No. 7, and in giving in lieu thereof the following instruction:

"The court instructs the jury that it is the duty of a person injured by the wrongful act of another to take such reasonable precautions to prevent increase of injury as would be taken by a reasonable man under the circumstances; and if the jury believe from the evidence that the plaintiff failed to take such precautions and that the injury which the jury may believe from the evidence the plaintiffs have suffered was thereby increased; the defendants are not responsible in damages for the amount of such increased injury—the burden of proof is upon the defendants to establish by a preponderance of legal evidence that the injury caused by deposit of debris from defendant's operations has been increased in whole or in part by failure by plaintiffs to take such reasonable precautions."

The criticism made upon the instruction given by the court is that it left to the jury the question of whether or not the plaintiffs had been guilty of contributing to the injury done them by the defendants in failing to remove certain trees which had fallen into the stream, blocking it and thereby causing the water and the deposits therein to extend over more land than they would have done if the trees had been removed, since the evidence showed that the plaintiffs were guilty of contributory negligence in not so removing the trees as a matter of law.

We do not think that under the evidence the court would have been justified in taking that question away from the jury and holding that the plaintiffs were per se guilty of negligence in not removing the trees and thereby mitigating their damages. Under the circumstances disclosed by the record that was a question for the jury, and the instruction given fairly submitted it to them.

[8] The action of the court in permitting S. P. Maury to testify as an expert is assigned as error.

The defendants had introduced evidence tending to show that it was practically impossible for them to operate their mines without polluting the waters of Contrary creek. Maury was introduced by the plaintiffs for the purpose of controverting that contention, and gave some evidence which tended to do so, but his testimony was objected to upon the ground that it did not appear from his testimony that he had had any experience in mining iron pyrites or sulphur ore. It appeared that he was a scientific and practical engineer of long ex-

perience, and though he did not claim to be a mining engineer, he had been for many years a member of the American Society of Mining Engineers; that while he had no experience in filtering or purifying water from mines, he had been a city engineer and had experience in filtering and cleansing water for drinking purposes. He may not have been very highly qualified to speak as an expert upon the question as to which he was permitted to testify, yet we cannot say that it clearly appears that he was not a competent witness, and unless we can so declare, under the well-settled rule of this court permitting him to testify as an expert would furnish no sufficient ground for reversal. *Locomotive Works v. Ford*, 94 Va. 627, 641, 27 S. E. 509; *Va. Iron & Coal Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 388.

[8] But if he were clearly an incompetent witness, his evidence could not have prejudiced the defendants, since we have seen in disposing of the last preceding assignment of error that it was immaterial whether the defendants could or could not operate their mines without polluting the waters of Contrary creek, as it was charged with doing; for if they could not that gave them no right to inflict the injuries complained of.

[10] The next assignment of error, as we understand it, is based upon the refusal of the court to set aside the verdict because it was jointly against both the plaintiffs in error for the whole damages suffered, instead of against each for the injury, if any, caused by each.

There was evidence sufficient to justify the jury in finding that each of the plaintiffs in error had inflicted injury upon the defendants in error by polluting the stream, but it does not appear—indeed it is not contended—that the plaintiffs in error were joint wrongdoers. The instruction asked for by the plaintiffs upon this point and given by the court without objection treated the defendants as several wrongdoers, and told the jury, that "if it was possible to determine from the evidence what specific amount of damage has been caused by any one of the defendants, they should assess against such defendant the amount for which it was responsible, but if it is impossible to determine in what proportions the defendants have contributed to the injuries, each who has contributed in any degree to the injury is responsible for the whole injury, and this although his act alone might not have caused the entire injury, and though without fault on his part the damage would have resulted from the act of another."

At the time this case was tried (May, 1909), the case of *Pulaski Coal Co. v. Gibboney*, 110 Va. 448, 66 S. E. 73, had not been decided, which holds that if several mining companies, acting independently, cast their

refuse into a stream, thereby causing injury to a lower riparian owner, each is liable only for the damage done by its acts and not for the result of the acts of others. While, as stated in that case, the weight of authority is in favor of the doctrine announced, the cases are not in harmony upon the subject, some holding that where several mineowners contribute to the pollution of a stream, they are liable either jointly or severally for all the damages caused the lower riparian owner, especially where it is impossible to determine in what proportion each contributed to the injury. See *Day v. Louisville Coal & Coke Co.*, *supra*, where authorities sustaining that view are cited.

The instruction given seems to have been based upon the principle announced in *Grand Trunk Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, in which it was held, that where separate and independent acts of negligence of two parties are the direct cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although his act alone might not have caused the entire injury, and although without fault on his part the same damage would have resulted from the act of another. Whether the rule announced in *Pulaski Anthracite Coal Co. v. Gibboney*, *supra*, would control, where it is impossible to determine in what proportion each of several wrongdoers had contributed to the injury complained of, need not be considered in this case, since the instruction given was not objected to by the defendants. The defendants must be treated, therefore, as having impliedly assented to the proposition laid down in the instruction, and they will not be heard here for the first time to question its correctness. See *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Montague, etc., v. Allan, etc.*, 78 Va. 592, 49 Am. Rep. 384; *Lambert v. Cooper*, 70 Va. 61, 66; *Clark v. Sleet*, 99 Va. 381, 38 S. E. 183.

[11] The remaining assignment of error is to the refusal of the court to set aside the verdict of \$800 because not sustained by the evidence. Without discussing in detail the large mass of testimony taken on that subject, it is sufficient to say that while there is a great diversity of opinion among the witnesses, and we might, if upon the jury, have given smaller damages, we cannot say that the verdict is without evidence to support it. While this court has the right to pass upon the evidence in the case, it is well settled by a long line of decisions that it will not reverse the judgment of the trial court and grant a new trial because the verdict is contrary to the evidence or without evidence to support it, except in a case of plain deviation from or palpable insufficiency of evidence, and not in a doubtful case merely because the court, if on the jury, would have given a different verdict. Kim-

ball & Fink v. Friend, 95 Va. 125, 143, 144, 27 S. E. 901, and cases cited; C. & O. Ry. Co. v. Williams, 108 Va. 689, 62 S. E. 796.

The judgment complained of is affirmed. Affirmed.

WHITTLE, J., absent.

(113 Va. 102)

NORFOLK & PORTSMOUTH TRACTION CO. v. C. B. WHITE & BROS.,
Incorporated.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

Where defendant's deed recited that it was the intent of his grantor to convey all the property acquired by said grantor under a certain recorded deed, and that the property was subject to any easements created by the occupancy of a street railway, and the recorded deed referred to contained no reference to the easement of the street railway, it merely gave notice to the grantee that the street railway was in possession of part of the land conveyed, but not as to the railway's title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. § 230.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—RECORDING OF DEED—POSSESSION AS EVIDENCE OF TITLE.

Code 1904, §§ 2463, 2464, 2465, respectively, provide that every contract for the sale or conveyance of real estate, not in writing shall be void as to bona fide purchasers and creditors; that any such contract, if in writing, from the time it is admitted to record shall be, as against creditors and purchasers, as valid as a deed conveying the property covered by the contract; and that every such contract in writing, or deed conveying any estate or term of years, as to subsequent purchasers and creditors, shall be void, unless duly recorded, provided that the possession of any such estate, without notice of other evidence of title, shall not be notice to subsequent purchasers. *Held* that, while the proper office of a proviso is to modify or restrain the enacting clause or preceding matter, and a proviso to a particular section does not apply to others, unless it is clear that its effect was intended to extend beyond the section immediately preceding it yet the proviso in this case applies to all of the preceding sections, because all were intended to perfect registry laws, and section 2463 was intended to place the purchaser of land under a parol agreement in the same condition as purchasers under a writing who had failed to record it; and hence the mere possession of a purchaser of land under a parol contract is not notice to a subsequent bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

Appeal from Law and Chancery Court of City of Norfolk.

Bill by the Norfolk & Portsmouth Traction Company against C. B. White & Bros., Incorporated. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Williams & Tunstall and H. W. Anderson, for appellant. Tazewell Taylor, for appellees.

BUCHANAN, J. This is an appeal from a decree sustaining a demurrer to an amended bill filed by the appellant to restrain the appellee from prosecuting an action of ejectment to recover a small strip of land over which the appellant alleges that it has a perpetual right of way, acquired under a parol purchase from D. C. Foreman, who subsequently sold and conveyed the land over which the right of way passes to the John L. Roper Lumber Company, which company conveyed the land to the appellee.

The ground relied on to obtain the relief sought is that when the appellee acquired title to the land it had notice of the appellant's rights therein, by reason of a provision in the deed of the appellee and the fact that the appellant was in possession of the right of way, and was operating its street car line over it at that time.

[1] The appellee's deed contains the following statement, viz.:

"It is the intention of this deed to convey unto the parties of the second part all of the property acquired by the said party of the second part by a certain deed made to it by D. C. Foreman and wife dated on the 18th day of April, 1902, and of record in the office of the clerk of the corporation court of the city of Norfolk, Virginia, in Deed Book 134-B, page 222, to which reference is hereby made as part hereof, together with any additional rights, privileges or appurtenances obtained after the execution of the said deed by virtue of the change of the port warden's line, as made and adopted by the board of harbor commissioners on the 11th day of July, 1904, and subject to any easements (if any) acquired by the Berkley Street Railway by virtue of its occupancy of a part of said property, as shown on said plat, with its street railroad, the said party of the first part having given the said Berkley Street Railway no right so to occupy, or made no conveyance to it of any interest therein.

"The party of the first part covenants that it is seized in fee simple of the aforesaid property; that the same is free from incumbrances; that it will execute such further assurances thereof as may be requisite and necessary, and that it will warrant generally the title thereto."

The only effect of the language quoted, as we construe it, and as seems to be conceded by the petition of the appellant for the appeal, when read in connection with the deed of Foreman to the appellee's grantor, which neither reserved nor made mention of the appellant's right of way, was, so far as it affects this case, to give notice to the appellee that the appellant was in the posses-

sion of a part of the land conveyed. The question, therefore, to be determined upon this appeal is whether or not a vendee of an interest in land of a greater extent than a term of five years, under a verbal contract, who has paid the purchase price, and is in possession of such interest, has superior rights to a subsequent grantee of the land who has no other evidence of the former's title than his possession.

[2] The decision of this question depends upon the effect of the proviso to section 2465 of Pollard's Code. If, as contended by the counsel of the appellant, that proviso only applies to possession taken under such contracts as are mentioned in section 2465, and not to possession taken under such contracts as are described in section 2463, then the amended bill stated a case entitling the appellant to the relief sought.

Sections 2463, 2464, and 2465 of the Code are as follows:

"Sec. 2463. Contracts in consideration of marriage, or for the sale of real estate, and so forth, void as to creditors and purchasers unless in writing. Every contract, not in writing, made, in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors.

"Sec. 2464. If in writing and recorded, as valid as deeds. Any such contract, if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

"Sec. 2465. Contracts, deeds, and so forth, that are void as to creditors and purchasers unless recorded. Every such contract in writing and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels, and every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor), shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed, or bill of sale may be: *Provided, that the possession of any such estate or term, without notice of other evidence of title, shall not be notice to said subsequent purchasers for valuable consideration.*"

As will be observed, section 2463 relates to contracts not in writing, while the provisions of sections 2464 and 2465 relate to written instruments.

Those sections are the same now as they were when the case of *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, was decided, except the language italicized in section 2465. That section was amended by adding that language after the decision in the case of *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846 was rendered. Acts of Assembly 1895-96, p. 842; 1897-98, p. 833; and 1899-1900, p. 89.

In that case it was held that a purchaser for value of real property in the possession of another was put upon his inquiry as to the rights of the one in possession, and is affected with knowledge of whatever rights such possessor has; and such knowledge was held to be the same in effect as the notice which is imputed by the registry laws. The object of that amendment of section 2465, as generally understood by the courts and the legal profession, was to abolish the common-law doctrine of *Chapman v. Chapman*, and to provide that the possession of such estate or term, without notice of other evidence of title in such occupant, should not be notice to such subsequent purchaser for valuable consideration.

The contention of appellant's counsel is that the proviso in question only applies to a possession under a written instrument, such as is described in section 2465, of which the said proviso is a part, and that the common-law doctrine of *Chapman v. Chapman* is still in force as to contracts (unwritten) mentioned in 2463.

The general rule undoubtedly is that the appropriate office of a proviso is to restrain or modify the enacting clause or preceding matter, and that a proviso to a particular section does not apply to other sections. But if, from the context and a comparison of all the provisions relating to the same subject-matter, it is clear that it was intended to give the proviso an effect beyond the phrase immediately preceding it, or a scope beyond the section of which it is a part, it will be construed as restraining or qualifying preceding sections relating to the same subject-matter of the proviso, or as tantamount to the enactment of a separate section, without regard to its position and connection. *Wartensleben v. Haithcock*, 80 Ala. 565, 1 South. 38; *Mayor v. Cumberland*, 34 Md. 381; *U. S. v. Babbit*, 1 Black, 55, 61, 17 L. Ed. 94; *Banking Co. v. Smith*, 128 U. S. 174, 181, 9 Sup. Ct. 47, 32 L. Ed. 377; *U. S. v. Whitridge*, 197 U. S. 135, 143, 25 Sup. Ct. 406, 49 L. Ed. 696.

One of the objects of section 2463 was to abolish the doctrine of *Floyd v. Harding*, 69 Va. 401, and to place a purchaser of land under a parol contract, as to purchasers for valuable consideration, without notice, and creditors, in the same condition as purchasers under a writing, who had failed to register it as provided by sections 2464 and 2465. All three sections were intended to

render more nearly perfect our registry laws, and might very properly have been embraced in one section. Sections 2464 and 2465 are so connected with and dependent upon section 2463 that they must be read with it, in order to ascertain what is meant by the terms "any such contract" and "every such contract in writing," as used in those sections, respectively. It is clear that before the proviso was added to section 2465 a person in possession of land under a contract, not in writing, and one in possession under a contract in writing, not recorded, were in the same condition as to subsequent purchasers for valuable consideration, without notice, and creditors. The doctrine of *Floyd v. Harding*, supra, having been abolished, there is no reason why the possession of a purchaser of land under a contract, not in writing, should have any greater weight as evidence in determining the good faith of a subsequent purchaser than the possession of a purchaser under a written contract. There was not only no reason when the proviso was enacted why it should not apply alike to the possession of both classes of purchasers, but, unless it be so construed, it will fail to accomplish one of the objects for which, as before stated, it was passed, viz., to abolish the common-law doctrine of *Chapman v. Chapman*, supra; for in that case the prior purchaser was in possession under a contract not in writing.

For the foregoing reasons, the court is of opinion that the proviso in question was intended to apply, and should be construed as applying, to the possession of a prior purchaser of land, whether his purchase was under an unwritten contract, such as is mentioned in section 2463, or under a written instrument, such as is described in section 2465.

The court is further of opinion that the contract set up by the appellant was a contract "made in respect to real estate," within the meaning of sections 2463 and 2465 of the Code. 2 Minor on Real Property, §§ 97, 100; 2 Minor's Inst. 28.

It follows from what has been said that the court is of opinion that there is no error in the decree complained of, and that it must be affirmed.

Affirmed.

(113 Va. 117)

SOUTHERN RY. CO. v. LEWIS.

(Supreme Court of Appeals of Virginia. Jan. 11, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—SAFE APPLIANCES.

An employer is not bound to use the newest and best appliances, but only to furnish those of reasonable safety according to the usages of the business.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 174-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—SAFE PLACE OF WORK.

An employer need use only ordinary care to provide a reasonably safe place of work, considering the character of the work, not being an insurer against injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171-184, 192; Dec. Dig. §§ 101, 102.*]

3. NEGLIGENCE (§ 121*)—BURDEN OF PROOF.

The burden is upon plaintiff to prove negligence in an action for resulting damages.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224-228; Dec. Dig. § 121.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In a switchman's action for personal injuries by being struck by a switch stand while riding on the side of a car, evidence held not to show that defendant was negligent in setting the switch stand too close to the track.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

Error to Corporation Court of Danville.

Action by W. T. Lewis against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

William Leigh, for plaintiff in error. B. H. Custer and R. W. Peatross, for defendant in error.

HARRISON, J. This case is before us for the second time. See 110 Va. 847, 67 S. E. 357. On the former hearing the judgment was reversed for error in the instructions. The last trial resulted, like the first, in a judgment against the defendant company, which this writ of error brings under review.

In the view we take of the case, it is only necessary to consider the assignment of error which calls in question the action of the lower court in refusing to set aside the verdict and grant the defendant a new trial.

The action was brought by W. T. Lewis to recover damages for an injury which he alleges was brought about by the negligence of the defendant company. There is no material difference between the facts established on the two trials. They are sufficiently stated in the former opinion of this court, and need not be repeated here, except so far as may be necessary in disposing of the question now under consideration.

It is not alleged that the shifting engine and cars were improperly operated, or that the particular car which the plaintiff was attempting to mount was out of order or of an improper width, or that the switch was out of repair. The plaintiff was in the act of mounting a shifting box car when it was passing a switch, and the sole negligence charged is that the defendant company placed and maintained the switch, which it is alleged struck the plaintiff, too close to its track, and that the switch was too high. The evidence shows that the appliance was a "Ramapo" switch stand, that was in com-

mon use by the defendant and other railroads in their yards; that it was placed seven feet from the center of the track, which was the distance from the track commonly adopted for placing all such switches, thereby leaving a space of two feet between the lamp and the side of the car, which was a reasonably safe clearance for passing trains; that the switch stand was four feet and one inch high, including the lamp or target on top; and that this was the height of all such switches used on the railroad yards mentioned. Not only is this switch stand shown to be one of a class in common use by the defendant and other roads, and situated at a distance from the track commonly adopted by such roads, but it appears that the point of its location was where the greatest amount of work was done on the yards, and that it had been in that location for about two years without complaint and without accident to any one.

The evidence for the plaintiff tends to show that this class of switch was being superseded by the "New Century" switch, which was better liked and had been largely adopted by the defendant and other companies. This is not controverted; but it is none the less an established fact that the "Ramapo" switch stand is still in common use and is still regarded as a reasonably safe appliance.

[1, 2] It is well settled that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and reasonable safety means safe according to the usages of the business. His duty is also to use ordinary care to provide a reasonably safe place in which his servant is to work, considering the character of work in which the servant is engaged, and he is liable for injuries to the servant resulting from his failure to exercise such care. Absolute safety is unattainable, and employers are not insurers. They are liable for negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117; *Southern Ry. Co. v. Lewis*, 110 Va. 847, 67 S. E. 357.

The plaintiff endeavored, but failed, to show that the car he was attempting to mount was of more than ordinary width, thereby diminishing the space between it and the switch. It appears that the car in question was an ordinary box car of the defendant company, belonging to what is known as the "14,000 series," which series was in general use by railroad companies. The car being used at the time of the ac-

cident was not measured, but one of that series was; the measurement showing that cars of that width would not diminish or obstruct the space provided for between the switch and passing cars, but would leave a clearance of two feet, which was the standard clearance commonly adopted by the defendant and other companies as reasonably safe, and sufficient if the brakeman exercise ordinary care in performing his duty.

[3, 4] One who affirms negligence as the basis of an action for damages must establish it. We are of opinion that the evidence in this case fails to show that the defendant was guilty of any negligence which contributed to the injury complained of by the plaintiff. Under such circumstances there is no liability, and there can be no recovery.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, if the plaintiff be so advised, to be had not in conflict with this opinion.

Reversed.

(113 Va. 732)

POTTS v. COMMONWEALTH

(Supreme Court of Appeals of Virginia. Nov. 23, 1911.)

1. HOMICIDE (§ 146*)—MURDER—INSTRUCTIONS—BURDEN OF PROOF.

It was not error to instruct that, if the jury believed from the evidence that the killing was done with a deadly weapon, then the law presumes it was done with malice; and it was for the defense to satisfy the minds of the jury that it was not done with malice.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 265-271; Dec. Dig. § 146.*]

2. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—SHIFTING BURDEN OF PROOF.

An instruction that if the jury believed that the commonwealth had proven beyond reasonable doubt that decedent was killed by accused with a deadly weapon in his previous possession, and accused relied upon self-defense, the jury must be satisfied from the evidence that the defense was a true one, was improper, as shifting the burden of proof to accused.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 778.*]

3. CRIMINAL LAW (§ 308*)—PRESUMPTION OF INNOCENCE—OPERATION.

The presumption of accused's innocence follows him through every stage of the prosecution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 781; Dec. Dig. § 308.*]

4. CRIMINAL LAW (§ 327*)—PLEA OF NOT GUILTY—EFFECT.

A plea of not guilty denies every essential allegation in the indictment, and places upon the prosecution the burden to prove accused's guilt beyond a reasonable doubt; and that burden can never be imposed on accused, though the evidence may shift from one side to the other, to meet the varying exigencies of the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 720; Dec. Dig. § 327.*]

5. HOMICIDE (§ 151*) — BURDEN OF PROOF — SELF-DEFENSE.

The rule that the burden to prove accused's guilt is upon the prosecution throughout the trial is not affected by the rule that, where self-defense is pleaded, accused must set it up by affirmative proof, unless the fact appears on the commonwealth's own evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 151.*]

Error to Circuit Court, Norfolk County.

Shirley Potts was convicted of murder in the second degree, and he brings error. Reversed.

John W. Hopper, for plaintiff in error.
The Attorney General, for the Commonwealth.

WHITTLE, J. The plaintiff in error, Shirley Potts, brings error to a judgment of conviction of murder in the second degree, for which he was sentenced to confinement in the penitentiary for the term of 18 years.

[1, 2] At the instance of the commonwealth's attorney, the jury were instructed as follows:

First. "The court instructs the jury that if they believe from the evidence that the commonwealth has proven beyond a reasonable doubt that the deceased was killed by the accused with a deadly weapon in his previous possession, and that the accused relies upon the defense of self-defense to excuse the act, then the jury are instructed that their minds must be satisfied from the evidence that the said defense is a true one;" and,

Second. "The court instructs the jury that, if they believe from the evidence that the killing was done with a deadly weapon, then the law presumes it was done with *malice*, and it is for the defense to satisfy the minds of the jury that it was not done with malice."

The giving of both these instructions was made the ground of exception, and constitutes the first assignment of error.

The last instruction, with some change of language, is the equivalent of instructions approved in Hill's Case, 43 Va. 595, Bristow's Case, 56 Va. 634, Honesty's Case, 81 Va. 284, and a long line of Virginia decisions.

[3-5] But we are of opinion that the circuit court erred in giving the first instruction. It is a fundamental principle of criminal law that a person charged with the commission of crime is presumed to be innocent; and that presumption follows the accused through every stage of the prosecution. Moreover, the plea of not guilty denies every essential allegation in the indictment, and lays upon the prosecution the burden of proving the guilt of the defendant beyond a reasonable doubt. That burden is continuous, and can never be imposed upon the accused, although the evidence may shift from one side to the other, to meet the varying exigencies of the trial.

The rule is stated with exceptional clearness and force in *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329, where it is said: "That it devolves upon the state to establish by evidence the guilt of the accused beyond a reasonable doubt will not be controverted. The defendant by his plea of not guilty puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts—one of guilt, asserted by the state; the other of innocence, asserted by the accused. He does not plead affirmatively that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout. There is no shifting of the burden of proof. It remains upon the state throughout the trial. The evidence may shift from one side to the other. The state may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence; but still the burden of proof is on the state to establish the guilt of the accused beyond a reasonable doubt."

This rule is not affected by the modification that in cases of homicide, where the defense of self-defense is interposed, unless the fact appears from the commonwealth's own evidence, it is incumbent upon the accused to set it up by affirmative proof. For the evidence so introduced by the defendant must be considered and weighed by the jury, along with all the other evidence in the case, in determining the ultimate proposition, whether the evidence as a whole raises a reasonable doubt on their minds as to the guilt of the accused.

This principle is recognized in *Litton's Case*, 101 Va. 833, 849, 44 S. E. 923, 927, where the court sustained an instruction which told the jury: "That when the commonwealth has proved that the accused has committed a homicide, and it does not appear from the circumstances given in evidence by the commonwealth that the killing was of a lower degree than murder in the second degree or in self-defense, then it is *prima facie* murder in the second degree, and the burden is cast upon the accused to prove that it was below murder in the second degree or in self-defense; and if the commonwealth seeks to elevate the offense to murder in the first degree, the burden is upon it to do so. Yet when the evidence is all in, then, if the evidence both for the commonwealth and the accused leave a reasonable doubt as to the guilt of the accused, the jury must find the prisoner not guilty."

The principle enunciated in the concluding paragraph of the instruction in *Litton's Case* is supported by the great weight of authority. Many of the cases on the subject are collected and reviewed in a comprehensive note to the case of *Commonwealth v. Palmer*,

222 Pa. 299, 71 Atl. 100, 128 Am. St. Rep. 809, found in 19 L. R. A. (N. S.) 483.

The instruction under review does not incorporate the qualification adverted to, and the practical effect of the omission is to impose upon the accused the burden of proving that he is not guilty.

For this error, the judgment must be reversed, and the case remanded for a new trial. It is unnecessary, therefore, to consider the remaining assignment of error, that the verdict is contrary to the evidence.

Reversed,

(113 Va. 156)

WILLIAMS PRINTING CO. et al. v. SAUNDERS.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. LIBEL AND SLANDER (§ 104*)—EVIDENCE—MALICE—OTHER PUBLICATIONS.

Libels other than those declared on, whether published before or after the bringing of suit, including libels on third parties, are admissible to show malice, and the general character of the publication issued by defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

2. LIBEL AND SLANDER (§§ 6, 33*)—LIBEL PER SE—CHARGING OFFENSES.

The declaration in libel alleged that defendant published an article headed "S. and L.—Boss and Lieutenant," S. being plaintiff, and also an article stating that a certain person, a saloonkeeper, was plaintiff's partner, the article being entitled "G., Polcy King—Partner of S. in Stock Farm," and also an article, entitled "Buying Votes in M. and R.," which charged by innuendo that plaintiff would buy votes to get re-elected to the Democratic executive committee of the city. *Held*, that the charge must have been injurious to plaintiff's reputation, and was actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16, 112; Dec. Dig. §§ 6, 33.*]

3. LIBEL AND SLANDER (§ 32*) — GENERAL DAMAGES—LOSS OF BUSINESS OR PROFITS.

Evidence of general loss of customers or profits is general, not special, damage, and is admissible in proof of general damages, where the words charged are actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 32.*]

4. LIBEL AND SLANDER (§ 100*) — ACTIONS—ISSUES—PROOF—TRUTH.

Under Code 1904, § 3375, providing that defendant may justify by "alleging and proving" that the words written were true, and, after notice of intent to do so, may show in mitigation an apology offered to plaintiff before the action, the truth cannot be shown under a plea of not guilty, but only under a special plea of justification.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 249½, 251; Dec. Dig. § 100.*]

5. LIBEL AND SLANDER (§ 48*) — PRIVILEGED COMMUNICATIONS — DISCUSSING POLITICAL CANDIDATES.

A publication in good faith of the truth as to the qualifications of a candidate for public office is not libel, being qualifiedly privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 146; Dec. Dig. § 48.*]

6. LIBEL AND SLANDER (§ 34*)—"PRIVILEGED COMMUNICATION."

"Privileged communications" are of four classes, to wit, where the publisher of the slander acted in the bona fide discharge of a public or private, legal or moral, duty, or in the prosecution of his own interests; second, statements by an employer with reference to the character of a servant who has been in his employment; third, words used in the course of a legal or judicial proceeding; and, fourth, publications duly made in the course of parliamentary proceedings.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

7. LIBEL AND SLANDER (§ 48*)—PRIVILEGED COMMUNICATIONS—QUALIFIED PRIVILEGE—CANDIDATE FOR OFFICE.

While the privileged character of a publication may be such as to absolutely bar an action, as where it is absolutely privileged, as in the case of words used in legal, judicial, or parliamentary proceedings, the right to comment on the character and qualifications of a candidate for public office is only qualifiedly privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 146; Dec. Dig. § 48.*]

8. LIBEL AND SLANDER (§ 101*) — MALICE—PRESUMPTION — PRIVILEGED COMMUNICATIONS.

There is no presumption of malice if the publication is even qualifiedly privileged, so that plaintiff must prove malice in order to recover.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 101.*]

9. LIBEL AND SLANDER (§ 123*) — ACTIONS—JURY QUESTION—PRIVILEGED COMMUNICATIONS.

Whether a communication is privileged is for the court to determine, leaving it for the jury to determine whether it is malicious, so as to abuse the privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 362, 363; Dec. Dig. § 123.*]

10. LIBEL AND SLANDER (§ 48*)—WORDS LIBELOUS—CRITICISM OF POLITICAL CANDIDATE.

While publications of the truth as to the character and qualifications of a political candidate, made in good faith to inform the public, are not libelous, the publication of falsehood and calumny against candidates is libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 146; Dec. Dig. § 48.*]

11. LIBEL AND SLANDER (§ 49*) — CONSTITUTIONAL LAW (§ 90*)—PRIVILEGED COMMUNICATIONS—PRIVILEGE OF PRESS—"LIBERTY OF THE PRESS."

The press has only the same privilege as to publications as private individuals; the phrase "liberty of the press" merely meaning that newspaper publications shall not be subject to censorship, and, in the language of the Bill of Rights, that any citizen may write or publish his sentiments on all subjects, being responsible only for the abuse of that right.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 148; Dec. Dig. § 49; Constitutional Law, Cent. Dig. § 172; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4131-4133; vol. 8, p. 7706.]

12. TRIAL (§ 285*)—INSTRUCTIONS.

Instructions should be considered in the light of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 699; Dec. Dig. § 285.*]

13. COURTS (§ 89*)—PRECEDENTS.

The value of a case as a precedent depends on whether the precise point for which it is relied upon as authority was presented in argument and considered by the court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 89.*]

14. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A requested instruction was properly refused, where it was sufficiently covered by another instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

15. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS.

A requested charge in a libel case, which left it to the jury to determine whether the publications were true, when there was no plea of justification, so that they were conclusively presumed to be false, was properly refused.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 387; Dec. Dig. § 124.*]

16. LIBEL AND SLANDER (§ 50*)—PRIVILEGED COMMUNICATIONS.

A publication falsely imputing moral delinquency to a political candidate is libelous per se, though the publisher had good reason to and did believe the publication true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.*]

Error to Law and Equity Court of City of Richmond.

Action by Clyde Saunders against the Williams Printing Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

The declaration contained three counts. The first count set forth as a libel a publication headed "Saunders and Leaman—Boss and Lieutenant." The second count set forth as libel another publication, entitled "Andy Griffith, Policy King—Partner of Clyde Saunders in Stock Farm." The third count was under the statute for insulting words, and set forth the two publications above mentioned and a third publication, entitled "Buying Votes in Manchester and Richmond."

In said declaration it was stated, and was also proven by the evidence, that the plaintiff was, at the time of the publication, and had been for several years prior thereto, a member of the Democratic executive committee from Clay ward, in the city of Richmond, and was, at the time of said publication, a candidate for re-election upon said committee. Each of said articles was published in a certain periodical, entitled "The Idea," issued weekly by the said defendant A. A. Yoder, and was printed by the said Williams Printing Company in the ordinary course of business. It was alleged that they were so published to injure the plaintiff, and "to prevent him, the said plaintiff, from being chosen by the voters of his ward as a mem-

ber of said Democratic executive committee at an election" soon thereafter to be held.

Meredith & Cocke, for plaintiffs in error. Scott, Buchanan & Cardwell and David H. Leake, for defendant in error.

KEITH, P. This is a writ of error to a judgment of the law and equity court of the city of Richmond, rendered in an action for libel brought by Clyde Saunders against Rufus O. Williams and Roy H. Williams, partners doing business as the Williams Printing Company, and Adon A. Yoder. There was a verdict and judgment for the plaintiff for \$1,600.

During the progress of the trial, the defendants reserved a number of exceptions to the rulings of the court, the propriety of which will be the subject of inquiry.

The declaration contains three counts. The first two set forth as libels certain publications which were printed and published by the Williams Printing Company, and of which Yoder was the author. The third count is under the statute for insulting words, and sets forth the publications mentioned in the first and second counts and one peculiar to itself, entitled "Buying Votes in Manchester and Richmond."

There was no demurrer to the declaration, and the only plea was that of not guilty; but the defendants, at the request of the plaintiff, stated their grounds of defense as follows: (1) Not guilty; (2) privileged communication; (3) fair or proper criticism or comment upon the plaintiff when running for public office or position; (4) no malice; and (5) erroneous construction of the words of the publication. No plea of justification was filed; the defendants deeming it unnecessary so to do.

[1] Numerous exceptions were taken to the introduction of evidence offered by the defendant in error and admitted by the court, despite the objection of plaintiffs in error. They may be considered under three heads: (1) Articles published in the Idea of and concerning the defendant in error, Saunders, prior to the institution of the suit, other than those mentioned in his declaration; (2) articles published after the institution of the suit of and concerning the defendant in error; and (3) articles published which did not refer to defendant in error, but to others, and were admitted as tending to prove the general scope and character of the Idea as edited by Yoder and printed and published by the Williams Printing Company. All of these articles embraced in the three classes were admitted by the court for the purpose of showing malice, and for that purpose only, and the jury were instructed that the plaintiff could not recover for any words published, either before or after the bringing of the suit, except the words declar-

ed upon; and, with reference to those publications concerning other members of the community than the plaintiff, the jury were told that they might be considered as showing a reckless indifference to the rights of others, and as furnishing a basis for the inference that they were malicious in fact, but that, before such other publications could be considered, the jury must be satisfied from the evidence that they were false and defamatory.

In Newell on Libel and Slander, at page 331, it is said: "Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant, and for this purpose it makes no difference whether the words tendered in evidence are themselves actionable or not, or whether they be addressed to the same party or to some one else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in the defendant's mind at the time of publication. And not only are such other words admissible in evidence, but also the circumstances attending the publication, the mode or extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be."

Ogders on Libel and Slander (pages 270-273, inclusive) is to precisely the same effect, and adds: "The jury no doubt should be told, whenever the other words so tendered in evidence are in themselves actionable, that they must not give damages in respect of such other words, because they might be the subject-matter of a separate action; but the omission by the judge to give such a caution will not amount to a misdirection. But the defendant is always at liberty to prove the truth of such other words so given in evidence, for he could not plead a justification as to them, as they were not set out on the record."

"It must be remembered," says Ogders, "that this evidence of former or subsequent defamation is only admissible to determine *quo animo* the words sued on were published; that is, they are only admissible when *malice in fact* is in issue. If there is no question of malice, no such other libels would be admissible, unless they had immediate reference to the libel sued on; and even then it would be better that they should be set out in the statement of claim. * * * And it is now clear law that, whenever the question of malice or bona fides is properly about to be left to the jury, evidence of any previous or subsequent libel is admissible, even though it be more than six years prior to the libel sued on, and even though a former action has been brought for the libel now tendered in evidence, and dam-

ages recovered therefor. The law is the same in America." See Russell v. Macquister, 1 Campbell, 49, note; Camfield v. Bird, 3 C. & Kir. 56; 2 Starkie on Slander, p. 55; Pearson v. Lemaitre, 5 M. & Gr. 719.

Objection was made to questions asked the defendant in error, as follows:

"Q. Has that decline in your business been marked or otherwise? A. Very perceptible, commencing in July. The first notice the books show that trade had fallen off was in July.

"Q. What, in figures, was the amount of that diminution? A. About \$4,000—three thousand, nine hundred and some dollars.

"Q. Can you state whether there was any other reason, either known to you or reasonably to be conceived by you, for that diminution, other than the publication of this libel? A. I know of none whatever, as I have lost no contract, and the contract work was excluded from that calculation. It was taken from the regular current trade work."

[2, 3] The words alleged and proved to have been used by the defendant must have been injurious to the plaintiff's reputation, and are therefore actionable *per se*; and the plaintiff may recover a verdict for substantial damages without giving any evidence of pecuniary loss. Odgers on Libel and Slander, § 289. And at page 314 the same author says: "Loss of custom or diminution of profits * * * is general, not special, damage, and can only therefore be proved where the words are actionable *per se*."

And in 25 Cyc. p. 506, it is said: "When the defamation complained of is one affecting plaintiff's business, from which the law presumes general damage, evidence of general diminution or loss of business is admissible in proof of general damages."

It is further to be observed here that the jury were instructed not to award the plaintiff speculative or conjectural profits, but only such sum, if any, as they believe from the evidence will compensate him by way of general damage for the injury, if any, occasioned by the publication.

[4] Before considering the instructions to the jury, we shall consider two propositions of law: First, is it permissible for the defendant to an action for defamation, such as that under consideration, to allege and prove, under the plea of not guilty, that the words spoken or written were true; or must he plead a special plea of justification?

The plaintiffs in error rely with confidence upon the case of Commonwealth v. Morris, 3 Va. 176, in support of their contention that the plea of justification is not necessary in this state, where the publication concerns a candidate for office. That case was an information filed against the defendant, who pleaded not guilty, on which the issue was joined, and tendered two special pleas, to the effect that it was lawful for him to write and publish the paper writ-

ing charged in the information to have been written and published by him, because he saith that all the charges therein set forth were true, and all the acts therein charged to have been done and committed were in fact and truth done and committed. The second plea was also one of justification, and differed only from the first, in that it recited that the plaintiff, at the time the writing in question was written and published, and before that time, was a public officer, to wit, the high sheriff of the county, and then set forth that the charges were true as in the first special plea. The circuit court adjourned to the general court, and requested its decision upon the following points: First. Whether the defendant to an indictment or information for a libel can in all cases plead the truth of the libel in justification. Second. If not, whether he can give the truth of such libel in evidence on the plea of not guilty. Third. Whether, in this particular case, the defendant can in either way, and which, give evidence of the truth of the matters stated in the writing alleged to be libelous.

The general court held as follows: "It is the unanimous opinion of the court that by the common law truth is no justification of a libel, and cannot, as such, be given in evidence on an indictment or information for the offense. In this commonwealth, the second article of the Bill of Rights having declared, 'that all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them,' it follows as a necessary consequence that the people have a right to be informed of the conduct and character of their public agents. In the case of an indictment or information for a libel against public officers, or candidates for public office, truth is a justification, and may be given in evidence as such under the general issue, and this forms an exception to the general rule established by the common law; but even in such case any libelous matter which does not tend to show that the person libeled is unfit for the office cannot be justified, because it is true."

In the note to that case it is said that, "Although, in a criminal prosecution for a libel, the truth forms no justification in England, in any case whatever, yet, in mitigation of the fine, it may be shown to the court, after the verdict rendered. In Virginia, the truth may be given in evidence before the jury, in mitigation of the fine, because here it is rendered, by Act of Assembly, the duty of the jury to assess the fine."

It is admitted that the plaintiff, Saunders, was a candidate for office and within the class referred to in *Commonwealth v. Morris*, and that the defendants are entitled to its protection, if that case is to be considered as establishing the law of this state in actions for defamation.

Since that case was decided, more than a

century has elapsed, and, so far as we have been able to discover, it is the only reported case in our books of a criminal libel. Many civil suits for damages for defamation, however, are to be found in our reports, covering almost every conceivable aspect of the subject, and *Commonwealth v. Morris* appears never to have been cited. In *Minor's Law of Crimes*, it is referred to, under the head of "Offenses against the Public," at page 165. It is reported, also, in 5 Am. Dec. 515, with no other comment than the citation of *Commonwealth v. Clap*, 4 Mass. 163, reported, also, in 3 Am. Dec. 212, where a different conclusion was reached. Indeed, wherever we have found any mention made of *Commonwealth v. Morris* in digests, encyclopedias, or text-books, it has always been with reference to a criminal prosecution. Either that case must be held to apply only in prosecutions by the commonwealth, or its authority must be considered as completely overruled by subsequent decisions of this court.

In *Bourland v. Eldson*, 49 Va. 27, decided in 1851, all the Virginia authorities upon the subject of defenses in actions of slander were considered; Judge Allen, speaking of *Cheatwood v. Mayo*, 19 Va. 16, said: "The defendant offered in mitigation of damages, and not by way of justification, to prove facts which, if they did not altogether, almost established the truth of the charge. He could not offer such evidence in bar of the action, because he had failed to file the plea of justification. But, if permitted to introduce it in mitigation of damages, the same impression would be made on the minds of the jury, and the plaintiff could not know what defense he was to meet. The case therefore establishes that evidence falling short of a full justification, but tending to prove the truth of the words charged, and leaving that impression on the minds of the jury, is inadmissible, notwithstanding the declaration that it is offered in mitigation of damages, and not by way of justification."

The case of *McAlexander v. Harris*, 20 Va. 465, was to the same effect.

The syllabus of the case of *Bourland v. Eldson*, supra, is that: "In an action of slander, under the plea of not guilty, the defendant may, in mitigation of damages, prove any facts as to the conduct of the plaintiff, in relation to the transaction which was the occasion of the slanderous language complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact relieve the plaintiff from the imputation involved in it."

Language could not be used more strongly to establish the proposition that the truth of the charge cannot be shown under the plea of not guilty.

In *Newell on Slander and Libel* (page 651), it is said: "The defendant cannot prove, under the plea of the general issue at com-

mon law, the truth of the defamatory words, either in bar of the action or in mitigation of damages. If he desires to confess the publication of the defamatory words and avoid the consequences by asserting the truth of the same, he can do so under the plea of justification. The truth of the defamatory words is, if pleaded, a complete defense to any action of libel or slander, though alone it is not a defense in a criminal trial."

The same author, at page 652, says: "A justification must always be specially pleaded, and with sufficient particularity to enable the plaintiff to know precisely what is the charge he will have to meet. If the libel makes a vague general charge, as, for instance, that the plaintiff is a swindler, it is not sufficient to plead that he is a swindler. The defendant must set forth the specific facts which he means to prove, in order to show that the plaintiff is a swindler. The plea is always construed strictly against the party pleading it. It must justify the whole of the words to which it is pleaded, and set forth facts issuably."

It would seem, therefore, to be a dangerous plea, and one not lightly to be resorted to. It has the further effect, if not maintained, of being a strong circumstance going to establish malice, and it is not to be wondered at that cautious and astute counsel in difficult or doubtful cases do not rely upon it.

See 1 Starkie on Slander, 466, where the law is thus stated: "If the defendant means to rely on the truth of that which he has published, either in bar of action or mitigation of damages, he must plead it specially."

In Townshend on Slander and Libel (note to section 211), it is said, "The defense of truth must be pleaded, and cannot be given in evidence under the general issue, either in bar or in mitigation of damages," and in support of this proposition there is a great array of authorities, English and American.

In 4 Minor's Inst. (1st Ed.) pt. 1, at page 384, it is said: "It seems clear, therefore, that the Legislature designed to change the previous policy, as expounded in those cases of Brooks v. Calloway and Moseley v. Moss, and to allow and require the truth to be pleaded specially in bar of the action, as at common law. If so, the truth of the specific accusation cannot be given in evidence under the general issue in mitigation of damages, and much less can facts of bare suspicion." See Underwood v. Parks, 2 Strange, 1200, and the Virginia cases to which we have already referred; Sweeney v. Baker, 13 W. Va. 153, 31 Am. Rep. 757; 1 Barton's L. Pr. § 126; Hogan v. Wilmoth, 57 Va. 80.

Authorities might be multiplied almost without limit to the same effect, but why should authority be cited when the controversy is covered by statute?

In the Code of 1849, p. 669, there was first enacted a statute, which has passed into

our present Code as section §375, which declares, that: "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and (after notice in writing of his intention to do so, given to the plaintiff at the time of, or for pleading to such action), may give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action. * * *

The language used, that "the defendant may justify by alleging and proving that the words spoken or written were true," plainly intends that the truth shall be specially pleaded; for if the Legislature had intended that the proof should be given in under the plea of not guilty there was no occasion to require that it should be alleged.

We conclude, therefore, that in this state, in an action of defamation, the truth of the publication, if relied upon by the defendant, either as a bar or in mitigation of damages, must be shown under a special plea of justification, and not under a plea of not guilty.

[5] The second contention upon the part of plaintiff in error is that, as Saunders was a candidate for office, the occasion of the publications complained of was privileged; and that may be conceded. A candidate for office is considered as putting his character in issue, so far as with respect to his fitness or qualification for the office he seeks, and publications of the truth on this subject, with the honest intention of informing the people, are not a libel.

"A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable." Newell on Libel and Slander, p. 388.

[6] Privileged communications are of four classes: First. Where the author or publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. Second. Anything said or written by a master in giving the character of a servant who has been in his employment. Third. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. Fourth. Publications duly made in the ordinary mode of parliamentary proceedings.

[7] The privilege may constitute a bar to an action—for instance, words used in the course of a legal or judicial proceeding, or publications made in the ordinary mode of parliamentary proceedings; but the privilege with which we are here to deal, which grows

out of the fact that the plaintiff, Saunders, was a candidate for office, is known as a qualified privilege.

[8, 9] In all actions for defamation of character, whether by libel or slander, in order that damages may be recovered, malice must be alleged and proved. Where the communication is not privileged, malice may be presumed, but where the communication is privileged, even though it be but a qualified privilege, there is no presumption of malice, and in order to recover the plaintiff must prove actual malice or malice in fact. Whether or not a communication, oral or written, is privileged is a question for the court; and it is for the jury to say whether or not the privilege has been abused; that is to say, whether or not it was actuated by a malicious motive. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295.

[10] Publications of the truth regarding the character of a public officer, and relating to his qualifications for such office, made with intent to inform the people, are not libelous; but the publication of falsehood and calumny against public officers and candidates for public office is a very high offense. *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212.

"The term 'privileged,' says Newell on Slander and Libel, at page 566, 'as used by the judges, does not mean privileged by reason of the occasion, in the strict legal sense of that term. The meaning really is that the words are not defamatory—that criticism is no libel. If such criticism was privileged in the strict sense of the word, it would in every case be necessary for the plaintiff to prove actual malice, however false and however injurious the strictures may have been; while the defendant would only have to prove that he honestly believed the charges himself, in order to escape all liability; and this clearly is not the law.'"

"Criticism and comment on well-known or admitted facts are very different things from the assertion of unsubstantiated facts. A fair and bona fide comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication. The statement of this rule assumes the matters of fact commented upon to be somehow ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and bona fide manner on the supposition that the facts were true. If the facts, as a comment upon which the publication is sought to be excused, do not exist, the foundation fails. There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as

that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. To state matters which are libelous is not comment or criticism." Newell, p. 568.

"So long as a writer confines himself to discussing the public conduct of public men, the mere fact that motives have been unjustly assigned for such conduct is not of itself sufficient to destroy this defense. A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation." Newell, p. 572.

While discussing the general principles of the law of libel and slander pertinent to the case in hand, it will not be improper to refer to the "liberty of the press," which has been much urged in argument.

[11] The press has no exclusive privilege. It does not matter by whom the report is published; the privilege is the same, as a matter of law, for a private individual as for a newspaper. Newell, p. 552.

Speaking on this subject, Mr. Cooley says:

"A candidate for public office does not surrender his private character to the public, and he has the same remedy for defamation as before; and publication of false and defamatory statements concerning him, whether relating to his private character or public acts, is not privileged. * * *

"Liberty of the press is not license, and newspapers have no privilege to publish falsehoods or to defame under the guise of giving the news. It is held that the press occupies no better position than private persons publishing the same matter; that it is subject to the law, and if it defames it must answer for it."

Cooley on Torts (3d Ed.) 448.

By "liberty of the press" indeed is merely meant that the publications in the press shall not be subject to an antecedent censorship, but, in the language of our Bill of Rights, "any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

We come now to the consideration of instructions asked for by plaintiffs in error and rejected by the court, and those given to the jury by the court, to which the plaintiffs in error excepted.

[12, 13] Instruction No. 1, which was refused, was approved in *Gatewood v. Garrett*,

106 Va. 552, 56 S. E. 335, as applied to the facts appearing in that case, in which it seems that the evidence was not made a part of the record by proper bill of exceptions; but, as instructions are to be considered in the light of the facts proved, it may well be that an instruction proper upon one state of facts would be altogether improper upon a different state of facts. Then, too, the value of a case as a precedent is affected by the consideration that the precise point for which it is relied upon as authority was presented in argument and considered by the court. The opinion says that it was not denied in that case that the instruction asked for was a correct statement of the law, and, comparing the facts before us with those existing in *Gatewood v. Garrett*, no two cases could be more dissimilar.

Instruction No. 3, it is claimed, is also supported by the opinion in *Gatewood v. Garrett*, *supra*, and we accept as law the instruction as it appears in *Gatewood v. Garrett*. It declares that the conduct of candidates for public office is open to public criticism, and it is for the interest of society that their acts may be fully published with fitting comments or strictures; but one of the differentiating features between the case before us and *Gatewood v. Garrett* is that, while the comments and strictures in that case were fitting—that is to say, suitable and proper to the occasion—those set out in the declaration in this case transcend the bounds of propriety prescribed by law, are in excess of the right and duty of a citizen to make complaint of any misconduct or act showing a lack of qualification or fitness for office of a candidate, and attribute moral turpitude to the defendant in error.

[14] The second instruction asked for and refused is, we think, sufficiently covered by instruction No. 15, which was given by the court.

[15] Instruction No. 4 was properly refused, because it left it to the jury to say whether or not the publications were true, when, there being no plea of justification in the case, they are conclusively presumed to be false; and, secondly, that their verdict should be for the defendants, if Yoder's expressed belief was justified by the facts as the jury found them, or was such as he might reasonably and justly hold from such facts—"then the jury must hold that the occasion was privileged."

[16] The law is, as we have seen, that it is for the court to say whether or not the occasion is a privileged one, and, if it be one of privilege, whether a qualified or an absolute privilege, and by its instructions to guide the jury to a right conclusion. As the privilege with respect to the criticism of public officers, or candidates for public office, does not extend to the imputation of moral delinquency with reference to their private character, such imputations are libelous, and

the party making them may be held liable therefor in a suit for slander, unless he can prove the charges to be true. In such case it is not sufficient to prove that the party publishing had good reason to believe and did believe them to be true, as a publication of this character is not even conditionally privileged. From the publication of such libelous charges, the law implies malice, as well as damages to the plaintiff; and the jury may, therefore, on proof of the publication, only render a verdict for substantial damages. *Sweeney v. Baker*, 13 W. Va. 153, 31 Am. Rep. 757. And just here we will state that this case is one of unusual authority. It was an action for libel upon a man who was a candidate for the House of Delegates of West Virginia. The opinion was delivered by a judge of great distinction, and is a mine of learning and sound reasoning. It cites all of the Virginia cases upon the subject prior to the creation of the state of West Virginia; such cases being as binding authority in the new state as in the old. The case, therefore, may be accepted without hesitation as one of the highest authority.

Instruction No. 5 depends upon No. 4, and must fall with it.

No. 6, while rejected in the form in which it was offered, was given with an addendum in No. 10 of the instructions by the court, which is, we think, a correct and sufficient statement of the law.

Instruction No. 7 was properly refused, if for no other reason, because there is nothing in the evidence which would have warranted the jury in reaching any such conclusion as the instruction suggests.

We are of opinion that the cases and textbooks consulted establish the following propositions:

(1) That the truth of defamatory words, written or spoken, cannot be shown under the plea of not guilty, but that there must be a plea of justification.

(2) That it is the right and duty of the citizen to criticize public officers and candidates for public office, and that proper criticism is privileged, and imposes no liability, unless express malice be shown; that it is for the court to say whether or not the occasion is privileged, and for the jury to say whether or not it has been abused.

(3) That, while proper criticism of the conduct or fitness of public officers and candidates for public office is privileged, the privilege does not extend to the imputation of moral delinquency to such persons, and that he who attacks their private character and attributes to them moral turpitude must stand prepared to prove the truth of his statement under a plea of justification; otherwise the presumption is that the defamatory language, written or spoken, is false and will, without more, support a verdict for substantial damages.

(4) That the press enjoys no special privi-

lege or immunity, but stands in all respects before the law upon the same footing as the great body of citizens.

For these reasons, we are of opinion that the judgment should be affirmed.

Affirmed.

WHITTLE, J., absent.

(112 Va. 47)

ELSNER BROS. v. HAWKINS, Revenue Com'r, et al.
(Supreme Court of Appeals of Virginia. Jan. 11, 1912.)

1. PAWNBROKERS (§ 1*)—POLICE POWER—REGULATIONS.

The pawnbrokerage business, because of the opportunities it offers for the commission of crime and its concealment, is one which properly comes within the control of the police power of the state, and which is subject to the strictest regulation.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 1.*]

2. PAWNBROKERS (§ 2*)—POLICE POWER—DELEGATION OF POWER BY STATE—CITY CHARTER.

Under the charter of the city of Richmond the city council may enact suitable ordinances for the promotion of the safety, health, peace, good order, and morals of the city, and punish violations by any fine or penalty up to an amount limited by the charter. *Held*, the power delegated is broad enough to permit the city, in the interest of good order and the protection of its citizens, to provide that it shall be unlawful for pawnbrokers to deal in deadly weapons, and such an ordinance is a reasonable exercise of the power granted.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 1; Dec. Dig. § 2.*]

3. MUNICIPAL CORPORATIONS (§ 63*)—GOVERNMENTAL POWERS AND FUNCTIONS—JUDICIAL SUPERVISION.

Municipal corporations are *prima facie* the sole judges of the necessity and reasonableness of their ordinances, and as every intendment is in favor of the lawfulness of the exercise of power in making regulations to promote public health and safety, the courts will interfere with such action only in case of a clear abuse.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 63.*]

4. MUNICIPAL CORPORATIONS (§ 592*)—POLICE POWER—CONFLICT OF ORDINANCE WITH STATUTORY PROVISIONS.

State Tax Bill (Code 1904, p. 2253) § 140, provides that no person shall sell pistols, dirks, or bowie knives without having first procured a license therefor and paid a privilege tax to the state. An ordinance of the city of Richmond provided that no such weapons should be sold in pawnshops. Pawnbrokers, who complied with the requirements of the statute, brought mandamus to compel the city officials to issue a license authorizing them to deal in such weapons. *Held*, the object of the statute was for the raising of revenue, not to give every person who paid the tax and obtained a license the right to carry on the business, notwithstanding police regulations to the contrary, and the ordinance was not void as in conflict with the statutory provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

Error to Hustings Court of City of Richmond.

Mandamus by Elsner Bros. against one Hawkins, Revenue Commissioner, and others. From a judgment dismissing the petition, plaintiffs bring error. Affirmed.

Wyndham R. Meredith, for plaintiffs in error. H. R. Pollard and Minitree Folkes, for defendants in error.

HARRISON, J. The grand jury of the city of Richmond, having recommended, in the interest of the public safety, that pawnbrokers should not be allowed to deal in weapons which may be used for personal injury the council of the city passed an ordinance, approved April 18, 1911, providing that it shall be unlawful for any licensed pawnbroker, or any other person acting as pawnbroker, to receive as security, pledge, or pawn, or to purchase, sell, loan, or hire any pistol, dirk, bowie knife, razor, slung shot, or any weapon of like kind. Any person violating the provisions of this ordinance was made liable to a fine of not less than \$5 nor more than \$25 for each offense, recoverable before the police justice of the city.

The plaintiffs in error are a duly licensed firm of pawnbrokers, who had given the bond and complied with all the police regulations prescribed by the state statute, and had paid the license required both by the state and the city of Richmond.

Section 140 of the state tax bill (Code 1904, p. 2253) provides that no person, firm, or corporation shall sell pistols, dirks, or bowie knives without having first procured a license therefor. The sum of \$20 per annum is required to be paid to the state as a special license tax for the privilege of transacting the business of selling pistols, dirks, or bowie knives by any such person, firm, or corporation, and any violation of the provisions mentioned is made a misdemeanor punishable by fine. Under this section 140 of the state tax bill the plaintiff applied to the proper officials of the city of Richmond for a special license authorizing them to deal in pistols, etc. Acting in obedience to the city ordinance of April 18, 1911, making it unlawful for any licensed pawnbroker to deal in pistols, etc., these city officials refused to issue the license asked for. Thereupon the plaintiffs in error applied to the hustings court for the city of Richmond for a writ of mandamus compelling the defendants in error to issue the license authorizing them to deal in pistols, etc. The hustings court having denied the writ of mandamus and dismissed the petition praying therefor, its judgment is brought under review by this writ of error.

The record shows that the ordinance of

April 12, 1911, was passed by virtue of the police power which the city of Richmond deemed to be vested in it, and was intended to remedy to some extent the growing and dangerous practice, by the lawless and disorderly class in the community, of carrying concealed weapons.

The plaintiffs in error insist that the city of Richmond did not have the authority under its police power to pass the ordinance in question; that the statute of the state having made it lawful for a person, firm, or corporation to deal in pistols, etc., upon the payment of a license tax, the city of Richmond could not, under its police power, deny such privilege to pawnbrokers.

[1] The business of pawnbrokers, because of the facility it furnishes for the commission of crime and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed. This is shown by our legislation, both state and local, on the subject, and by the adjudications of courts. Acts of Assembly 1904, p. 196 (Code 1904, p. 2232); Ordinances of Richmond City, c. 48, §§ 1, 2; Freund on Police Power, § 93; *Lauder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472.

In the case last cited it is said "that it is a matter of common knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous and oftentimes criminal persons are engaged in the business. The business, therefore, comes expressly within the control of the police power of the state and is properly subject to reasonable rules and regulations."

[2] Very broad and comprehensive police powers are delegated by the Legislature to the city of Richmond. Under its charter the council has power to enact suitable ordinances to secure and promote the general welfare of the inhabitants of the city, such as they may deem proper for the safety, health, peace, good order, and morals of the community. In addition they have the power to make such ordinances and regulations as may be deemed desirable and suitable to prevent vice and immorality, to preserve public peace and good order, to prevent and quell riots, disturbances, and disorderly assemblages, etc. For a violation of any of its ordinances the council has power to prescribe any fine or penalty (except when a fine or penalty is otherwise provided for in the charter) not exceeding \$500, and may provide that on failure to pay the fine or penalty imposed the offender shall be imprisoned in the jail of the city for any term not exceeding three calendar months.

The police powers delegated by these provisions to the city are, within its limits, quite equal to those possessed by the Legislature itself. They are certainly amply

broad to cover and include the right of the city, in the interest of its good order and the protection of its citizens from violence, to provide that it shall be unlawful for any licensed pawnbroker, or other person acting as pawnbroker, to receive as security, pledge, or pawn, or to purchase, sell, loan, or hire, any pistol, dirk, bowie knife, etc. In view of the character of the business conducted by these dealers, where the criminally disposed can go and for a pittance procure a deadly weapon for a deadly purpose that he would not otherwise be able to obtain, the ordinance assailed is not only reasonable, but eminently wise, as tending to minimize the commission of crime in a populous city.

[3] The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances. Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of courts, except in clear cases, to interfere with the exercise of the powers vested in municipalities for the promotion of the public safety. *McQuillin on Ordinances*, § 186; 2 *Dillon on Mun. Cor.* (5th Ed.) § 649; *California Red Co. v. Sanitary Red Works*, 199 U. S. 306, 319, 26 Sup. Ct. 100, 50 L. Ed. 204; *Wagner v. Bristol Belt Line Co.*, 103 Va. 594, 598, 62 S. E. 391, 25 L. R. A. (N. S.) 1278.

[4] The plaintiffs in error contend that under section 140 of the revenue bill, *supra*, any person, firm, or corporation can sell pistols, dirks, etc., by first procuring a license therefor; that the ordinance forbidding such a license to pawnbrokers is in conflict with the state law and therefore void, unless the city of Richmond had express power to enact the same.

This question was settled in this state more than 50 years ago. *Mayo, Mayor, etc., v. James*, 53 Va. 17. In that case Clinton James, a free negro, who had been duly licensed to keep a cook shop under the provisions of an act of assembly of April 17, 1853, complained that he had been unlawfully prosecuted before the mayor of the city of Richmond for the violation of an ordinance thereof, which provided that no negro should keep a cook shop within the city under the penalty of stripes, at the discretion of the mayor, insisting that the ordinance was in conflict with the act of assembly, and therefore void. The circuit court awarded a writ of prohibition in vacation, restraining the mayor from enforcing the ordinance, and upon the hearing refused to discharge the writ and gave judgment against the city. Upon appeal that judgment was reversed by this court, upon the ground that a statute requiring a license to keep a cook shop, and

laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond, passed in pursuance of its charter, prohibiting or restricting the keeping of cook shops by free negroes within the city. In reaching this conclusion, Judge Moncure, speaking for a unanimous court, says: "The only object of the act was to aid in raising revenue by laying a tax on the business of keeping a cook shop. It was not the object or effect of the act to give to every person who paid the tax and obtained a license to keep a cook shop the right to do so, notwithstanding any police regulations which might otherwise lawfully be made for the good government of a city or town, much less to repeal or annul any such regulations in actual existence at the time of the passage of the act. If the ordinance would have been lawful, had there been no such act, it is lawful notwithstanding the act; for there is nothing in the act to render it unlawful. The business of keeping a cook shop before the passage of the act was a lawful business, which any man might pursue, subject only to such lawful police regulations as might be made in regard to its being carried on within the limits of a town. The effect of taxing it was to restrict, not to enlarge, the right of pursuing it, nor to exempt it from such lawful police regulations."

The case at bar is in all essential particulars like the case cited, and is controlled by it. The object of section 140 of the tax bill, like the act in *Mayo v. James*, supra, was to aid in raising revenue. It was not the purpose or effect of the act, in laying a tax on the business of selling pistols, dirks, etc., to give to every person, who paid the tax and obtained a license, the right to carry on such business notwithstanding any police regulations which might otherwise lawfully be made for the good government of a city or town. The ordinance assailed would have been lawful, had there been no section 140 of the tax bill, and it is lawful notwithstanding that act; for there is nothing in the act to render it unlawful or in conflict therewith. As said in *Mayo v. James*, supra, with respect to the keeping of cook shops in Richmond by free negroes, the propriety and necessity of regulating, restraining, or wholly interdicting the right of pawnbrokers to deal in pistols, dirks, etc., in the city of Richmond must be apparent to all.

For the foregoing reasons, we are of opinion that the ordinance of April 18, 1911, which is called in question by this proceeding, is not in conflict with section 140 of the tax bill, that the city council had the power under its charter to enact the same, and that the judgment of the hustings court of the city of Richmond, so holding, must be affirmed.

Affirmed.

73 S.E.—31

(113 Va. 735)

THORNTON v. COMMONWEALTH

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. BANKS AND BANKING (§ 62*)—SURPLUSAGE.

Where an indictment charged an officer of a bank with a violation of Code 1904, §§ 1169, 1170, requiring banking corporations to render statements to the Corporation Commission, and punishing any banking officer making a false statement, an allegation charging a failure to comply with section 1160, requiring the directors once in three months to examine the moneys of the bank, and settle the cashier's accounts, must be treated as surplusage on demurrer.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 62.*]

2. INDICTMENT AND INFORMATION (§§ 133, 147*) — DEFECTS—SURPLUSAGE—MANNER OF RAISING OBJECTIONS.

Where an indictment contains surplusage, the remedy is by motion to strike the objectionable allegations or by motion to exclude testimony in support thereof, or by an instruction to disregard such allegations and evidence in support of them, but the objection cannot be reached by demurrer.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. §§ 133, 147.*]

3. CRIMINAL LAW (§ 1091*)—BILL OF EXCEPTIONS—REQUISITES.

Where the body of the evidence was not copied into a skeleton bill of exceptions signed by the judge or attached to the bill, but appeared in separate and distinct papers and in the stenographer's report of the evidence and not identified, the evidence was not a part of the record on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1091.*]

4. CRIMINAL LAW (§ 450*) — OPINION EVIDENCE—CONCLUSIONS OF WITNESS.

On the trial of an officer of a bank for making a false statement of the financial condition of the bank, in violation of Code 1904, §§ 1169, 1170, a question asked a witness for the prosecution, "Taking all your information up to the present time, including your investigation into these books, have you been able to reach a conclusion that [accused] made a true statement as to the condition of this bank?" called for an opinion on an issue for the jury, and the allowance of an answer that the statement was not true was reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1036; Dec. Dig. § 450.*]

Error to Circuit Court, Charlotte County.

F. C. Thornton was convicted of crime, and he brings error. Reversed.

H. D. Flood and W. C. Carrington, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. F. C. Thornton was indicted in the circuit court of Charlotte county for having made to the State Corporation Commission a false statement of the financial condition of the Charlotte Banking & Insurance Company, knowing it to be false, and he being the cashier of that institution. He demurred to this indictment, the demurrer was overruled, he pleaded not guilty, and upon the trial of that issue the jury found

him guilty, and fixed his imprisonment in the state penitentiary for one year, and assessed a fine against him of \$700, and to that judgment he has obtained a writ of error.

The first error assigned is to the judgment of the court overruling the demurrer to the indictment.

The prosecution relied upon sections 1160, 1169, and 1170 of the Code of 1904.

It is conceded, or if not conceded there can be no doubt, that the indictment states a case under the last two sections above referred to, the first of which requires that every bank and banking institution chartered under the laws of the state of Virginia and doing a banking business therein shall annually report to the State Corporation Commission its financial condition at such times as the State Corporation Commission may by its rules prescribe, identically as the national banks organized under the laws of the United States are required to make their statements to the Comptroller of the Currency. The statements are to be made in accordance with forms prescribed by the Corporation Commission, certified under oath by the president or cashier of the bank, and attested by at least three of its directors. It is made the duty of the Corporation Commission to call upon such companies, banks, and banking institutions for the statements mentioned, and at the time prescribed, and to have prepared such forms as may be necessary to carry out the provisions of the law. The Corporation Commission is required at least once in every year, and at such other times as they may deem necessary, to cause to be examined each and every such bank and banking institution designated as a state depository, all the expense incident thereto to be borne by the bank or institution so examined.

By section 1170 it is provided that any such joint stock company, bank or banking institution, etc., failing to comply with the provisions of section 1169 for a period longer than 30 days after being called upon by the State Corporation Commission, shall be fined not less than \$100 nor more than \$1,000. The Corporation Commission is required to give notice of such default in some newspaper, as provided in the preceding section, and any officer of any such joint-stock company, bank, banking institution, etc., who knowingly makes a false statement of the condition of any such bank, shall be deemed guilty of a felony, and, upon conviction, shall be fined not less than \$100 nor more than \$5,000, and imprisoned in the penitentiary not less than 1 nor more than 10 years.

[1] In the indictment under consideration, there is embraced a charge not only of failure to comply with the sections just cited (1169 and 1170), but there was a charge of failure to comply with section 1160, which is as follows: "The directors shall, once in three months at the least, cause an exam-

ination to be made of the moneys of the bank, and a settlement to be made of the accounts of the cashier, a statement of which examination and settlement shall be recorded with the proceedings of the board."

The contention of plaintiff in error is that section 1160 has no proper place in the indictment; that the offense for which he was tried and punished is fully provided for in sections 1169 and 1170; and that the introduction of section 1160 was and is prejudicial to his rights.

This may be true, but the objection cannot be availed of upon a demurrer to the indictment. That indictment, as we have said, states a sufficient case against the plaintiff in error. Such being the fact, the reference to section 1160 is surplusage, and does not vitiate the indictment. Stephens on Pleading, p. 424.

In Bishop's Criminal Procedure (4th Ed.) § 478, surplusage is defined to be "any allegation without which the pleading would remain adequate in law." And in section 479 it is said: "An indictment, either on a statute or at the common law, fully setting out the offense, is not rendered ill by the addition of matter aggravating it beyond the law's defining."

[2] While it cannot be reached by demurrer, there are other modes by which it can be done: By a motion to strike out the surplus statement or averment from the indictment; by a motion to exclude testimony sought to be introduced in support of such an averment; or by an instruction to the jury to disregard the averment and all evidence in support of it. Counsel for plaintiff in error recognized that the proceeding by demurrer could not be trusted to afford relief, and sought to accomplish the result by means of an objection to an instruction offered by the commonwealth; but with that aspect of the case we shall deal later on.

[3] During the progress of the trial 29 bills of exceptions were taken, and we are met at the threshold of the case with the objection upon the part of the commonwealth that in none of those bills are the papers or documents which are referred to, or the evidence of witnesses, so identified as to constitute a record proper for our consideration.

We regret that this difficulty is one of such frequent occurrence, and we shall not attempt to fix the responsibility for the omission or further animadvert upon the fact than to say that, while it is a matter of profound regret that such should be the case, we have no choice but to enforce the law as we find it. Those who are not responsible for the administration of justice in accordance with established modes of procedure easily dispose of such objections by denouncing them as technical, but while technical nothing can be of higher importance in the administration of justice than that the record upon which the courts are required to

act should be ascertained with certainty, and so attested as to leave no doubt of its authenticity, in order that the law pertaining to it may be safely and intelligently declared and the rights of individuals and of society duly protected.

All of the bills of exceptions in this case, from the first to the last (except perhaps the fourth and ninth), hang upon bill of exceptions numbered 29, which is what is known as a skeleton bill—that is to say, it is one into which the evidence, whether documentary or the testimony of witnesses, is not copied into the bill itself, which is signed by the judge, but the body of the evidence, documentary and otherwise, appears in separate and distinct papers and in the stenographer's report of the evidence. It is obvious, therefore, that the mere signature of the judge to such a bill leaves it incomplete, and that it becomes necessary to identify the papers referred to and the evidence of the witnesses contained in the stenographer's report in such manner as to leave no doubt, when found in the record, that they constitute the papers and stenographer's report referred to in the bill.

In the body of bill of exceptions No. 29, it is said that "the commonwealth to maintain the issue joined on its part introduced the following evidence in chief, which is as follows, to wit: (Here insert the evidence introduced by the commonwealth as shown by the evidence written up by the stenographers and marked 'Stenographer's Report of Evidence, Nos. 1 and 2,' and identified by the signature of the judge of this court.) And thereupon the defendant to maintain his defense on the issue joined, introduced the following evidence, which is as follows, to wit: (Here insert all the evidence introduced by the defendant as shown by the said 'Stenographer's Reports of Evidence Nos. 1 and 2,' identified by the signature of the judge of this court.) And thereupon the commonwealth to further maintain the issue joined on its part introduced in rebuttal the following evidence, which is as follows, to wit: (Here insert all of the evidence introduced by the commonwealth in rebuttal as shown by the said 'Stenographer's Report of Evidence Nos. 1 and 2,' identified by the signature of the judge of this court.) Which said stenographer's reports of the said evidence are filed herewith and are relied upon and made a part of this exception, and the foregoing being all of the evidence introduced except the following, to wit: The certified copies of the charter of the Charlotte Banking & Insurance Company from the clerk's office of Charlotte and from the office of the Secretary of the Commonwealth," and other papers introduced in evidence.

The trouble is that the signature of the judge of the circuit court, by which the report of evidence and the papers referred to were to be identified, is nowhere to be found

in the record, and there is as a matter of fact no such identification—indeed no identifying mark whatever.

These are the facts with reference to bill of exceptions No. 29, and all others, we believe, except Nos. 4 and 9.

No. 4 refers to a statement purporting to be made by the cashier, Thornton, "in the words and figures following, to wit: (Here insert statement.) And also the original statement made by F. C. Thornton to the State Corporation Commission under date of the 24th day of May, 1909, which original statement is in the words and figures following, to wit: [Here copy original statement.]" The difficulty here is that the papers referred to are not copied into or attached to the bill of exceptions, nor are they identified or earmarked in any way.

In *Kecoughtan Lodge v. Steiner*, 106 Va. 589, 56 S. E. 569, it is said: "Where a bill of exception states that all of the evidence in a case is certified in bill of exception No. 2, and bill No. 2 states that the 'evidence as certified by the court is in the words and figures following, to wit,' and the stenographer's report of the evidence, indorsed by counsel on both sides as a correct copy, and signed by the trial judge, is securely attached to the bill of exception by paper fasteners, the bill of exception and report of the evidence are so articulated as to form but one paper, and sufficiently identifies the evidence referred to in the bill of exceptions."

In *U. S. Mineral Co. v. Camden*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028, it was held that "a paper filed in the record, without identification of any kind whatever, which purports to set out the evidence given on the trial, at the end of which is a certificate of the judge presiding at the trial, 'I hereby certify that the foregoing is all the evidence in this case,' is not a bill of exception, and cannot be made to serve its function. It cannot be used as a basis of review of the action of the trial judge in granting and refusing instructions based on the evidence, or in overruling a motion for a new trial on the ground that the verdict is contrary to the law and the evidence."

In *Norfolk & Western Ry. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445, it appeared that the bill of exceptions, which after certifying that the plaintiff and defendant each introduced evidence, said, "all of which evidence, both for the plaintiff and the defendant, is found in a typewritten booklet now marked 'A,' and is adopted by the court as the evidence introduced by the plaintiff and the defendant, and that it contains all the evidence offered by them," and it was held that the bill of exceptions sufficiently identified the evidence, and made it a part of the record of the case.

In *Standard Peanut Company v. Wilson*, 110 Va. 650, 66 S. E. 772, it was held that "It must appear from the record itself when the bill of exception was signed and thereby

made a part of the record. That fact cannot be made to depend upon *parol evidence*. Neither *parol evidence*, nor custom, nor long practice in a particular court, will avail to add to or take from the record as made under the supervision of the trial judge. A statement by the clerk which is no part of the final order in a cause and not authorized by the trial judge, but which is inserted by him in making up the record for this court, that 'the bills of exception referred to in the foregoing order are in the words and figures following, to wit,' is no part of the record."

In *Hot Springs Lumber Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557, speaking of identification of bills of exceptions, the court said: "If not so identified within the time prescribed by law for taking the bill, it cannot be so identified afterwards. The identification of the evidence to be inserted in a bill of exception is a judicial act to be performed by the judge himself within the time prescribed for filing the bill, and cannot be delegated to the clerk. A skeleton bill containing such expressions, as 'here insert the evidence,' without earmarking the evidence to be inserted, is not a compliance with the law."

The citations which we have given show what the law is in this court; and it differs in no respect from the practice in other courts.

In the case of *Atchison, etc., R. Co. v. Wagner*, 19 Kan. 335, the opinion was delivered by Judge Brewer, afterwards a distinguished justice of the Supreme Court. Speaking of bills of exceptions, he said: "A bill of exceptions is a record, and like any other record is not to be established by *parol testimony*, but must carry on its face the evidences of its own integrity and completeness. While what is familiarly known as a skeleton bill—that is, a bill which provides for the subsequent copying by the clerk into it and as a part of it some paper or document—is allowed, yet, to make such a bill valid and complete, these rules must be regarded: (1) The bill, in referring to such paper or document, must purport to incorporate it into and make it a part of the bill. A mere reference to it, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient. (2) The document must itself, at the time of the signature of the bill, be in existence, written out and complete. (3) It must be annexed to the bill, and referred to as annexed, or it must be so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt when found in the record that it is the one referred to in the bill and these means of identification must be obvious to all, so that any one examining the record can know what document is to be inserted, or after insertion that the clerk has made no mistake."

The decisions of the Supreme Court of the United States are to the like effect.

In *Leftwitch v. Lecanu*, 4 Wall. 187, 18 L. Ed. 388, Judge Miller said: "If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, or it will not be considered." See, also, *Muller v. Ehlers*, 91 U. S. 250, 23 L. Ed. 319; *U. S. v. Jones*, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726; *Michigan Ins. Co. v. Eldred*, 148 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162; *Origet v. U. S.*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; *Malony v. Adsit*, 175 U. S. 287, 20 Sup. Ct. 115, 44 L. Ed. 163; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 448, 20 C. C. A. 503; *Oxford & Coast Line R. Co. v. Union Bank of Richmond*, 153 Fed. 723, 82 C. C. A. 609; *Harvey v. State*, 5 Ind. App. 422, 31 N. E. 835; *Shiletto v. Thacker*, 43 Ohio St. 63, 1 N. E. 438; *Coburn v. Murray*, 2 Me. 336; *Lynch v. Craney*, 95 Mich. 199, 54 N. W. 879.

[4] Bill of exceptions No. 9 makes no reference to the evidence as contained in bill of exceptions No. 29, but is complete in itself, and is as follows: "Allen Talbott, a witness for the commonwealth, was asked the following question: 'Taking all of your information, up to the present time, including your investigation into these books, have you been able to reach a conclusion that Mr. Thornton made a true statement as to the condition of this bank? A. No, sir; it was not a true statement'—to the introduction of which evidence the defendant, by counsel, objected, and moved the court to exclude the same from the jury on the ground that the same was not admissible in law on the issue joined, etc." The court allowed the evidence to go before the jury, and it was duly excepted to.

The very issue which the jury were sworn to try was whether or not the defendant, Thornton, had made a true statement as to the condition of the bank. The question and answer take that issue from the jury and submit it to the witness, and upon that evidence alone, if admissible, the prisoner might have been found guilty. It may be said that the witness was an expert, and his opinion, therefore, admissible in evidence. It may be said that, if all the evidence before the jury were before the court, it would have justified the question and the answer; but the evidence that may have been before the jury is not before the court. It is contained in bill of exceptions No. 29, and must stand or fall with that bill of exceptions, and this bill of exceptions must be treated and considered as though it stood alone in this record, and, so considered, we have no doubt that it presents reversible error.

But it is said, on the other hand, that this was not opinion evidence; that it called for the statement of a fact. If the question had been confined to what the witness had discovered from an examination of the books, there would be some force in this contention; but the question had a much wider range, and asked for his conclusion resting upon all the information in his possession up to the time the question was asked: "Including your investigation into these books, have you been able to reach a conclusion that Mr. Thornton made a true statement as to the condition of this bank?"—showing clearly that the witness was not to be confined to a mere examination of the books, but asked to give his conclusion based upon information in his possession from whatever source derived.

For the foregoing reasons, we are of opinion that the demurrer to the indictment was properly overruled; that the evidence attempted to be presented by bill of exceptions No. 29 was not properly authenticated, and cannot be considered; that the other bills, except bill of exceptions No. 9, are dependent upon the twenty-ninth bill, and the rulings of the court which they were designed to bring before us for review cannot be considered; and, finally, that the admission of the testimony contained in bill of exceptions No. 9 was erroneous, and for that error the judgment complained of must be reversed, and the case remanded for a new trial in accordance with the views expressed in the foregoing opinion.

Reversed.

(158 N. C. 54)

RICHARDS v. W. M. RITTER LUMBER CO.
(Supreme Court of North Carolina. Dec. 23, 1911.)

1. PUBLIC LANDS (§ 164*)—GRANTS—COUNTERSIGNING BY SECRETARY OF STATE — "COUNTERSIGN."

A land grant sealed with the seal of the state, signed by the Governor, and countersigned on the opposite side of the sheet by the Secretary of State is sufficient, within Const. art. 3, § 16, providing that grants shall be sealed with the seal of the state, signed by the Governor, and countersigned by the Secretary of State; the word "countersign" meaning the signature of an officer to a writing, signed by a superior, to attest its authenticity (quoting 2 Words and Phrases, p. 1651).

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 473; Dec. Dig. § 164.*]

2. PUBLIC LANDS (§ 164*)—LAND GRANTS—COUNTERSIGNING BY SECRETARY OF STATE.

A land grant, countersigned in the name of the Secretary of State, per his chief clerk, is void, because the statute does not authorize the countersigning by a deputy or clerk.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 473; Dec. Dig. § 164.*]

3. EVIDENCE (§ 345*)—ABSTRACTS OF GRANTS—CERTIFIED COPIES.

Under Revisal 1905, § 1596, providing that abstracts of grants filed in the office of the

Secretary of State, certified by him as true copies, shall be admissible in evidence like the original, does not make the abstract better evidence than the registration of the original in the designated county; and where the grant recorded in the county shows a countersigning by the Secretary of State, per his chief clerk, an abstract, not containing the countersigning by the clerk, cannot be received in evidence to show a valid grant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314; Dec. Dig. § 345.*]

Hoke, J., dissenting on defendant's appeal, and Allen and Walker, JJ., dissenting on plaintiff's appeal.

Appeal from Superior Court, Macon County; Cline, Judge.

Action by D. J. Richards against the W. M. Ritter Lumber Company. From the judgment rendered, both parties appeal. New trial granted on plaintiff's appeal, and defendant's appeal dismissed.

Robertson & Benbow, J. Frank Ray, and Geo. L. Jones, for plaintiff. L. C. Bell, for defendant.

CLARK, C. J. [1] Both sides appealed. The plaintiff offered grant No. 3,050. This grant was duly sealed with the great seal of the state, with a plot of the land attached, and is signed "W. W. Holden, Governor," and on the opposite side of the sheet are the words: "Secretary's Office, Feb. 3, 1869. H. J. Menninger, Secretary of State"—which bears the same date as the grant. The judge rejected the deed, on the ground that it was not "countersigned." In this there was error. There is no decision in the courts of this state, or in any other that we have been able to find, which authorizes this ruling. The word "countersign" comes from the French "contresigne" and the Latin "contra signum." Webster's International Dictionary gives this derivation, and says the meaning of the verb "countersign" is to "sign on the opposite side," and it has, secondarily, the meaning "to sign in addition to the signature of another." Worcester's, the Century, and Clarkson's Standard Dictionaries all give exactly the same meaning. The Century further says that it means "to superadd a signature." All four dictionaries give the meaning of the noun as follows: "The signature of a secretary or other officer to a writing, or writings, signed by the principal or superior to attest its authenticity." Words and Phrases gives the same definition.

It is well settled in this state that when a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end, unless the statute uses the word "subscribe." Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205. This has always been ruled in this state in regard to wills, as to which the signature may appear anywhere. If this is true of a "signature," it must also be true of

the word "countersign." It has been often held that the place of signing is a matter of taste. *Adams v. Field*, 21 Vt. 264; *Attorney General v. Clark*, 26 R. I. 474, 59 Atl. 395; 9 A. & E. Enc. 143; 36 Cyc. 441.

The Constitution (article 3, § 16) provides that there shall be a great seal of the state, and adds, "all grants and commissions shall be sealed with 'the great seal of the state' signed by the Governor and countersigned by the Secretary of State." But there is nothing in this or in any statute which changes the original meaning of the word, which is to "sign on the opposite side" of the sheet, or its derivative meaning, which is to super-add another signature, as "additional evidence of authenticity." Mr. Menninger, the then Secretary of State, evidently construed the word in its historical sense, to sign on the opposite side of the sheet. He did this, not at random, but officially, because the words used are: "Secretary's Office, Feb. 3, 1869. H. J. Menninger, Secretary of State." He also came within the derivative meaning, as set out in all the dictionaries, because he thus superadded his signature as proof of the authenticity of the paper. Originally a grant or order was signed by the king and authenticated by the great seal merely, but subsequently, especially after the advent of responsible government, "countersigning" by a minister was required, and this was usually done on "the other side of the sheet," as the word signifies.

The original grant is filed in the record. There is no question made by any one but that it is genuine. This is shown by the great seal of state. When that appears, the signatures of the Governor and Secretary of State on an instrument, thus issued from the Secretary's office, are presumed to be genuine. They are protected by the statute against forgery, and by the presumption of genuineness of the signatures upon an official document thus issued. The register of deeds of the county acts upon such instrument without any probate, and records it as was done in this case. A reference to the office of the Secretary of State shows that this grant was duly entered, and that the grant was issued in payment of the sum therein recited. An instrument, unquestionably genuine and authenticated, and issued in consideration of the money duly received by the state therefor, should not be set aside upon any controversy as to where a signature should be placed. The presumption is that the official act of the Secretary was correct, when, acting on his own judgment, he placed the signature on the opposite side of the sheet, and when there is no statute or decision requiring it to be placed elsewhere.

The defendant contends that the word "countersign" means to sign on the opposite side of the same page. But there is no statute or decision which provides this, and the place where the defendant says the Secre-

tary should sign is not on the opposite side of the page, but in immediate juxtaposition to the Governor's signature. It is true that there does appear printed at that place the words "By command," and a blank space, followed by the words "Secretary of State," but there is no statute requiring this, and all that we know is that the words were put there by the printer. The Secretary of State himself construed the meaning of the word "countersign" to be "to sign on the opposite side" of the sheet, and wrote his name with more formality: "Secretary's Office, Feb. 3, 1869. H. J. Menninger, Secretary of State." There is no authority anywhere for the use of the words "By command."

The grant being undeniably genuine, and duly issued upon payment of the consideration, authenticated by the great seal, signed by the Governor and by the Secretary of State, both officially, we cannot hold that it was not "countersigned," because the place where the Secretary added his signature, with the title of his office, was not at the particular spot on the grant which the defendant contends for. The essential thing is the additional signature, not its location, with the evidence of the intent to authenticate, which is here shown by the use of the words which show, not only that the grant was signed by "the Secretary of State," but in his office.

[2] The defendant offered grant 3,083. The plaintiff objected to this grant, because the grant, as recorded in Macon county, shows that the only indication of countersigning is as follows: "By command. H. J. Menninger, Secretary of State, per T. J. Menninger, Chief Clerk." In *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245, this very point was presented, and the court held that the statute did not authorize the countersigning of a grant to be done by a deputy or clerk; and therefore that such grant was void. The Legislature of 1905 (chapter 512) accepted that view, and validated all grants thus defectively authenticated, adding, "that nothing herein contained shall interfere with vested rights." Therefore, as to the plaintiff, this grant 3,083 was void, and should have been rejected.

[3] It is true that Revisal 1905, § 1596, provides that "all abstracts of grants which may be filed in the office of Secretary of State, certified by him as true copies, shall be as good evidence in any court as the original." The defendant, instead of the original, offered an abstract, which did not contain the defective countersigning by the deputy clerk. The statute does not make the abstract any better evidence than the registration of the original (Revisal, § 1598), and the inherent probability is that the words "per T. J. Menninger, Chief Clerk," were copied by the register of deeds, in Macon county, from the grant as actually issued. It is not probable that it would have ever occurred to him, out of his own head, to

transcribe those words, if not in the grant. Whereas, the abstract might have been made in the Secretary of State's office with the careless omission of those words. As the abstract is no better evidence, under the statute, than the record in Macon county, the case should go back, that the jury may find which is the better evidence. The plaintiff may serve notice on the defendant to produce the original grant, and, if found, of course, it will settle the controversy, as that is the best evidence. On account of these errors, there must be a new trial, and it is unnecessary to consider the other exceptions in the record.

Defendant's appeal dismissed. In plaintiff's appeal, new trial.

BROWN, J., concurs.

HOKE, J. (concurring in result). I concur in the disposition made of the case, being of opinion that, on the testimony, there was a sufficient countersigning of the grants in question, within the meaning of the Constitution and statutes. I am of opinion, further, that under the conditions and careful methods known to exist in the office of the Secretary of State, and of which we may, to this extent, take judicial notice (*Furniture Co. v. Express Co.*, 144 N. C. 639, 57 S. E. 458), where a grant, under the seal of the state, has been attested by the Governor and countersigned in the name of the Secretary of State, per his chief clerk, and to the issuance of which no suspicion has attached, and no reason for such suspicion is suggested or shown, the same should be held a valid grant. It should be presumed that such a grant was countersigned in the presence of the Secretary of State, and by his direction; and that the case of *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245, to the extent that it contravenes this position, was not well decided, and should be overruled.

ALLEN, J. I dissent from the opinion of the court on the plaintiff's appeal, and concur on the defendant's appeal, but do not care to do more than note the difference in the facts, and to state, without discussion, my view of the law.

On the plaintiff's appeal, the question is presented of the admissibility of a paper, purporting to be a grant, which was signed by the Governor, and the great seal attached, but which had no signature of any officer or clerk on the page which the Governor signed. On the back of this paper appear the words: "Secretary's Office, Feb. 3, 1869. H. J. Menninger, Secretary of State"—but no evidence was introduced that this indorsement was in the handwriting of H. J. Menninger, or that it was on the paper when it came from the office of Secretary of State.

The Constitution (article 3, § 16) says: "All grants and commissions shall be issued in the name and by the authority of the state

of North Carolina, sealed with the great seal of the state, signed by the Governor and countersigned by the Secretary of State." This language was construed, in 1820, in *Hunter v. Williams*, 8 N. C. 221, a part of it, at that time, being in the Constitution, and a part in a legislative act, and the court there says: "The Constitution (section 36) declares that all grants shall run in the name of the state and bear test, and be signed by the Governor. The year after the adoption of the Constitution the Legislature, at their November session, declares that the Secretary shall make out grants for all surveys returned to his office, which grants shall be authenticated by the Governor and countersigned by the Secretary. Act of Assembly 1777, c. 1, § 11. This is the only mode pointed out by the Legislature, whereby individuals can acquire a right to the unappropriated lands; and if it be not pursued no right can be acquired, in any other way, sooner than if no mode at all had been pointed out. Nothing, therefore, passed by this instrument, as it is not pretended that Mr. Martin had title individually."

When the Constitution says a grant shall be issued under the great seal, and shall be signed by the Governor, and countersigned by the Secretary of State, I think we may dispense with the seal or the signature of the Governor, if we can hold that it is not necessary for the Secretary of State to countersign.

If evidence of the handwriting on the back of the paper had been introduced, I do not think it would amount to more than an office entry, and it would not be a countersigning; but the paper, when offered at the trial, did not come from the office of Secretary of State, but was produced by the plaintiff, and he offered no evidence of handwriting, or as to the time when the indorsement first appeared on the paper. So far as we can see, it may have been written after the paper left the office of Secretary of State.

On the defendant's appeal, it appears that the defendant claimed under a paper purporting to be grant No. 3,083, under the great seal, which was signed by the Governor and countersigned "H. J. Menninger, Secretary of State, per T. G. Menninger, Chief Clerk." The defendant also offered in evidence a certified copy, from the office of Secretary of State, of the abstract of grant No. 3,083, which was signed by the Governor and countersigned by the Secretary of State. I think the paper was incompetent, under the authority of *Beam v. Jennings*, 96 N. C. 83, 2 S. E. 245, holding that: "The clerk of the Secretary of State has no power to certify to and affix the great seal of the state to copies of grants and other papers from the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself, and does not permit any of them to be done by a deputy"—and that the certified copy was com-

petent, by virtue of section 1596 of the Re-
 visal, which reads as follows: "Copies of
 the plats and certificates of survey, or their
 accompanying warrants, and all abstracts of
 grants, which may be filed in the office of
 the Secretary of State, certified by him as
 true copies, shall be as good evidence in any
 court as the original."

I therefore conclude that the judgment
 ought to be affirmed on the plaintiff's appeal,
 and reversed on the defendant's appeal.

WALKER, J., concurs in this opinion.

(158 N. C. 48)

**FOWLER et al. v. UNION DEVELOP-
 MENT CO.**

(Supreme Court of North Carolina. Dec. 23,
 1911.)

**1. PUBLIC LANDS (§ 164*)—GRANTS—CERTIFI-
 CATION—SUFFICIENCY.**

A land grant, countersigned in the name
 of the Secretary of State, per his chief clerk,
 is void.

[Ed. Note.—For other cases, see Public
 Lands, Cent. Dig. § 473; Dec. Dig. § 164.*]

**2. PUBLIC LANDS (§ 164*)—GRANTS—CERTI-
 FICATION—SUFFICIENCY.**

A land grant, countersigned by the Sec-
 retary of State, by writing on the opposite side
 of the sheet "Secretary's Office," followed by
 the date and name of the Secretary of State
 and the words "Secretary of State," is suf-
 ficiently countersigned, and a further counter-
 signing in the name of the Secretary of State,
 per his chief clerk, does not vitiate the proper
 countersigning, and the grant is valid.

[Ed. Note.—For other cases, see Public
 Lands, Cent. Dig. § 473; Dec. Dig. § 164.*]

**3. EVIDENCE (§ 83*)—PRESUMPTIONS—GRANTS
 OF PUBLIC LANDS—CERTIFICATES—SIGNA-
 TURES.**

The genuineness of the signature of the
 Secretary of State and of the Governor on a
 land grant is presumed from the fact that the
 seal of the state is affixed thereto.

[Ed. Note.—For other cases, see Evidence,
 Cent. Dig. § 105; Dec. Dig. § 83.*]

Allen and Walker, JJ., dissenting.

Appeal from Superior Court, Clay Coun-
 ty; Cline, Judge.

Action by Mary H. Fowler and another
 against the Union Development Company.
 From a judgment for defendant, plaintiffs
 appeal. Reversed.

A. W. Horn, J. Frank Ray, and O. L. An-
 derson, for appellants. F. S. Johnston, J. H.
 Dillard, and Geo. L. Jones, for appellee.

CLARK, C. J. The only question present-
 ed is whether grant No. 3,075 is valid. The
 original is sent up in the record, and shows:

[1] (1) The grant purports to be counter-
 signed as follows: "By command H. J. Men-
 ninger, Secretary of State, per T. J. Men-
 ninger, Chief Clerk." This is invalid. Beam
 v. Jennings, 96 N. C. 82, 2 S. E. 245; Rich-

ards v. Lumber Co., 73 S. E. 485, at this
 term.

[2] (2) The Secretary of State himself
 seems to have been of this opinion, and duly
 countersigned it himself, by writing on the
 opposite side of the sheet the following:
 "Secretary's Office, May 21, 1869. H. J.
 Menninger, Secretary of State." This is suf-
 ficient countersigning, as is held in Richards
 v. Lumber Co., 73 S. E. 485, at this term.
 The abortive countersigning by the chief
 clerk does not vitiate the proper counter-
 signing by the Secretary of State himself.
 "Utile per inutile non vitiatur."

[3] The genuineness of the signature of the
 Secretary of State and that of the Governor
 is presumed from the great seal being affix-
 ed, and there is no attack made upon it.
 Reference to the Secretary of State's office
 shows that this grant was duly issued, and
 upon payment of the purchase money. The
 entry and plot, as well as the great seal,
 are affixed to the grant. In rejecting it,
 there was error.

BROWN and HOKE, JJ., concur.

ALLEN, J. (dissenting). The question in-
 volved in this appeal is similar to the one
 considered on the plaintiff's appeal in Rich-
 ards v. Lumber Co., but the facts differ in
 one particular.

The paper, purporting to be a grant, of-
 fered in evidence in this case, in addition to
 a countersigning, "H. J. Menninger, Sec-
 retary of State, per T. J. Menninger, Chief
 Clerk," had indorsed on it: "Secretary's
 Office, May 21, 1869. H. J. Menninger, Sec-
 retary of State." There was no evidence as
 to handwriting, or that this indorsement was
 on the paper when it left the office of Sec-
 retary of State.

For the reasons assigned in the opinion in
 Richards v. Lumber Co., I think the paper
 was properly excluded, and that the judg-
 ment ought to be affirmed.

WALKER, J., concurs in this opinion.

(90 S. C. 312)

CAMPBELL v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. July 10,
 1911. On Rehearing, Jan. 12, 1912.)

**MASTER AND SERVANT (§§ 286, 287, 288, 289*)
 —EVIDENCE—QUESTION FOR JURY.**

In an action for injuries to a conductor on
 a work train, evidence held to authorize sub-
 mission to the jury of issues of negligence, con-
 tributory negligence, assumption of risk, and
 negligence of fellow servants [by equally divid-
 ed court].

[Ed. Note.—For other cases, see Master and
 Servant, Cent. Dig. §§ 1001-1132; Dec. Dig. §
 286, 287, 288, 289.*]

Hydrick and Woods, JJ., dissenting.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Common Pleas Circuit Court of Greenville County; R. O. Watts, Judge.

Action by Mrs. Joella Campbell, administratrix of Charles L. Campbell, deceased, against the Southern Railway Company and others. From a judgment for plaintiff, defendants appeal. Dismissed.

Cothran, Dean & Cothran, for appellants. McCullough & Blythe and Jas. H. Price, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained on account of the death of Charles L. Campbell, a conductor on a work train of the Southern Railway Company, at Piedmont, S. C., on the 21st of October, 1908.

The allegations of the complaint material to the questions under consideration are as follows: "That while in the discharge of his duty, and while carrying out the orders and instructions of the defendant Southern Railway Company, the said Chas. L. Campbell met his death on said date, by reason of the joint and concurrent negligence of the defendants, in that, while the engine and tender were being backed on a side track at the said station of Piedmont, the said Chas. L. Campbell had occasion to use the steps provided by the defendant Southern Railway Company on said tender for those having occasion to go from the ground to the back of the tender, or from the back of said tender to the ground, and one of the treads of said steps consisted of the top of a box, extending across the rear of said tender, which box was used by the defendant for the purpose of keeping and storing away tools and appliances, and, while in discharge of his duty he was using said steps, the defendant carelessly and negligently left the top of said box, which top constituted one of the treads, partly open at an angle of about 45 degrees, and, when intestate's foot hit the top of said step, he slipped and was thrown underneath the engine and tender, and his body was horribly crushed and mangled, which resulted in his death. That it was the duty of the defendants, and especially of the defendants Paul Odam and Rudolph Sammons, to see that the lid of said box was down and securely fastened for the use of such persons as might have occasion to go to and from the rear of said tender, and said defendants negligently, on this occasion, failed to perform their duty, and left said lid partly open as set forth, thereby rendering the use of the appliance which was furnished the intestate for the discharge of his duty unsafe, defective and dangerous, and defendants, through their joint and concurrent negligence, failed to furnish said intestate with a safe place to do the work required of him, and safe and suitable appliances to perform the duty expected of him, which negligence on the part of defendants combined and con-

curred as the proximate cause of intestate's death." The defendants denied the allegations of negligence, and set up the defenses of assumption of risk, contributory negligence, and negligence of a fellow servant. At the close of the plaintiff's testimony, the defendants made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for \$1,500.

The defendants appealed upon the ground that his honor erred in overruling the motion for the nonsuit, in that there was no testimony tending to sustain the plaintiff's allegations of negligence, and on the further ground that the testimony sustained the defenses upon which the defendants relied. The particular acts upon which the defendants relied to sustain their defense that the deceased was guilty of contributory negligence are as follows: "First. The tender and engine were moving backwards, and the deceased was sitting on the top of the cab of the engine, and jumped down therefrom upon the floor of the tender, immediately opposite which on each side were facilities for alighting. He passed through the tender to the rear thereof, at each corner of which and on the side were facilities for alighting. He attempted to alight at the most dangerous place he could have selected, namely, at the extreme rear end of the tender in the center thereof, where there were no facilities for alighting, and immediately in the path of the tender and engine. That it was not at all necessary to alight from the engine and tender until it stopped. Second. The deceased adopted the dangerous method of alighting when there were perfectly safe ways for alighting." They also relied upon these facts, and upon the additional fact that the deceased had knowledge of the danger, to sustain the defense of assumption of risk.

The first question that will be considered is whether there was any testimony tending to sustain the allegations of negligence. There was testimony tending to sustain every material allegation of the complaint upon which the plaintiff relied to show negligence on the part of the defendants. The only instances in which the court will sustain a nonsuit when there is testimony sustaining the plaintiff's allegations are when the complaint is subject to a demurrer. *Austin v. Manufacturing Co.*, 67 S. C. 122, 45 S. E. 135. In the case now before the court the complaint is not demurrable, as it alleges that the deceased was killed by reason of the failure of the defendant Southern Railway Company to furnish the deceased a safe place to work, which is a primary and nondelegable duty. Even conceding that there was testimony tending to sustain the defenses upon which the defendants relied, it was not of such a nature that only one inference could be drawn from it.

We do not deem it necessary to set out in

detail such portions of the testimony as induce us to reach these conclusions.

Appeal dismissed.

JONES, C. J., concurs. WOODS, J., did not sit.

HYDRICK, J. (dissenting). I think the nonsuit should have been granted. The only negligence alleged in the complaint consisted in leaving the tool box open, with the lid thrown back at an angle of about 45 degrees, so that, when Campbell stepped on it, he slipped and fell. There was no testimony to support the allegation that it was the duty of the defendants Odam and Sammons to keep it closed. If defendant would be liable under the authority of *Richey v. Railway*, 69 S. C. 387, 48 S. E. 285, as for a failure to furnish plaintiff's intestate a safe place to work, if it had appeared that the box was left open by one of his fellow servants, that fact was not proved, and the burden of proving it was on the plaintiff. It cannot be inferred from the mere fact that a box was left open by some one. Indeed, from the testimony, it is as probable that it was left open by Campbell himself as by any one else. If it was, he was the author of his own injury.

On Rehearing.

PER CURIAM. Rehearing denied.

WOODS, J. (dissenting). Charles L. Campbell, conductor in charge of a work train, was killed by falling from the tender of his train; and the plaintiff, as administratrix of his estate, recovered judgment under the allegation that his death was due to the negligence of the defendant, in that the tool box placed by the defendant at the rear of the tender to be used as a step in descending was not closed, but was left with the lid up at an angle of about 45 degrees, so that Campbell in attempting to descend lost his footing, and was run over and killed.

I can see no escape from holding that the nonsuit should have been granted on the ground that there was no evidence of negligence on the part of the defendant. It is elementary that, when an employer places reasonably safe appliances in the hands of an employé for his use, the employer is not responsible for their negligent use by such employé. There is no allegation nor proof that the box lid or the tool box was defective, or that the lid was raised when Campbell took charge of the train as conductor, and therefore no negligence can be imputed to the defendant in that respect. Being intrusted with the train as the representative of the master, the general rule would be that it was Campbell's duty to see that the box was kept closed if that was necessary to the safety of himself and the other employés.

Neither the conductor nor his administratrix can be allowed to allege that the defendant was negligent in failing to perform a duty which devolved on him as the company's representative.

A witness for the plaintiff, it is true, testified that it was the duty of the last man who used the box to close it, but on the part of the plaintiff there was not a particle of evidence tending to show when or by whom the box was opened and lid left so as to be dangerous. Therefore the plaintiff's case rested on negligence which must be imputed either to the conductor himself or one of his fellow servants on the same train. Even if it could be assumed that the defendant would be liable if the box had been left open by Odam, the engineer, or Sammons, the fireman, there could be no recovery, for, under the plaintiff's evidence, it would be entirely a matter of conjecture whether the conductor himself or the fireman or the engineer had left the box open. *Green v. So. Ry.*, 72 S. C. 398, 52 S. E. 45, and cases cited.

The evidence introduced by the defendant cannot help the plaintiff, for that evidence was to the effect that Campbell himself opened the box a very short time before the accident, and was the last man seen near it and in charge of it. This evidence not only does not tend to show that the box was left open by another employé of the defendant, but tends to prove affirmatively that Campbell himself, having control of the box, left it open after having had a cable taken from it.

(127 Ga. 123)

McFARLANE et al. v. ROBERTSON et al.
(Supreme Court of Georgia. Oct. 28, 1911.
Rehearing Denied Nov. 16, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 212*)—ASSIGNMENT OF POLICY—VALIDITY.

Upon the application of Stephens, an insurance policy was issued on his life, payable to his executors, administrators, and assigns, and placed in the hands of an agent of the insurer for delivery. The insured intended the policy for the benefit of a relative, Mrs. Smisson, provided she would pay the premiums thereon. She declined to do so, and the insured made known to his niece, Mrs. Robertson, that if she, or her husband, would pay the premiums on the policy, he would take the insurance, and she should receive the proceeds of the policy. On January 9, 1909, W. E. Hawkins, the general manager of the insurance company wrote to the husband of Mrs. Robertson that the policy was not yet in force, but if he would sign notes left with the local agent, "payable to W. E. Hawkins," the insurance would go immediately into effect, and "after this we can have the beneficiary changed on the request of Mr. Stephens, making it payable to your wife, the niece of the insured. We trust you will decide to give settlement for the policy and allow same to go into force. We have sent assignment blanks to Mr. Ray, so that Mr. Stephens can assign the policy to your wife, affording temporary protection until the beneficiary can be

changed." On January 21, 1909, Stephens assigned the policy to Mrs. Robertson, whose husband signed and forwarded to the general manager the notes above referred to. On that day Robertson also wrote the general manager that Ray stated that "you would have the policy rewritten in favor of my wife." If this is "not true, or not authorized by you, please return me the notes which I signed and mailed you this afternoon. I cannot afford to be carrying insurance made payable to some one else or his estate, when I wish it for the benefit of my wife and children." On January 23, 1909, the general manager wrote Robertson: "In reply I beg to say with the assignment blanks we have in our possession puts this policy in full force, and in the event of the death of Mr. Stephens it will be payable to your wife;" that it would be "some two weeks" before the policy could be rewritten, and "in the meantime you can feel fully protected under the assignments what we have on hand." On February 5, 1909, the general manager sent Robertson a writing for Stephens to sign, requesting that the policy be rewritten, payable to Mrs. Robertson. Stephens refused to sign the request. The policy was rewritten, payable to Mrs. Robertson, but was never delivered, because of the refusal of Stephens to sign the request. Robertson declined to pay the notes, but paid them after the death of Stephens and on the same day he died. Hawkins was to pay the premiums to the insurer and retain the notes as his individual property. Soon after the notes were given, and some time prior to the death of the insured, Hawkins paid the premiums to the company and sent its receipt therefor to Robertson. The insurer paid the money into court, and in a contest between the administrator of Stephens and Mrs. Robertson, the jury found a verdict in favor of the latter. To the order of the court overruling their motion for a new trial, the administrator and the children of Stephens, who were also parties to the case, excepted. *Held*, the fact that Stephens did not sign a request that the policy be rewritten, so that Mrs. Robertson should become the payee thereof, and the fact that the policy was not delivered after being rewritten, did not make the assignment of the policy by Stephens to Mrs. Robertson invalid, and the evidence did not warrant a charge wherein the jury were authorized to find that the assignment was invalid on the ground that it was not to be a binding and valid assignment unless the policy was rewritten, and was not a completed and final assignment.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

2. INSURANCE (§ 210*) — ASSIGNMENT — CONSIDERATION.

Under the evidence Robertson was liable to Hawkins on his notes for the premiums paid by Hawkins to the company, though the rewritten policy was not delivered, because of the refusal of Stephens to sign the written request that this be done, and the assignment could not be said to be invalid because of the refusal of Robertson, prior to the death of the insured, to pay these notes; and the charges of the court inconsistent with the ruling above made were error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 477; Dec. Dig. § 210.*]

3. APPEAL AND ERROR (§ 1033*) — REVIEW — HARMLESS ERROR — INSTRUCTIONS.

The charges referred to in the preceding headnotes were erroneous, but they were not such errors as were harmful to the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. INSURANCE (§ 119*) — INSURABLE INTEREST — WAGERING POLICY.

One of the charges of the court to which exception is taken is as follows: "The theory of the law as to wagering contracts is this: At best payment of an insurance premium in consideration of a guaranty of the payment of a certain fund upon the death of the person insured is at least practically a contract whereby the insurer, the company, takes the chances of the person insured not dying either within, if it be a limited contract policy, the limit of time, or if it be a life policy, or any other character of policy, it is a contract by which the company takes the chances of the premiums paid being worth as much or more than the amount to be paid upon the death of the insured; and, on the other hand, the payment of premiums constitutes a contract in which the assured agrees to pay a certain amount of premium under the terms of the contract on the theory when either his life terminates the policy becomes due, or for the years for which it is taken is passed the policy matures; so that you will see as between the two parties, the insurer and insured, they stand in the attitude towards each other of one agreeing to pay money in consideration of insurance, and the other agreeing to pay the insurance in the event of death. Now, the law says, to take out insurance, you must have an insurable interest." Immediately after this charge the court charged the jury as follows: "A creditor has an insurable interest in the life of another to the extent of his debt and premiums and interest necessary to maintain it in force. A husband has it in the wife, and the wife in the husband, and a child in the father." And immediately thereafter delivered the charge quoted in the succeeding headnote. *Held*, that the charge first above quoted, in connection with its context, did not accurately define a wagering contract as applicable to the law of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 165; Dec. Dig. § 119.*]

5. INSURANCE (§ 116*) — "INSURABLE INTEREST" — RELATIONSHIP OF PARTIES.

The court charged the jury as follows: "Uncle and niece occupy no such relations towards each other as that by the very fact of that relationship an insurable interest exists; but I charge you that the absolute relationship by blood of two parties is not the sole test of an insurable interest between them, but an insurable interest which takes a contract out of the class of wagering contracts may arise from such an interest or relationship as will convince the jury that the party claiming the insurable interest in the life of another has, because of natural affection and relationship between the two parties, a desire to protect the life of that other; and while it is true that the rule of law that a niece has no insurable interest in the life of her uncle, because of that fact of relationship alone, yet, if you believe from the evidence that, in addition to being the niece of the insured, Stephens, that defendant, Mrs. Robertson, had showed Stephens such natural affection as would tend naturally to create a desire on her part to prolong, promote, and protect the life of Stephens, then I charge you that Mrs. Robertson had an insurable interest in the life of Stephens." This charge was error, as it did not correctly set forth what constituted an "insurable interest" on the part of Mrs. Robertson in the life of Stephens. The charge made the insurable interest consist in the existence of the fact that Mrs. Robertson had shown Stephens such natural affection as would tend naturally to create a desire on her part to prolong, promote, and protect his life, instead of making an insurable interest depend upon the existence of such facts as would create a reasonable expectation on the part of Mrs. Rob-

ertson of benefit or advantage to her from the continuance of the life of Stephens, and of loss by reason of his death. 1 Cooley's Briefs on Ins. pp. 278-284, 290; 4 Words & Phrases, 3672, 3673.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.*]

6. INSTRUCTIONS—NO ERROR.

There was no error in the charge upon the subject of agency; nor was there any error in the refusals to give the charges requested by the plaintiff in error.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between T. S. McFarlane and others and George B. Robertson and others. From the judgment, McFarlane and others bring error. Reversed.

Lane & Park, for plaintiffs in error. Hall & Hall and L. D. Moore, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 281.)

CAMBRIDGE TILE CO. v. W. B. SCAIFE & SONS CO.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 750*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where, in a bill of exceptions assigning error upon the judgment of a trial court in awarding a fund in court to one of two contestants therefor, the issues presented by the pleadings and the facts as agreed upon by counsel for the respective parties are set forth, and there is an averment in the bill of exceptions that upon such issues and facts the judge, as a matter of law, decided that the party other than the one complaining was entitled to the fund, an assignment of error that such decision was error because it was contrary to law is sufficient, and the motion to dismiss the writ of error upon the ground that there was no sufficient assignment of error is overruled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 750.*]

2. MORTGAGES (§ 176*)—LIEN—PRIORITY—JUDGMENT.

The lien of a judgment rendered before the recording of a prior mortgage is superior to the lien of the mortgage (Civil Code 1910, § 3260), though at the time of the rendition of the judgment a petition to foreclose the mortgage (on realty) has been filed and a rule nisi has been issued thereon and served. *Richards v. Myers*, 65 Ga. 763; *Benson v. Green*, 80 Ga. 230, 4 S. E. 851; *New England, etc., Co. v. Ober*, 84 Ga. 294, 10 S. E. 625; *Cabot v. Armstrong*, 100 Ga. 438 (3), 28 S. E. 123. In such a case notice, actual or constructive, to the judgment creditor, at the time when the judgment was rendered, of the existence of the unrecorded mortgage, is immaterial. *Burke v. Anderson*, 40 Ga. 540; *Cottrell v. Bank*, 89 Ga. 517, 15 S. E. 944.

(a) A mortgage was executed January 7, 1908, on land of the mortgagor situated in a county other than that of his residence. A petition to foreclose was filed February 15, 1909. The mortgage was recorded September 20, 1909. An execution on the foreclosure was issued on February 28, 1910, and recorded, in

the county where issued, on March 2, 1910. A common-law judgment in favor of another creditor of the mortgagor was rendered against him, in the county of his residence, on April 7, 1909, and the execution issued thereon was entered upon the general execution docket of that county May 31, 1909. Held that, under the ruling just above announced, the lien of the common-law judgment was superior to the lien of the mortgage, and that the trial judge erred in holding that the mortgagee's claim to a fund arising from a sale of the mortgaged land was superior to the claim of the judgment creditor, and in awarding the fund to the mortgagee.

(b) If, in such a contest, the time when the common-law execution was entered of record on the general execution docket were material it appears in this case that it was entered prior to the record of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 176.*]

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Contest between the Cambridge Tile Company and the W. B. Scaife & Sons Company. From the judgment, the Cambridge Tile Company brings error. Reversed.

Wimbish & Ellis and Way & McCall, for plaintiff in error. P. W. Meldrim, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 307)

UNITED PAINTING & DECORATING CO. v. DUNN.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 3*)—EXISTENCE OF AGENCY—INDEPENDENT CONTRACTOR.

An owner of land entered into a written agreement with a contractor, under the terms of which, for a consideration of \$5,400, the latter was to furnish all material and labor and to erect upon the land of the owner a building in accordance with specifications prepared by a named architect. Among other stipulations in the agreement were in substance the following: The architect should supervise the work and see that it came up to the specifications. His decision as to the meaning of the drawings and specifications prepared by himself should be final. No alterations should be made in the work, except upon his written order; and the amount to be paid by the owner to the contractor on account of such alterations should be stated in such order. Within 24 hours after written notice from the architect, the contractor should proceed to remove from the ground or building all material condemned by the architect, whether worked or unworked, and take down all work which the architect should, in written notice to the contractor, condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications; and upon the failure of the contractor to perform certain conditions of the contract the owner should have the right to take charge of the work and complete it at his own expense, and charge the contractor with all expenses thereby incurred. On the same day that the contract was executed, a further stipulation was added, under the signatures of the parties, as follows: "It is fur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ther mutually agreed between the parties hereto that the above price is a guaranty that the cost of the house complete will not exceed this amount of money namely, \$5,400, and the bond is given to insure said guaranty. The contractor is to give the owner credit for any amounts which he may save in the construction of the building and in buying materials, etc. He is to furnish his service in the execution of the work for the sum of 10 per cent. of the total cost, said 10 per cent. being included in the \$5,400; contractor to furnish architect with the amounts of subcontracts and price paid for different materials and labor." *Held* that, under a proper construction of the whole contract as thus amended, the contractor was an independent contractor, and in no sense the agent of the owner for the purpose of buying materials with which to complete the construction of the building, and the owner was not liable to a creditor of the contractor for the price of materials sold to him for such purpose. *Ridgeway v. Downing*, 109 Ga. 591, 34 S. E. 1028; *Young v. Smith & Kelly Co.*, 124 Ga. 475, 52 S. E. 765, 110 Am. St. Rep. 186; *Lapton v. Cedartown Co.*, 6 Ga. App. 147, 64 S. E. 494, and citations in these cases; 2 *Thomp. on Neg.* § 41.

[*Ed. Note.*—For other cases, see *Principal and Agent*, Cent. Dig. § 5; Dec. Dig. § 3.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the United Painting & Decorating Company against B. H. Dunn, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

Payne, Little & Jones, for plaintiff in error. Mayson & Johnson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 283)

MCCARTHY et al. v. LAZARUS.

(Supreme Court of Georgia. Dec. 15, 1911.)

(*Syllabus by the Court.*)

1. EJECTMENT (§ 109*)—PROCEEDINGS—DIRECTION OF VERDICT.

This was an action of ejectment. The defendant claimed title only under an alleged contract between the plaintiff's intestate and the defendant, whereby the premises became the property of the defendant in consideration of the defendant's services in nursing and caring for the intestate during her last illness. The evidence was wholly insufficient to show that such a contract was made, and therefore the court did not err in directing a verdict in behalf of the plaintiff for the recovery of the premises.

[*Ed. Note.*—For other cases, see *Ejectment*, Cent. Dig. § 312; Dec. Dig. § 109.*]

2. EJECTMENT (§ 109*)—PROCEEDINGS—DIRECTION OF VERDICT.

According to the rulings of this court, jurors are not absolutely bound by the opinion of witnesses as to the rental value of the premises for the recovery of which an action is brought, though there be no variance as to such value in the opinion of the different witnesses. *Martin v. Martin*, 135 Ga. 162, 68 S. E. 1095, and cases cited. The trial judge there-

fore erred in directing a verdict for mesne profits in accordance with the opinion of witnesses as to the rental value of the premises.

[*Ed. Note.*—For other cases, see *Ejectment*, Dec. Dig. § 109.*]

3. APPEAL AND ERROR (§ 1172*)—DISPOSITION OF CAUSE—DECISION IN GENERAL.

The judgment is affirmed as to the direction of a verdict for the recovery of the premises; but a new trial is ordered on the sole question as to mesne profits, with direction that the issue as to mesne profits alone be submitted to a jury on another trial.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Dec. Dig. § 1172.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Ella McCarthy and others against Jake Lazarus, administrator. From the judgment, the plaintiffs bring error. Affirmed in part, and reversed in part.

F. R. Martin and S. B. Hunter, for plaintiffs in error. C. A. Glawson and L. D. Moore, for defendant in error.

FISH, C. J. Judgment affirmed in part, and reversed in part. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 353)

BATTS v. J. H. C. ALL & SON.

(Supreme Court of Georgia. Jan. 11, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where there were two grounds of demurrer directed to the same part of the plaintiff's petition, it affords no good ground of exception to the demurrant if the court struck the objectionable part of the petition on one of the grounds, but refused to strike it on the other ground.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Dec. Dig. § 1040.*]

2. SALES (§ 23*)—VALIDITY OF CONTRACT—CONDITIONS PRECEDENT.

Where an offer to purchase a given number of bales of cotton to be delivered in the future at a stipulated price is made by one party to another, which contains the statement that the party making the offer will give bond in an agreed amount guaranteeing his acceptance of the goods purchased, the stipulation in reference to the giving of the bond is to be construed as a condition precedent; and where the party to whom the offer is made accepts the offer generally, without further stipulation and without waiver of any condition contained in the offer, the contract made by the offer and the acceptance thereof does not become binding upon the party to whom the offer is made until a compliance by the offeror with the condition in reference to the giving of a bond.

[*Ed. Note.*—For other cases, see *Sales*, Dec. Dig. § 23.*]

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

Action by J. H. C. All & Son against E. W. Batts. Judgment for plaintiffs, and defendant brings error. Reversed.

Hal Lawson and H. J. Quincey, for plaintiff in error. Newbern & Meeks, for defendants in error.

BECK, J. J. H. C. All & Son brought an action against E. W. Batts to recover damages from the breach of certain contracts. There were three of the contracts, of different dates, but substantially the same in terms and conditions; and what is here said in reference to one of the contracts is controlling as to all of them. The first of these contracts reads as follows:

"Savannah, Ga., May 12, 1909.

"Mr. E. W. Batts, Ocilla, Ga.—Dear Sir: We beg to confirm that we have to-day purchased from you 100 bales of cotton at 10 cents per pound, basis good middling, f. o. b. cars Ocilla, Georgia, to be delivered in October, 1909, not less than 50 bales of which are to be delivered at a time. This 100 bales is to average 500 pounds per bale, with an allowance of 1% under or over. It is also understood that the difference between grades are to be those prevailing on the Savannah Cotton Exchange on the date of delivery. We are sending you a duplicate of this contract which please accept and return. We will send you in a later mail bond on our part for \$5.00 per bale to guarantee our acceptance of this purchase. We offer to do this for you, although we have bought cotton to-day for October delivery at the same figures, without having to put up any guaranty. On your part you may put up the \$5.00 per bale, or give bond in a reputable company for same, or get the bank in your town to guarantee your fulfillment of same. Yours truly, J. H. C. All & Son, by John E. All."

"Accepted. E. W. Batts."

Paragraphs 1 to 12 of the petition consist of allegations that the contract was executed on the date thereof; that according to the terms of the contract Batts sold to petitioners and contracted to deliver 300 bales of cotton, averaging 500 pounds in weight, on the basis of good middling, at stipulated prices; that petitioners were bound under the contract to receive and pay for the cotton according to the stipulations of the writing; that petitioners, up to the 30th day of October, 1909, had been able, willing, and ready to accept and pay the contract price for the cotton and perform all the obligations imposed by the contract; that on the 30th day of October, 1909, petitioners made demand upon the defendant for the cotton, and defendant refused to deliver, and has not yet delivered it. It is alleged that the value of cotton at the time of the breach of the contract exceeded the contract price, and petitioners lay their damage in the amount equal to the excess. That part of the petition embraced in paragraphs 13 to 20 relates to damages sued for on the ground that, because of a failure of certain cotton shipped by the defendant to the plaintiffs to come up to the stipulated grade, there was

an "out-turn" against the plaintiffs of a stated amount; and the plaintiffs sue for this. That part of the petition embraced in paragraphs 1 to 12, inclusive, thereof, is referred to herein as the first part of the petition, and the remainder, excepting the prayer for judgment and process, is referred to as the second part of the petition.

[1] 1. The defendant filed a demurrer containing 13 grounds. Of these grounds the court overruled 1 to 7, inclusive, and sustained 8 to 13, inclusive. The defendant excepted to the order overruling the first 7 grounds. The seventh and eighth grounds of the demurrer read as follows:

"(7) Defendant demurs to the alleged cause of action attempted to be set forth in paragraphs 13 to 20, inclusive, upon the ground that said paragraphs set forth no cause of action as against this defendant.

"(8) Defendant demurs to the alleged cause of action attempted to be set forth in paragraphs 13 to 20, inclusive, upon the ground that it nowhere appears that the payments of money by the plaintiffs were made upon any mutual mistake of fact; nor does it appear why the plaintiff paid the purchase money demanded by the defendant without first investigating to ascertain whether the amounts were correct; nor does it appear that this defendant in any way deceived or misled the plaintiff; nor does it appear that the defendant was ever notified of any alleged mistake in a reasonable time after the discovery by the plaintiffs of such mistake."

As we construe these two grounds of demurrer, the plaintiff in error was not hurt by the failure of the court to sustain the seventh ground of the demurrer, because, even if the part of the petition to which it relates—that is, the second part of the petition—was open to attack by the general demurrer as stated in the seventh ground, that part of the petition to which the seventh ground refers was effectually destroyed when the court sustained the eighth ground of the demurrer. All that the defendant could ask was that the court wipe out the second part of the petition. The court did so by its order sustaining the eighth ground of the demurrer. What does it matter to the defendant if the court refused to destroy the second part of the petition on one ground, if it was completely annihilated on another?

[2] 2. The contract in this case consisted, in effect, of an offer on the part of the plaintiffs to purchase 100 bales of cotton and an acceptance of the offer by the defendant. In the statement of the offer there is contained an obligation upon the party making the offer to give a bond on his part for \$5 per bale (which would be \$500 for each 100 bales). This offer was accepted generally by the defendant, without stipulation of any condition on his part or the waiver of any condition contained in the offer; and the contract would have been binding upon him

Immediately upon a compliance with the stipulated condition in the offer that the bond should be given (sent by mail). But we are of the opinion that the stipulation contained in the offer that a bond in compliance with the terms of the contract should be sent by mail was a condition precedent, and that until it was complied with the contract was not binding upon the defendant. While the acceptance of the plaintiff's offer was general in its terms, it secured to the defendant the benefit of all conditions in the offer which might safeguard him in the delivery of the property purchased, as effectually as it brought him under the obligation to perform his undertaking, and one of those safeguards was a bond, which would have protected him against loss or diminished his loss in the event the proposed purchasers should refuse or become unable to pay for the cotton after the same had been shipped to them. Consequently, in order to state a cause of action against the defendant for a failure to deliver the cotton, it was essential that the plaintiffs should have alleged a compliance with this material condition stated in their offer which we have under consideration, and, having failed to allege this, no cause of action was shown against the defendant, and a general demurrer to the petition should have been sustained. *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 338)

BROWN et al. v. MARTIN et al.

(Supreme Court of Georgia. Jan. 9, 1912.)

(*Syllabus by the Court.*)

1. VENUE (§ 5*)—CHARACTER OF ACTION—TITLE TO LAND — "RESPECTING TITLES TO LAND."

An action under Civil Code 1910, § 3666, by a remainderman against a life tenant, to have the estate of the latter declared forfeited and the remainderman put in possession, because of waste committed by the tenant, is a suit "respecting titles to land," and the venue thereof is the county in which the land involved is located.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*]

2. GROUNDS OF DEMURRER—DISMISSAL OF PETITION.

None of the grounds of demurrer were well taken, and the court erred in dismissing the petition.

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by Herbert Brown and others against R. B. Martin and another. Judgment for defendants, and plaintiffs bring error. Reversed.

Herbert Brown and others, as remaindermen under a certain deed, brought an action against Mrs. Madden and R. B. Martin, to

declare a forfeiture of the life estate conveyed by the deed, and to acquire possession of the property because of alleged waste committed. By the terms of the deed the property was conveyed to Mrs. Madden for life, for the comfortable maintenance of herself and children, and at her death to go to the children in fee simple. The plaintiffs are the children just referred to. The original petition made substantially the following averments: On June 16, 1906, a decree was taken, subjecting the interest of Mrs. Madden in the property named in the deed to a certain indebtedness, under which decree her life estate was sold at public outcry, and was bought in by her; but, she failing to comply with her bid, under the terms of the decree "title to the said property went to various creditors, subject to a fixed charge for the maintenance of petitioners." The defendant Martin was one of the creditors, and went into possession of the land, holding the life interest only as held by Mrs. Madden, and subject to the liabilities imposed by law on her, and entitled only to such rights as she had. The land is located in Calhoun county. Mrs. Madden is a resident of that county, and Martin is a resident of Randolph county. Various acts of waste have been committed by Martin, and allowed by him to be committed by others, consisting of working the timber for turpentine purposes, cutting, selling, and destroying valuable timber in large quantities. Mrs. Madden, the life tenant, fails and neglects to prevent these acts of waste, and both defendants have been guilty of such acts "as to forfeit her or his interest in said land, and cause said estate to vest absolutely in fee simple in petitioners," and they elect to claim immediate possession. The prayers of the petition are that the life estate be declared to be forfeited; that Mrs. Madden, and Martin, holding under her, be decreed to have forfeited their interest in said estate; and that plaintiffs recover the land, with the title, possession, and right of possession vested in them free of condition, together with the rental value of the land since the filing of the suit.

An amendment to the petition was allowed, in which it was alleged: Mrs. Madden leased to one Sealy about 75 acres of the land for the purpose of working turpentine thereon, and Sealy extracted the turpentine from the trees and carried it away, and cut timber and converted it into barrel staves, and used large quantities of timber for making turpentine, which "act was done by Mrs. Madden with the knowledge and assistance, in the year 1906, of R. B. Martin." Mrs. Madden and Martin conspired and confederated, while she was life tenant, to sell and dispose of the real estate, and in furtherance of that intention Martin leased the land and sold said timber for Mrs. Madden. "Said

Madden permitted said Martin to waste said real estate, by neglecting to care for same, and neglecting to prevent the cutting of same. Said Madden has committed voluntary waste, and in a manner evidencing entire disregard of the rights of the next taker, by cutting said timber, allowing it to die and fall upon the ground and rot. Said Martin had full knowledge of this fact, and knew that said waste was permissive and voluntary, and took title to said land under a decree with full knowledge of the facts that said Madden had committed said acts." Martin has continued the acts of waste, and his title was taken subject to full knowledge that Mrs. Madden had forfeited her entire life estate.

A demurrer was filed by Martin, setting up the following grounds: "(1) Because no cause of action, either legal or equitable, is set forth in the petition. (2) Because no such acts are alleged in the petition as will justify the court in decreeing a forfeiture as prayed. (3) Because no copy of the decree under which it is alleged defendant holds title is attached to the petition, nor does it appear with sufficient fullness under what title the defendant claims. (4) Because the land referred to in paragraph 1 of the petition is not described with sufficient fullness or definiteness. (5) Because the petition shows that the superior court of Calhoun county has no jurisdiction of this defendant."

The court rendered judgment as follows: "The plaintiffs have amended their petition, and said amendment having been allowed, and the within and foregoing demurrers having been renewed to said petition as amended, it is, after argument, ordered that said demurrers be sustained, and the petition as amended be dismissed, both parties by agreement treating the decree referred to in the petition as being a part of and attached to the petition." To this judgment the plaintiffs filed their bill of exceptions.

M. C. Edwards, for plaintiffs in error.
Hawes & Pottle, for defendants in error.

HILL, J. (after stating the facts as above). There is no merit in the first and second grounds of the demurrer. Acts of waste on the part of the life tenant, of the character alleged in the petition, would give the remaindermen the right to bring an action to declare a forfeiture of the estate of the life tenant, as provided for in Civil Code 1910, § 3666. In view of the recital of the court, in his order quoted in the statement of facts, that by agreement both parties treated the decree referred to in the petition as though it were a part thereof, the third ground of demurrer will be considered as having been waived. It might be here remarked, however, that this decision, in its entirety, is made without reference to the decree, as it does not appear to have been actually at-

tached to the petition, and was not brought to this court. This statement is made, in view of the fact that the plaintiffs may have been parties to the decree and bound thereby, and it may have contained provisions which would affect their rights with respect to the present litigation. There is no merit in the fourth ground of demurrer. Paragraph 1 of the petition gives the numbers of the land lots involved, and this description, taken in connection with the allegation elsewhere in the petition that the property is situated in Calhoun county, sufficiently identifies the land referred to, or can be made to do so when aided by parol testimony.

[1] This brings us to the fifth and last ground of the demurrer, by which the defendant Martin challenges the jurisdiction of Calhoun superior court with respect to him. Counsel in their briefs largely deal with the case on the theory that it is an equitable proceeding, and should be located in the county of his residence, because he is the defendant against whom substantial relief is prayed; however, counsel for the plaintiff in error does insist that the suit is one respecting title to land, and therefore properly brought in Calhoun county, where the land in controversy is situated. In order to determine the venue of the suit, it is important to classify the action. While the petition does not in terms so state, the suit evidently is brought under the statute of this state providing for a forfeiture in behalf of the remainderman against the life tenant in the event the latter wastes the estate, which statute is hereinafter copied. Originally at common law an action of waste was maintainable only against the holder of the legal estate of a guardian in chivalry, or tenant in dower or by the curtesy, on the theory that, this class of estates being creatures of the law, the law would protect the inheritance of the heir by affording him a remedy for waste committed. No action could be maintained against the holder of an estate for life or for years, since they were created by the demise or lease of the owner, and it was deemed that his failure, when granting the estate, to provide against waste by the tenant, constituted an act of neglect on his part, the consequences of which he would be left to suffer. 2 Blackstone Com. 283. The statute of Marlbridge (52 Hen. III, c. 23) extended the common-law liability, so as to make it apply to tenants of the last-named class, and to make them liable for full damages resulting from waste; and the statute of Gloucester (6 Edw. I, c. 5) gave a more stringent remedy in such cases by a writ of waste, under which the tenant was liable to forfeiture of the thing wasted and treble damages. 2 Bl. Com. 283-284; 1 Reeves on Real Property, § 558; Roby v. Newton, 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601. In Parker v.

Chambliss, 12 Ga. 235, it was held: "In this state, a tenant in dower is liable for waste committed on the estate, but she does not thereby forfeit her estate, and treble damages as provided by the statute of Gloucester. The remedy against her is by action on the case, in the nature of waste, to recover the actual damage done to the estate, or by an injunction to restrain her from committing waste, when necessary, on a proper case made." In the opinion Judge Warner, after pointing out that we had adopted the common and statute law of England only where "properly adapted to the circumstances of the inhabitants of this state," and quoting Chancellor Kent to the effect that the writ of waste had gone out of use, and special action on the case in the nature of waste had superseded the common-law remedy, on page 238, said: "We therefore adopt and recognize the principles of the common law including the statute of Gloucester, so far as to make the tenant in dower liable for waste committed, but reject the harsh and penal remedy provided by that statute." This decision was made in 1852.

Code 1863, § 2235 (which is identical in language with section 3666 of the Code of 1910), contained the following provisions: "The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainderman if he elects to claim immediate possession." In *Dickinson v. Jones*, 38 Ga. 97, a case of injunction to restrain threatened waste, it was assumed that the statute of Gloucester was of full force in Georgia; but in *Woodward v. Gates*, 38 Ga. 205, 212, it was pointed out that the apparent holding in the *Dickinson* Case was obiter, no question of forfeiture being there involved, and the true rule in *Woodward v. Gates* was declared to be that the effect of the adoption of the Code of 1863 was that (page 213), "in case of waste, the tenant for life shall forfeit his interest to the remainderman, if he elects to take immediate possession. But the rule of the statute of Gloucester as to treble damages is not still adopted." And this decision was construed and followed in *Belt v. Simkins*, 113 Ga. 894, 39 S. E. 430. It appears, therefore, that the present statute (Civil Code 1910, § 3666), quoted supra, is declaratory, and at the same time restrictive, of the common law, and that the right of action thereunder is purely an action at law. What was the nature of this action at common law? Blackstone says: "This action of waste is a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages." 2 Bl. Com. 228; 3 Bl. Com. 118. It would seem, therefore,

that, our statute having eliminated the treble damages feature, and retained only the forfeiture provided for by the common law, an action brought under such statute would be a real action.

The suit in the present case is based purely on this statute. It is in no sense an equitable action, and no equitable features are involved. The allegations of the petition, simplified, are to the effect that the life tenant has been guilty of acts of waste within the meaning of the statute, and thereby rendered his estate subject to the forfeiture, and that the remaindermen elect to have such forfeiture declared and to take immediate possession of the estate. The prayers of the petition all seek relief within the bounds of the statute; that is, that the interest of the life tenants be declared to be forfeited and they be put in possession of the land. True, there is an additional prayer that the defendants be required to account for the rental value of the premises since the filing of the suit; but this is merely a prayer for incidental relief with respect to a right which will accrue to them during the pendency of the action, provided they succeed in maintaining their claim of forfeiture, which, if declared, would relate back at least to the filing of the suit. There is also a prayer to the effect that the plaintiffs recover the premises free of any charge for the maintenance of the life tenant, or any one holding under her. The property was conveyed to the life tenant for life, for the comfortable maintenance of herself and children. The children are the remaindermen, and are the plaintiffs in this case. The right of the life tenant to maintenance from the property is incident to and a part of her life estate, and would cease with the loss of that estate, in the event a forfeiture thereof be declared. Neither of the prayers just mentioned seeks any relief other than is incidental to an action under the statute. The suit being one in which no equity is invoked, but purely a real action under a statute having its origin in the common law, its venue is not affected by the constitutional provision that equity cases shall be tried in the county of the residence of a defendant against whom substantial relief is prayed. (It might here be remarked that no equity jurisdiction can attach with respect to legal waste, except for purposes of injunction. 5 Pomeroy's Eq. Jur. § 491.) "Real actions at common law were those by which all disputes concerning corporeal hereditaments were decided." Will's Gould on Pleading, 6. They extended to actions claiming title to rents, commons, and the like, in fee simple, fee tail, or for life, as well as actions for the recovery of the land itself. 3 Bl. Com. 117. Such actions were local in character. 3 Bl. Com. 294. But with us the venue of suits is now controlled by constitutional and statutory provisions. In addition to the constitutional provision regard-

ing equity cases above referred to, the Constitution further declares that "cases respecting titles to land shall be tried in the county where the land lies," and, with exceptions as to specified actions not material here to mention, "that all other civil cases shall be tried in the county where the defendant resides." This suit was brought in Calhoun county, in which the land involved is located. The demurrers were filed by the defendant Martin, who did not reside in that county; and unless the suit was one "respecting titles to land," within the meaning of the constitutional provision referred to above, there was no jurisdiction over Martin.

Was it such a suit? Numerous adjudications have been made with respect to what did or did not constitute an action respecting titles to land; but an examination of all the cases we have been able to find discloses that those held not to be of this nature are, in the main, reducible as follows: (a) Those in which the action sounded in trespass and the object was the recovery of damages, or proceedings were for the purpose of injunction to prevent trespass, or an attempt was made to fasten a lien on property, actions in which the question of title was only incidentally involved to the extent of showing a right on the part of the plaintiff to maintain his action. Examples of this class are *Osmond v. Flournoy*, 34 Ga. 510, *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572, *Beckwith v. McBride*, 70 Ga. 642, and *Wheatley v. Blalock*, 82 Ga. 406, 9 S. E. 168. (b) Those in which the legal title was out of the plaintiff, and it was sought to cancel a deed, or to obtain specific performance, or in some other way invoke the aid of a court of equity in order to establish the plaintiff's legal title. The following cases fall within this class: *Smith v. Bryan*, 34 Ga. 53, *Bivins v. Bivins*, 37 Ga. 346, *Taylor v. Cloud*, 40 Ga. 288, *McArthur v. Matthewson*, 67 Ga. 134, *Lowe v. Mann*, 74 Ga. 387, *Saffold v. Scottish Security Co.*, 98 Ga. 785, 27 S. E. 208, *Fulgham v. Pate*, 77 Ga. 454, *Clayton v. Stetson*, 101 Ga. 634, 28 S. E. 983, *Ellis v. Farmer*, 119 Ga. 238, 46 S. E. 105, and *Martin v. Gaisert*, 134 Ga. 34, 67 S. E. 536.

The line of cases just cited are the progeny of *Smith v. Bryan*, supra, in which the ruling was that "a bill in equity to set aside and cancel a deed, on the ground of fraud, is not a case respecting title to land," within the meaning of the provision of the Constitution fixing the venue in such cases. In that case (34 Ga. 62, 63) the court used this language: "What, in the intendment of the Constitution, are 'cases respecting titles to land'? We understand them to be cases in which the plaintiff asserts his title to the land in question, and depends for his recovery upon his maintenance of it, or to supply a link in the chain, wanting by reason of accident or other cause. In order to

determine whether or not a plaintiff at law or a complainant in equity, who selects his forum upon this clause of the Constitution, has made a case of jurisdiction for the selected court, it is necessary to examine carefully his allegations. What, then, is the gravamen in this case? Is it, at the time of the filing of this bill, the complainant had title to the lands, and that the defendant held possession, or committed waste, or did any act respecting them, without his consent, and in derogation of his title? Not at all. * * * His case is not that the title never legally passed from him, nor that it has legally returned to him. His prayer is not that his title, under existing circumstances, may be adjudged good and valid, but that by reason of certain facts, dehors the title, the contract which divested him of it may be annulled, and it restored. The case, then, does not respect title to lands, but is respecting a contract in relation to them, and certain fraudulent practices, which, it is alleged, vitiate that contract." And in *Clayton v. Stetson*, 101 Ga. 634, 638, 28 S. E. 983, 984, it was said: "If the plaintiff, without resorting to the powers of the superior court as a court of equity, and without invoking equitable relief, can, upon her legal title, recover, the suit is well brought in the county where the land lies; but if, in order to vest herself with a legal title upon which she can recover at law, it becomes necessary at first to assert an equity as against the person invested with the legal title, then we conclude that the action should have been brought in the county wherein the defendant resided."

In the present case, proof of the conveyance to them by deed of the remainder interest (giving to them the right of ultimate enjoyment), and proof of acts of waste on the part of the life tenant such as to create a forfeiture of the intermediate estate within the intendment of Civil Code, § 3666, quoted supra, is sufficient to show in the plaintiffs a legal title and make out a prima facie case for recovery. We are satisfied that where the plaintiff, as in this case, confines himself to the remedy afforded him by the statute, he is seeking only to maintain a title devolving upon him by law as against the defendant's possession and claim of title under deed, and the suit is one "respecting titles to land," within the meaning of the Constitution. The very gist of the action is: Whose legal title is superior with respect to the right of possession in present—the defendant, claiming the life estate under deed, or the plaintiff, claiming it under forfeiture by virtue of the statute? The object of the action is to gain possession, and the right to possession is determined by an adjudication as to which has the superior legal title. We think the case we are considering measures up to the criterion laid down in *Clayton v. Stetson*, quoted supra, by which to determine when the

action is one respecting titles to land, and that the venue of the suit, as brought, is in Calhoun county.

[2] None of the grounds of demurrer were well taken, and the court committed error in sustaining them and dismissing the petition.

Judgment reversed. All the Justices concur.

(137 Ga. 322)

JEFFERSON v. STATE.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1156*)—WRIT OF ERROR—REVIEW—DISCRETION OF TRIAL JUDGE—COMPETENCY OF JUROR.

When, in a criminal case, after verdict, an attack is made upon a juror upon the ground that he was not impartial, the trial judge occupies the place of a trier, and his finding that the juror is competent will not be reversed, unless under all the facts the discretion of the judge is manifestly abused. No abuse of discretion appears in this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070; Dec. Dig. § 1156.*]

2. GROUNDS FOR NEW TRIAL—EXPRESSION OF OPINION BY JUDGE.

Certain grounds of the motion for new trial, in which exception was taken to the expressions of the judge made pending the examination of witnesses, and others made while instructing the jury, were not subject to the criticism that they amounted to the expression of an opinion upon material facts in issue, or that they were otherwise prejudicial to the accused.

3. HOMICIDE (§ 203*)—EVIDENCE—"DYING DECLARATIONS"—ADMISSIBILITY.

In the trial of a murder case, if at the time of making declarations the condition of the wounded party making them, the nature of his wounds, the length of time after making the declarations before he expired, and all the circumstances, make a prima facie case that he was in the article of death, and conscious of his condition when he made the declarations, such declarations are admissible in evidence under proper instructions by the court to the jury, though the person may not have expressed his consciousness of impending dissolution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 431; Dec. Dig. § 203.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

4. CRIMINAL LAW (§ 921*)—NEW TRIAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Whether or not statements, made about eight or ten minutes after deceased was shot, to the effect that the accused "shot him like a dog and kicked him in the face," were admissible as a part of the res gestæ, the admission of them was not cause for a new trial, in view of other evidence to the same effect, which was afterwards introduced, some of which was introduced by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2207; Dec. Dig. § 921.*]

5. CRIMINAL LAW (§ 921*)—NEW TRIAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In view of other evidence admitted, it was no cause for a new trial that the judge refused to allow a witness to testify that the prosecutor in the case, who was a witness for the state, had previously said: "He stated to me

he wanted to hang him [meaning defendant] as high as a telegraph post."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2207; Dec. Dig. § 921.*]

6. EXCEPTIONS TO CHARGE—NO ERROR.

There were numerous exceptions to the charge; but, considered in the light of the evidence and the charge in its entirety, none of them were sufficient to require the grant of a new trial.

7, 8. OMISSIONS TO CHARGE—NO ERROR.

Several grounds of the motion for new trial complained of omissions to charge, and several of the refusal to charge upon request; but, in the light of the charge as given and the evidence submitted, none of them were meritorious.

9. NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.

The alleged newly discovered evidence was not sufficient to require the grant of a new trial.

10. HOMICIDE (§ 234*)—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.*]

(Additional Syllabus by Editorial Staff.)

11. HOMICIDE (§ 309*)—INSTRUCTIONS—DEGREE OF OFFENSE.

The contention that the court erred in refusing to instruct Pen. Code 1910, §§ 64, 65, relating to voluntary manslaughter, cannot be sustained, where the court gave a concrete charge as to the law of voluntary manslaughter in so far as the offense was involved in the case, under either the evidence or the prisoner's statement.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

12. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—DEGREES OF HOMICIDE.

Instructions that, if the circumstances were sufficient to excite the fears of a reasonable man that he was in any serious danger and the serious danger was less than a felony, it would be a voluntary manslaughter, and, if of a felonious assault, it would be justifiable homicide, and that, if an assailant intends to commit a trespass only, to kill him is manslaughter, and if he intends a felony, the killing is self-defense, and justifiable, did not give accurate statements of the law, and were properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

13. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTS—DYING DECLARATIONS.

Where the court, in charging, read the sections of the Code as to dying declarations, and further instructed that dying declarations should be received with great caution, that if they were made the jury should consider all the circumstances under which they were made, the mental and physical condition of the deceased, whether the circumstances were calculated to impair his powers of observation and memory, whether he stated a mere conclusion, or the facts of the case, whether his statement was full, and whether the account was influenced by resentment, and therefore biased, there was no error in refusing to charge that great caution is necessary in the use of dying declarations, as deceased may have spoken under circumstances of confusion and surprise, which may occasion an injury to the mind and

an indistinctness of memory, and that such evidence is liable to be incomplete.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

14. CRIMINAL LAW (§ 942*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—IMPEACHING TESTIMONY.

Alleged newly discovered evidence, merely intended to impeach witnesses for the state, is insufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2331, 2332; Dec. Dig. § 942.*]

15. CRIMINAL LAW (§ 944*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—CREDIBILITY.

Newly discovered evidence, partly cumulative, offered by a witness whose veracity is sustained by the affidavit of one person and attacked by the affidavits of several, is insufficient to require interference with discretion of the judge in overruling a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2335; Dec. Dig. § 944.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

James Jefferson was convicted of murder, and brings error. Affirmed.

J. H. Martin, S. B. Hatcher, A. W. Cozart, Ed. Wohlwender, S. T. Pinkston, and J. E. Sheppard, for plaintiff in error. Geo. C. Palmer, Sol. Gen., T. T. Miller, T. S. Felder, and T. Hix Fort, Atty. Gen., for the State.

ATKINSON, J. James Jefferson was indicted for the crime of murder. The person alleged to have been killed was Marion Marchant, a policeman in the city of Columbus. The implement employed by Jefferson in committing the homicide was a pistol. Immediately before the killing, Jefferson was seen standing in the front door of Thompson's near-beer saloon, fronting on Sixth avenue, talking to Marchant, who was standing out on the sidewalk facing him. No other witness testified to having heard the conversation, but Jefferson was seen suddenly to commence firing his pistol while standing in the door, and to fire five shots in rapid succession; all taking effect, and all passing entirely through the body except one, which passed through the arm. At the first shot Marchant began falling face forward, and when the shooting was over was lying face downward on the sidewalk, unable to move. After lying in that position for several minutes, and calling for those coming to the scene to turn him over, he was lifted, and carried into the saloon, and laid on the pool table. In about five minutes after he was shot, he made certain statements to McPhail, a witness introduced by the defense, concerning the homicide, and about eight or ten minutes afterwards made other statements of the same character to J. T. Moore, the chief of police, and Moses Moon, a fellow policeman. The shooting occurred in the city of Columbus at about 7:30 o'clock on

Wednesday evening, the 12th day of April, 1911. On Saturday following the shooting, he made to the solicitor general a statement, telling who shot him, and giving other circumstances attending the shooting. The statement was reduced to writing, and on the following Monday morning submitted to him, and upon its being read over to him he said that it was correct. During the same morning he died. The doctor was with him at the time he made the statement on Saturday, and testified as to the nature of his wound and his opinion that Marchant could not recover, and that he was conscious and realized his condition; but he was not with him at the time the written statement was submitted to him on Monday. The chief of police, who was present on both occasions, testified as to Marchant's condition and appearance, and, upon the facts recited by him, stated that Marchant was conscious and obliged to know that he was in a dying condition.

According to the statement of the accused, the policeman threatened to arrest him without cause, and, upon being remonstrated with, threatened to blow a hole through him, and attempted at the time to draw his pistol, whereupon the accused drew his pistol and fired the five shots; Marchant endeavoring all the time to draw his pistol, but failing to do so. According to the statement of the deceased, Jefferson was drunk, and a few minutes before had been warned by him to go home, and after returning from up the street and finding him at this saloon he "got after him again," and Jefferson began shooting him without any provocation. At the first shot he fell, and Jefferson "stamped" him. After this he was shot while lying on the ground, but could not say how many times. The jury found the accused guilty, without recommending that he be punished by imprisonment in the penitentiary for life, and the death penalty was imposed. A motion for a new trial was refused, and the defendant excepted.

[1] 1. The fourth ground of the motion for new trial, being the first of the amended grounds, complained that one of the jurors who rendered the verdict "was not a fair and impartial juror, but he was incompetent and disqualified to serve as a juror in said case; he having said [on a given date], and before the trial of this case, that the defendant ought to be hung." As to this ground the trial judge occupied the position of a trier on the hearing of the motion for new trial. The evidence submitted upon the question was conflicting, and there was no abuse of discretion in overruling this ground of the motion. In such a case the Supreme Court will not control the discretion of the trial court, unless it clearly appears that it has been abused. *Bowdoin v. State*, 113 Ga. 1150

(6), 39 S. E. 478; *McNaughton v. State*, 136 Ga. 600, 71 S. E. 1038.

[2] 2. The fifth, tenth, eleventh, thirteenth, twenty-second, twenty-third, and thirty-fifth grounds complained that certain expressions of the judge used pending the examination of witnesses, and others made while instructing the jury, amounted to the expression of an opinion upon the facts, and were otherwise prejudicial to the accused. These grounds of the motion are lengthy, and it is unnecessary to set them out or elaborate upon them; but upon a careful consideration of each of them we fail to find that the expressions of the judge were subject to the criticism that they contained intimations upon questions of fact at issue, or that the remarks of the judge or questions propounded by him to the witnesses, upon which error was assigned, were unfair or illegally prejudicial to the accused. Grounds 9, 26, 27, 28, 31, and 34 also, among other things, complained that the charge criticised in them expressed opinions of the judge on issues of fact; but none of them were subject to this criticism. Other criticisms upon the charge embodied in these grounds fall within the ruling announced in the sixth division of this opinion.

[3] 8. The sixth amended ground complained that the court illegally admitted in evidence a paper which the state contended constituted the dying declaration of the deceased, over the timely objection that, before a paper as a dying declaration can go to the jury, the state must show that the declarant was conscious of his condition and in the article of death, and the evidence only showed that the paper was taken on Saturday and read over to the declarant on Monday, a short time before his death, and failed to show that he was conscious of his approaching dissolution. Evidence was introduced as to the nature of his wounds, the physical condition of the deceased produced by them, and other circumstances, which, taken together, was sufficient to make a prima facie case that the deceased was in the article of death and conscious of his condition when he made the declarations which were admitted in evidence; and the court submitted them to the jury under appropriate instructions. It is not necessary to the admissibility of such a statement that the person whose statements are sought to be introduced as dying declarations should express himself as believing that he is in a dying condition. Consciousness of his condition may be inferred from the nature of the wounds or from other circumstances. *Barnett v. State*, 136 Ga. 65, 70 S. E. 868; *Perdue v. State*, 135 Ga. 277 (8), 69 S. E. 184. There was no error in admitting the paper in evidence over the objection urged.

[4] 4. The seventh and eighth grounds of the amended motion for new trial complain of the admission in evidence of statements

made by Marchant, after he was shot, to the effect that the defendant "shot him like a dog and stamped him in the face"; the statements having been made separately to J. T. Moore, the chief of police, and to Moses Moon, a fellow officer. The objection urged to the admissibility of the evidence was that the statements were no part of the *res gestæ*, but were mere hearsay. The statements were made about eight or ten minutes after the wounds were inflicted. Whether or not these statements were admissible, their admission will not require a new trial, as statements to the same effect were contained in the written dying declaration of the deceased, which was properly admitted in evidence on the testimony of one of the witnesses to whom the alleged *res gestæ* statements were made. The other witness to whom the alleged *res gestæ* statements were made did not testify concerning the dying declarations; and, were the issue close upon the point, it might make a difference, owing to the difference in the credibility of the witnesses. But the issue was not close. McPhail, a witness introduced by the defendant, whose testimony went in without objection, testified that Marchant told him that the accused "shot him like a dog"; also that, when he approached Marchant, who was lying on the sidewalk, his head was bruised. The accused denied in his statement that he had stamped Marchant in the face, and McPhail testified to the same effect; but he was the only witness so testifying, and he did not pretend to account for the manner in which Marchant's head became bruised. Several other witnesses testified that the accused stamped Marchant in the face.

[5] 5. The question, "State what prosecutor, Chief J. T. Moore, said with reference to this case," was propounded to a witness for the accused. It was stated to the court that, if permitted to answer, the witness would testify. "He said to me he wanted to hang him [meaning defendant] as high as a telegraph post." It was also stated that the testimony was offered in order to show the prosecutor's feelings, and in order that the evidence might go to the credit of the prosecutor, who was a witness for the state. The court refused to allow the question and answer, and error was assigned upon the ruling. It appears that Moore had elsewhere testified that he was the prosecutor in the case, had aided in employing counsel to assist in the prosecution, and had taken great interest in the prosecution, and could not remember whether he had made the remark attributed to him as sought to be proved. Under these circumstances, the exclusion of the proposed evidence did not furnish ground for the grant of a new trial.

[6] 6. The twelfth, fourteenth, fifteenth, sixteen, seventeenth, eighteenth, nineteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh,

twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second grounds of the amended motion complain of excerpts from the charge of the court. After a careful consideration of each of them, in connection with the evidence and the charge in its entirety, none of them contained any error requiring the grant of a new trial, nor were they of such character as to require elaboration.

[7, 11] 7. The twentieth amended ground complained that the judge erred in failing to define and charge the different grades of homicide, including manslaughter and voluntary manslaughter. The thirty-eighth ground was substantially to the same effect. The forty-third ground complained that the judge erred in failing to charge the jury the law of voluntary manslaughter, and failed to charge sections 64 and 65 of the Penal Code of Georgia; "there being evidence to warrant the jury in finding the defendant guilty of voluntary manslaughter, because the defendant killed the deceased upon a sudden heat of passion, and there being evidence to warrant the jury in believing that the deceased attempted to commit a serious personal injury on the defendant, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied." The court gave the jury a concrete charge as to the law of voluntary manslaughter, in so far as that offense was involved in the case, under either the evidence or the prisoner's statement. Therefore there was no merit in the ground of the motion for new trial complaining that the court failed to define voluntary manslaughter in accordance with sections 64 and 65 of the Penal Code.

[8, 12] 8. The thirty-sixth amended ground complained that the judge refused to charge, on written request: "If the circumstances were sufficient to excite the fears of a reasonable man that he was in any serious danger, and the serious danger was less than a felony, it would be voluntary manslaughter; if of a felonious assault, it would be justifiable homicide." The thirty-seventh ground complained that the judge refused to charge, upon written request: "If an assailant intends to commit a trespass only, to kill him is manslaughter; if he intends a felony, the killing is self-defense, and justifiable." These requests did not give accurate statements of the law, and the principles sought to be stated in them were sufficiently covered by the general charge.

[13] The thirty-ninth ground complained that the judge refused to charge: "I charge you that great caution is necessary in the use of dying declarations, because, although there may have been an utter abandonment of all hope of recovery, it may often happen that the particulars of the violence of which the deceased has spoken occurred under circumstances of confusion and surprise, calculated to prevent their being accurately ob-

served. The consequence also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his inference from facts concerning which he may have drawn a wrong conclusion, or he may have omitted particulars, from not having his attention called to them. Such evidence is therefore liable to be incomplete. He may naturally also be disposed to give a partial account of the occurrence, although not possibly influenced by animosity or ill will. From these considerations the law recognizes and declares that dying declarations shall be received and used as testimony with great caution." The court, in charging the jury, read them the sections of the Code as to dying declarations. He further instructed them: "Dying declarations should be received and considered by the jury with great caution. If such declarations were made, it is your duty to consider all of the circumstances under which they were made, the mental and physical condition of the deceased at the time, whether the circumstances were calculated to impair his powers of observation and memory, whether the deceased stated a mere conclusion of his own mind or the facts of the case, whether his statement was full, or only a partial one, and, after considering all the attending circumstances, determine for themselves the credibility and weight of this part of the testimony. The jury may also consider, in regard to dying declarations, whether the account given by the deceased on the occasion was influenced by resentment, and therefore was biased and incomplete, or whether it was complete and unbiased. * * * It is for you to determine, therefore, first, whether the evidence sufficiently shows that the deceased was conscious of his approaching death, that his death was really approaching, to authorize the admission of the dying declarations; and, if not, you should disregard the dying declarations altogether. * * * You are to determine what weight to give it," etc.

These instructions being certainly as favorable to the accused as he could expect, it was not error for the court to decline a request to give a lengthy argumentative charge on the subject of dying declarations, which set forth the reasoning of a writer on criminal evidence, quoted in the opinion in the case of *Mitchell v. State*, 71 Ga. 128, delivered by a judge of this court, "why great caution is necessary, not only in the admission, but in the use, of this testimony." In *Campbell v. State*, 11 Ga. 353-375, it was said: "Great caution should be observed in the use of this kind of evidence." But this was before the adoption of the Code dealing with the admissibility of dying declarations. It would seem that the codifiers, in prescribing the rule as to the admissibility of dying declarations in prosecutions for homicide, declaring that they are admissible only when

made by a person in the article of death, when he is conscious of his condition, as well as restricting the use of such declarations to the sole purpose of showing the cause of death and the person who committed the act, defined the precautionary rule which the decisions had pronounced which should be observed in the admission of this kind of evidence. See *Mitchell v. State*, 71 Ga. 141. Having so instructed the jury, there was no error in refusing this request.

[9, 14] 9. The fortieth ground of the motion relates to alleged newly discovered evidence as disclosed in an affidavit by Hermon Bussey, and the forty-first ground relates to alleged newly discovered evidence as set forth in an affidavit by Irene Jones. An examination of the affidavits discloses that the alleged newly discovered evidence merely tended to impeach witnesses who had testified in behalf of the state, and therefore it did not show cause for the grant of a new trial.

[15] The forty-second ground relates to the alleged newly discovered evidence of Virginia Reynolds. Her affidavit amounts to evidence merely cumulative of the statement of the accused, except that she states that the deceased had his hand on his right hip pocket, with the other hand reaching toward the accused, and that the deceased had one foot on the steps of the store when the accused first fired. The character and credibility of Virginia Reynolds is vouched for by one affidavit only, that of Ellen Schley, who deposes that the associates of Virginia Reynolds were Emma Peterson, William Peterson, and the deponent. On the hearing of the motion for a new trial the state submitted affidavits of numerous witnesses, whose respective characters were sustained by affidavits of other witnesses, to the effect that Virginia Reynolds was a negro prostitute, of bad character, and unworthy of belief, and that they would not believe her on oath, and that Ellen Schley, who made the affidavit as to the good character of Virginia Reynolds, was herself of bad character, and a prostitute, and unworthy of belief. This ground also is insufficient to require interference with the discretion of the trial judge in overruling the motion for a new trial.

[16] 10. The verdict was authorized by the evidence, and the discretion of the trial court in refusing a new trial will not be disturbed.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 346)

GASKINS v. RIGELL et al.

(Supreme Court of Georgia. Jan. 9, 1912.)

(*Syllabus by the Court.*)

INTERLOCUTORY INJUNCTION.

There was no error in refusing an interlocutory injunction. *Tune v. Beeland*, 131 Ga. 528, 62 S. E. 976.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by J. B. Gaskins against W. F. Rigell, Sr., and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. P. Knight, for plaintiff in error. E. K. Wilcox, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 361)

NEAL BANK v. BRUCE.

(Supreme Court of Georgia. Jan. 11, 1912.)

(*Syllabus by the Court.*)

1. MORTGAGES (§ 439*) — FORECLOSURE — AMENDMENT TO PETITION.

Where the petition for the foreclosure of a mortgage was brought in the name of the holder of the mortgage, there being upon the back of the mortgage an indorsement making the instrument payable to a named party, which indorsement purported to be signed by the mortgagee, followed by an indorsement in blank, which purported to be that of the transferee under the first indorsement, the defendant in his plea having denied both the genuineness and the legality of the indorsements and transfers set forth, it was competent for the plaintiff to amend the petition, so as to substitute therein the name of the mortgagee as suing for the use of the original plaintiff, the holder of the instrument sought to be foreclosed; and the court erred in refusing to allow an amendment to that effect upon its being offered by the plaintiff.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1292-1297; Dec. Dig. § 439.*]

2. REVIEW.

The court having erroneously refused to allow the amendment referred to above, the subsequent proceedings on the trial of the case were nugatory.

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by J. L. Bruce against the Neal Bank. Judgment for plaintiff, and defendant brings error. Reversed.

A petition for the foreclosure of a mortgage on realty was brought against the mortgagor in the name of the Neal Bank; there being upon the back of the mortgage the following indorsements: "Pay to the order of Dreger & Doughty, Mgrs., Sept. 3, 1904. L. M. Bruce." "Dreger & Doughty, Mgrs." L. M. Bruce was the mortgagee. To which petition for foreclosure the defendant filed the following plea: "Defendant denies both the genuineness and legality of the indorsements and transfers set forth in the third paragraph of said petition." Upon the trial of the case the plaintiff offered the following amendment to the declaration: "Now comes the plaintiff in the above-styled case, and, by leave of the court first had and obtained, amends the declaration in said case filed as follows, to wit: The defendant in said case having denied in the pleadings therein

the legality of the transfer on said mortgage from L. M. Bruce to Dreger & Doughty, Mgrs., and the transfer by Dreger & Doughty, which transfers are on the back of the mortgage as follows: 'Pay to the order of Dreger & Doughty, Mgrs., Sept. 3, 1904.' 'Dreger & Doughty, Mgrs.' Therefore the plaintiff aforesaid amends the declaration in said case, so as to substitute in said declaration wherever the name of said plaintiff, the Neal Bank, appears as plaintiff, the name of L. M. Bruce for the use of the Neal Bank, so that the suit shall proceed, not in the name of the Neal Bank as plaintiff, but in the name of L. M. Bruce, suing for the use of the Neal Bank." And in connection with said amendment the plaintiff offered to indemnify L. M. Bruce against any costs in the case, in such way as the court might direct. Upon objection of the defendant the court refused to allow the amendment, which ruling was assigned as error.

Hal Lawson, for plaintiff in error. Max Isaac, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 453)

CROMARTIE et al. v. WEAVER.
(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 346*)—FORECLOSURE—DUTY TO TAKE POSSESSION.

Under the power of sale contained in a mortgage on certain land, authorizing the mortgagees, or their assigns, "to foreclose in the usual manner, or (at their option) by taking possession of the mortgaged property and selling all or any portion thereof either at public or private sale upon giving ten days notice" to the mortgagor, the assignees of such mortgagees were authorized, but not required, to take possession of the land before sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1044; Dec. Dig. § 346.*]

2. MORTGAGES (§ 346*)—FORECLOSURE—FAILURE TO TAKE POSSESSION—"AUTHORIZED."

A sale of land described in a mortgage properly executed and recorded is not void because the assignee of the mortgage did not take possession of the mortgaged property before selling the land under a power in the mortgage, which authorized, but did not require, him to take possession and sell the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1044; Dec. Dig. § 346.*]

For other definitions, see Words and Phrases, vol. 1, pp. 646-648.]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Action by J. L. Weaver against J. B. Cromartie and Tenar Cromartie. Judgment for plaintiff, and defendants bring error. Affirmed.

V. E. Padgett, for plaintiffs in error. H. L. Williams and W. W. Bennett, for defendant in error.

HILL, J. A complaint for certain described land was brought by J. L. Weaver against J. B. Cromartie and Tenar Cromartie in Appling superior court. The defendants admitted possession of the land, but denied the plaintiff's title thereto.

The plaintiff sought to recover upon substantially the following state of facts: A mortgage was executed by J. B. Cromartie, of Appling county, upon a valuable consideration, and for the purpose of securing the payment of a certain promissory note, payable to Dwelle & Dwelle, or order, and by the terms of the mortgage the mortgagor did "sell, mortgage, alien, and convey unto Dwelle & Dwelle, their successors and assigns," the real estate sued for, and did "authorize the holder of this mortgage to foreclose the same in the usual manner, or (at their option) by taking possession of the mortgaged property and selling all or any portion thereof, either at public or private sale upon giving ten days notice to me in writing (the said J. B. Cromartie) the same to be left at my usual place of residence, of their intention to sell, and such other notice as they may deem proper, and I hereby constitute the said Dwelle & Dwelle, or their assigns, my attorney to pass good and sufficient title to such property upon making such sale." The above-recited instrument, properly executed and recorded, was transferred to "Dr. J. L. Weaver, with all our right and title and full power to foreclose the same as we might do under the laws of the state of Georgia." Notice was given to the mortgagor, J. B. Cromartie, dated January 6, 1910, reciting that on the 17th day of January, 1910, he, J. L. Weaver, would sell before the courthouse door in Appling county, Ga., between the legal hours of sale, the property described in the suit; "the purpose of said sale being to pay the mortgage hereinbefore recited for the sum of \$316.47, besides interest thereon, and signed by the plaintiff, J. L. Weaver, holder of said mortgage." The property described in the mortgage and notice was sold to H. W. Reins, and a deed executed to the purchaser on January 17, 1910, by J. L. Weaver, attorney in fact for J. B. Cromartie, and, in turn, a deed was executed by Reins to J. L. Weaver to the property described in the mortgage and notice. At the conclusion of the evidence, the defendants moved the court to grant a nonsuit because the evidence was insufficient to authorize a verdict in favor of the plaintiff, which motion the court overruled, and directed a verdict for the plaintiff, and to this judgment the defendants excepted.

The sole question in this case is whether the sale of the land sued for is in conformity with the power of sale contained in the mortgage, and whether that power must be strictly complied with before the sale would

be legal and pass the title to the land to the purchaser at the sale. Under the terms of the mortgage, the holder was "authorized to foreclose in the usual manner, or (at their option) by taking possession of the mortgaged property and selling all or any portion thereof, either at public or private sale upon giving ten days notice" to the mortgagor, etc.

[1] It is insisted as neither Dwelle & Dwelle, the original mortgagees, nor J. L. Weaver, their assignee, had ever "taken possession of the property" before the sale, that the sale was therefore void under the power of sale contained in the mortgage. There are two lines of decisions upon this question, but the weight of authority seems to be against the contention of the plaintiffs in error, and we follow the weight of authority in support of the judgment of the court below. In 2 Jones on Mortgages (8th Ed.) § 1782, it is stated that: "Under a power in default of payment to 'enter and take possession of said premises immediately, and sell and dispose of the same,' the entry and possession are not generally considered a condition precedent to the exercise of the power of sale." The following authorities support the text above quoted: Vaughn v. Powell, 65 Miss. 401, 4 South. 257; Kiley v. Brewster, 44 Ill. 186; Jones v. Hagler, 95 Ala. 534 (3), 10 South. 345; Williams v. Dreyfus, 79 Miss. 245, 30 South. 633 (2); Hamilton v. Halpin, 68 Miss. 99, 8 South. 739. And to the same effect is the text in 27 Cyc. 1464 (c) and cases cited. We hold that the taking of possession of the land sued for in this case was not a condition precedent to the exercise of the power of sale under the mortgage, and, while the language quoted would authorize, it did not require, the assignee of the mortgage to take possession before the sale. The general rule is that a power of sale in deeds of trust, mortgages, and other instruments must be construed strictly. Civil Code 1910, § 4620; Callaway v. People's Bank, 54 Ga. 450. But it will be noted that the language of the mortgage is that the holder is "authorized" to foreclose or take possession and sell. The right to do both does not exclude the right to do either. That the assignee is authorized to proceed in either manner does not mean, we take it, that he must do both. Nor do we think, because he is "authorized" to sell the land "by taking possession," that it would destroy the power of sale if he failed to take possession of the land as a condition precedent to the sale.

[2] We think the assignee was authorized, but not required, to take possession of the land before the sale, and that the sale, without his taking possession, was legal, and passed the title in the land to the purchaser at the sale. The court did not err in over-

ruling the motion for a nonsuit and directing a verdict for the plaintiff.

Judgment affirmed. All the Justices concur.

(137 Ga. 347)

CENTRAL GEORGIA POWER CO. v.
PRESTON.

(Supreme Court of Georgia. Jan. 10, 1912.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict.

2. REQUESTS TO CHARGE—SUFFICIENCY OF GENERAL CHARGE.

The requests to charge, in so far as they were legal and pertinent, were sufficiently covered by the general charge.

3. EMINENT DOMAIN (§ 262*)—PROCEEDINGS TO TAKE PROPERTY—VERDICT.

While in the trial of cases of this character this court has recognized it as the correct practice for the trial court to instruct the jury that in case their finding should be for the owner of the land in any amount as consequential damages, as well as actual damages, they should include both in one lump sum, the fact that the court below departed from this practice, and instructed the jury to state the amount of actual damages and consequential damages, in case their finding included both, is not such error as to require the grant of a new trial.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 262.*]

4. EMINENT DOMAIN (§ 223*)—FORM OF VERDICT—INSTRUCTION.

The evidence in this case demanded a finding in some amount for consequential damages, and consequently the court did not err in charging the jury as follows: "The form of your verdict will be: 'We, the jury, assess the value of the property taken at so many dollars, and find so many dollars as consequential damages for property not taken.' You can state the amount in figures or letters."

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 223.*]

5. EMINENT DOMAIN (§ 203*)—PROCEEDINGS TO TAKE PROPERTY—ADMISSIBILITY OF EVIDENCE.

The court did not err in refusing to allow a witness for the movant to answer the following question: "State in what way the company proposes to control this land." Nor was this testimony rendered admissible by the statement, made by counsel for the movant at the time the question was propounded, to the effect that "the witness, if permitted to answer, would state that it was the intention of the plaintiff company to operate and maintain these lines so as not to injure the defendant's property, and that said land and said lines would not be patrolled by wagons and autos, but same would be patrolled prudently and skillfully."

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 203.*]

6. EMINENT DOMAIN (§ 222*)—PROCEEDINGS TO TAKE PROPERTY—INSTRUCTIONS.

In view of the entire charge, the jury were sufficiently instructed as to the meaning of the expressions "value," "compensation," and "compensatory damages," as used in the charge.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Condemnation proceedings by the Central Georgia Power Company against W. M. Preston. From the judgment, the Central of Georgia Power Company brings error. Affirmed.

Walter T. Johnson and Greene F. Johnson, for plaintiff in error. O. L. Redman and O. M. Duke, for defendant in error.

BECK, J. The Central Georgia Power Company condemned certain lands belonging to W. M. Preston, for the purpose of erecting and maintaining towers and transmission lines on and across the same. From the award of the assessors, Preston appealed to a jury in the superior court. To the verdict awarded by the jury the Power Company excepted and moved for a new trial, and upon the court's refusal to grant the same the case was brought here for review.

[1] 1. While the jury seem to have accepted as true the very highest estimate made by any witness as to the actual damages resulting from the erection of certain towers and the "clearing up" of a strip across the defendant's tract of land, we cannot say that their verdict was unauthorized by evidence, and that it is so excessive as to shock the moral sense and show bias and prejudice upon the part of the jury trying the case.

[2] 2. The court was requested in writing to give the following charge: "In estimating the value of the land taken by the plaintiff in this case, I charge you that under the law the plaintiff company is entitled to have this land at its fair market cash value, unaffected by the fact that it needs it or desires it. It is not a question of the value of the property to the owner, nor can the value be increased by his unwillingness to sell. On the other hand, the compensation cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and it is bought by one who desires, but is not obliged, to buy it. It is what the property would bring, if sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owners are willing to sell, and the purchaser willing to buy."

In the case of Central Georgia Power Co. v. Mays, 137 Ga. —, 72 S. E. 900, this court, speaking in reference to the rule for fixing the compensation to an owner whose property is taken for a public use, said: "Lewis on Eminent Domain (3d Ed.) § 706, well states the rule as follows: 'In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market val-

ue of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and it is bought by one who is under no necessity of having it. In estimating its value, all the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition it is in at the time, and the use to which it is then applied by the owner. * * * All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value.' " Generally speaking, says the same author: "The true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of the buyer to whom he is negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence desiring to purchase. In this estimation the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and of any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use."

The request to charge states a part of this rule; but upon a comparison of the written request with the true rule, as stated by the text-writer and approved by this court, it will be observed that the request to charge was incomplete, in that it omitted certain very essential elements of the rule as stated in the quotation made by Mr. Justice Hill in the course of his opinion. It fails to include in the definition of market value, as given, the very material qualification that, "in estimating its value, all the capabilities of the property and all the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." With this essential principle omitted from the request to charge touching the subject of market value and actual damages, we do not think that the request contained such a complete statement of the law upon the question dealt with as would render the refusal to give it error upon the part of the court.

The other requests to charge, in so far as they were legal and pertinent, and not of a merely cautionary nature, were sufficiently covered by the general charge.

[3-5] 3-5. The rulings made in headnotes 3, 4, and 5 require no discussion.

[6] 6. In one ground of the motion for a new trial it is complained that the court erred "in failing to instruct the jury that the plaintiff company was entitled to the property taken at its fair market value, and

erred, further, in nowhere giving in charge to the jury any definition of what constituted market value in the eyes of the law and in contemplation of such condemnation proceedings as the jury were then and there trying." While the court did not use the expression "market value" in his instructions to the jury in discussing the amount of compensation to be allowed to the landowner, he did instruct the jury that "damages which the law allows to be assessed in favor of a landowner whose property has been taken or damaged under the right of eminent domain are purely compensatory. No remote, fanciful, or speculative damages can be allowed, but only such damages as are the necessary and connected effect of the company's act, in taking this land and using it for its purposes. * * * You ascertain from the evidence in the case what is the value of the property taken by this company, used for its purposes, and then the value of the crops destroyed, if any were destroyed or injured, and the value of the timber or trees cut or injured, if any, or destroyed, if that has been shown, and the reasonable value of the same. He would be entitled to recover that in addition to the actual value of the land taken." We are of the opinion that in view of these portions of the charge, in the absence of a pertinent and apt written request to charge that actual value was the market value of the property, it was not error for the court not to further instruct the jury as to the meaning of the terms "value," "compensation," and "compensatory damages," as used by him in his charge.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 300)

VARN v. CHAPMAN.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Failure of counsel for plaintiff in error to refer in his brief to an assignment of error amounts to an abandonment of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. JUDGMENT (§ 17*)—PROCESS TO SUPPORT—ATTACHMENT—PERSONAL JUDGMENT.

Where a defendant in attachment, at the time it was issued and levied, resided in the county where it was returnable, but prior to the filing of the declaration changed his domicile to another county, the court wherein the attachment was pending did not have jurisdiction to render a general judgment against the defendant; he not having appeared and made defense, nor replevied the property levied upon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

3. COURTS (§ 37*)—JURISDICTION OF PERSON—WAIVER OF OBJECTION—ACKNOWLEDGMENT OF SERVICE OF NOTICE.

In such a case, a written acknowledgment, made after the filing of the declaration, of due and legal service of notice of the pendency of the attachment and of the proceedings thereon, did not amount to a waiver of jurisdiction as to the defendant's person.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.*]

4. TRIAL (§ 252*)—FRAUDULENT CONVEYANCES (§ 57*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—INSOLVENCY OF GRANTOR.

On the trial of the traverse to the grounds of the attachment, after the plea to the jurisdiction had been stricken, the court erred, under the facts of the case, in instructing the jury as follows: "If, at the time the conveyance [a deed of gift from the defendant to his wife and children] was made, it appears that some portion or all of this indebtedness [alleged to be due plaintiff by defendant] was then in existence, and it further appears that the defendant is insolvent, then the law presumes that the conveyance was made for the purpose of defeating that indebtedness. If you find that is true, then you will find in favor of the plaintiff, and against the traverse."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.* Fraudulent Conveyances, Cent. Dig. §§ 141-158; Dec. Dig. § 57.*]

5. COURTS (§ 37*)—JURISDICTION OF THE PERSON—WAIVER OF OBJECTION.

Where a plea to the jurisdiction of the court to render a general judgment against the defendant in attachment was on the trial stricken by the trial judge, and the Supreme Court holds that he erred in so doing, the defendant cannot subsequently urge defenses to the merits of the case, without waiving the objection to such jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.*]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by A. B. Varn against G. W. Chapman. Judgment for plaintiff, and defendant brings two writs of error. Reversed.

H. A. King and W. W. Bennett, for plaintiff in error. F. Willis Dart, for defendant in error.

FISH, C. J. On September 26, 1908, an attachment was issued in favor of Chapman against Varn, on the ground that defendant was a fraudulent debtor. In the petition for attachment it was alleged that the defendant was a resident of Jeff Davis county. On the 30th day of the same month the attachment was levied on a described parcel of land situated in the county of Jeff Davis. The attachment was returnable to the February term, 1909, of the superior court of that county. At that term, and on February 22d, the plaintiff filed his declaration in attachment, and on the succeeding day the defendant acknowledged "due and legal service" of notice by plaintiff of the suing out and levying of the attachment and of the filing of the declaration. Defendant, on February 23d, and at the same term of the court at which the declaration was filed, entered a

plea to the jurisdiction of the court, in so far as plaintiff sought in his declaration to recover a general judgment, in which plea it was in effect set up that at the time of the filing of the declaration, and at the time of the acknowledgment of notice by the defendant, he did not reside in Jeff Davis county, but in the county of Appling, Ga., and that therefore the superior court of Jeff Davis county had no jurisdiction to render a general judgment against him, but that the jurisdiction for such purpose was in the superior court of Appling county. During the term to which the attachment was returnable, and on February 26, 1909, the defendant filed a traverse to the attachment, in which he not only denied the truth of the grounds of the attachment, but also specifically denied all the allegations of the petition for attachment as to the indebtedness claimed by the plaintiff to be due him by the defendant. The case went to trial at the September term, 1910, and at that term the defendant moved to dismiss the plaintiff's case, in so far as it was sought therein to obtain a general judgment against defendant, upon the ground that it appeared from the declaration that, at the time of the filing of the same and the service of notice, the court was without jurisdiction to render a general judgment against defendant. The declaration alleged: "That A. B. Varn was, at the date of issuing, levying, and filing of the attachment herein referred to, a resident of said state and county [Jeff Davis], but is now a resident of Appling county, Georgia." The court, on motion of the plaintiff, struck the plea to the jurisdiction, and overruled the defendant's motion to strike from the declaration so much thereof as sought to recover a general judgment against him. An answer to the declaration was filed by the defendant at the trial term, one paragraph of which was, on motion of the plaintiff, stricken by the court. The matter of the answer is not now material. The traverse was first separately tried. A verdict was rendered against the traverse. The court in the main case directed a general verdict in favor of the plaintiff against the defendant for given amounts as principal and interest, as alleged in the petition for attachment and in the declaration to be due and owing to the plaintiff by the defendant, with a special lien in favor of the plaintiff for such amounts on the property attached, and judgment was entered in accordance with this verdict. The defendant moved for a new trial as to the traverse, which motion was overruled. The defendant, in a direct bill of exceptions, assigned error upon the ruling of the court in striking his plea to the jurisdiction, and in refusing to dismiss so much of the declaration as sought a general judgment, and also excepted to the direction of a general verdict against him. He subsequently filed another bill of exceptions, in which error was

assigned upon the overruling of his motion for a new trial as to the traverse. No point of practice as to the suing out of the two writs of error has been made.

[1] 1. Counsel for plaintiff in error, in the brief filed in this court, does not refer to the assignment of error as to the striking of the portion of the answer to the declaration, and such assignment must therefore be considered as abandoned.

[2] 2. In such brief it is insisted that the trial court erred in striking the plea to the jurisdiction, in overruling the motion to strike therefrom so much of the declaration as sought a general judgment, and in directing a general verdict in the main action, upon the ground that all such rulings were erroneous for the one reason that, under the facts of the case, the court was without jurisdiction of the defendant's person, and that for such reason no personal or general judgment could be rendered against him. Therefore the question here raised is whether, under the facts of the case, the court had jurisdiction of the defendant's person, so that a general judgment might be rendered against him. The ground of the attachment was that the defendant had conveyed, by deed of gift to his wife and children, a described parcel of realty liable for the payment of his debts, for the purpose of avoiding the payment of the same, and was based upon the provisions of Civil Code, § 5088. A judge of the superior court of the circuit wherein such debtor resides, if qualified to act, and, if not, the judge of an adjoining circuit, may grant an attachment on such grounds, to be issued in the usual form and directed as usual, and which shall be executed as existing laws provide, and subject to existing laws as to traverse, replevy, demurrer, and other modes of defense. Id. § 5090. And such attachment, when issued and served, shall be returned and disposed of as attachments are now returned and disposed of, and be subject to the same defenses. Id. § 5092. The general rule governing the return of attachments returnable to the superior court is that they shall be returned to the next term of such court of the county where the defendant resides. Id. § 5063. When the attachment is returnable to the superior court, the plaintiff shall file his declaration at the first term, and the subsequent proceedings shall be in all respects the same as in cases where there is personal service. Id. § 5102. "The plaintiff, his agent, or attorney at law may give notice in writing to the defendant of the pendency of such attachment and of the proceedings thereon, which shall be served personally on the defendant by the sheriff, his deputy, or a constable of the county in which said attachment is returnable by giving him a copy of said notice at least ten days before final judgment on said attachment, and returning said original notice with his service entered thereon to the

court in which said attachment is pending, which being done, the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law; and no declaration shall be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed, as in other cases at common law, upon the merits of the case." Id. § 5103. "The defendant may appear by himself or attorney at law, and make his defense at any time before final judgment is rendered against him." Id. § 5104. "In all cases of attachment the defendant may traverse the truth of the affidavit in relation to the ground upon which the attachment issued, at the return of the attachment; and if said attachment is returnable to the superior court, the issue formed upon such traverse shall be tried by a jury at the same term, unless good cause is shown for a continuance; and if the final verdict upon such issue shall be in favor of the defendant said attachment shall be dismissed at the cost of the plaintiff." Id. § 5106. "No traverse of the plaintiff's attachment, affidavit or other proceeding of the attachment shall delay judgment on the declaration where personal service has been perfected, but judgment may be had thereon, subject to the rules of the common law, as well before the trial of the issue made on the attachment proceedings as afterward." Id. § 5107.

It appears, therefore, that an attachment may become a sort of dual proceeding—that is, one quasi in rem in its nature, wherein only a judgment against the property seized in attachment can be rendered; and another, which is of a somewhat supplementary character, wherein by personal notice, served upon the defendant as provided by statute, a general judgment may be obtained against him as in a suit at common law. No general judgment can, however, be obtained, unless the defendant be notified in accordance with the statute, or unless he appears and makes defense, or replevies the property levied upon. The attachment in the present case was properly issued, was levied upon described realty as the property of the defendant situated in the county of his then residence, and was returned to the superior court of the county where he then resided. So no question could be raised as to the jurisdiction of the court as to the property seized. Did the court, at the time of the filing of the declaration in attachment, have jurisdiction of the defendant's person? The plea challenging the jurisdiction of the court over the defendant's person, and which was stricken by the court, set up that after the issuance and levy and return of the attachment, which was in September, 1908, and before the declaration was filed in February, 1909, the defendant had removed from Jeff Davis county, where he resided when the attachment was issued and levied, to Appling

county, in this state, where he has since retained his domicile. Where it is sought to obtain a general judgment against the defendant, after the filing of the declaration, the service of the notice provided by the statute is in the nature of a new or supplemental proceeding; and, in order that such a judgment may be rendered, the court must then have jurisdiction of the defendant's person. The service of such notice of pending proceedings quasi in rem in the manner prescribed takes the place of an ordinary suit and service of process. The statute, in requiring a written notice to be given to the defendant of the pendency of the attachment and the proceedings thereon, which notice "shall be served personally on the defendant by the sheriff, his deputy, or a constable of the county to which said attachment is returnable," clearly contemplates that the defendant, at the time of the service of such notice, shall be a resident of the county where the attachment has been returned; for, if the defendant did not then reside there, neither the sheriff, his deputy, nor a constable of that county, would have any authority to serve him with the notice. The Constitution of this state provides that all civil cases, other than in certain instances, shall be tried in the county where the defendant resides. They must, of course, therefore, be brought in such county. The proceedings to obtain a general judgment against the defendant in attachment, by giving him the statutory notice, does not fall within any of the exceptions specified in the Constitution to the general rule. The seizure under attachment of the defendant's property is not process or notice which will authorize the rendition of a general judgment against him. The statute prescribed the notice to be given in lieu of process. From what has been said, we are quite clear in our conclusion that the court had no jurisdiction of the defendant's person at the time of the filing of the declaration, in which it was sought to obtain a general judgment against him, and that it was error to strike the plea to the jurisdiction.

[3] 3. No notice of the pendency of the attachment and the proceedings thereon was served upon the defendant, but he acknowledged "due and legal service" of such notice prior to the filing of his plea to the jurisdiction. If the court had no jurisdiction of the defendant's person at the time the declaration was filed, the acknowledgment of notice of its filing would not amount to a waiver of jurisdiction. *Jackson v. Hitchcock*, 48 Ga. 491 (2); *Hartsfield v. Morris*, 89 Ga. 254, 15 S. E. 363. See, also, *Moss v. Burch*, 99 Ga. 94, 24 S. E. 865, and citations; *Shearouse v. Morgan*, 111 Ga. 858, 36 S. E. 927.

[4] 4. On the trial of the traverse the court gave the following instruction to the jury: "If at the time the conveyance [the deed of gift made by the defendant to his

wife and children to the realty levied upon] was made, it appears that some portion or all of this indebtedness [the sums alleged by the plaintiff to be due him by the defendant on certain promissory notes] was then in existence, and it further appears that the defendant was insolvent, then the law presumes that the conveyance was made for the purpose of defeating that indebtedness. If you find that is true, then you will find in favor of the plaintiff and against the traverse." This was excepted to in the motion for a new trial. The instruction was erroneous for two of the reasons assigned: Because (1) there was no evidence that the defendant was insolvent at the time he made the conveyance; and (2) the financial condition of the defendant at the time of the trial would not necessarily affect the validity of the conveyance, but his insolvency at the time the voluntary conveyance was executed is what would render it fraudulent and void.

We deem it unnecessary to specifically deal with any of the other grounds of the motion for a new trial; it being sufficient to say that none of the errors therein assigned, except as they are included in what is said above, were of sufficient materiality to require the grant of a new trial.

[5] 5. The defendant, in his traverse, not only denied the grounds of the attachment—that is, that he had conveyed his property liable for the payment of his debts, for the purpose of avoiding the payment of the same—but also denied specifically the various paragraphs of the petition for attachment, in which the nature and amounts of the various indebtedness were alleged to be owing by him to the plaintiff. He also, in his answer to the declaration, pleaded to the merits of the case. The filing of such traverse and answer, in which defenses to the merits of the case were set forth, would not of itself amount to a waiver of his plea to the jurisdiction of the court to render a general judgment against him; for such traverse and answer would be considered as filed subject to the plea to the jurisdiction. Nor would the fact that the defendant, after the striking of such plea, upon the trial of the traverse, submitted evidence to sustain his answer in denial of the indebtedness alleged to be due the plaintiff, amount to a waiver of his plea to the jurisdiction. The defendant, however, cannot insist upon his plea to the jurisdiction, and have it sustained, and then plead to the merits, without subjecting himself to the jurisdiction of the court, so as to enable it to render a personal judgment against him. In other words, as we have held that his plea to the jurisdiction of the court to render a personal judgment against him was good, and should not have been stricken, he cannot hereafter stand on his defense to the merits of the case, without waiving his ob-

jection to such jurisdiction and authorizing the rendition of a personal judgment against him.

Judgment reversed on both bills of exception. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 233)

McWILLIAMS et al. v. CITY OF TALLAPOOSA.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 284*)—DUE PROCESS OF LAW—ASSESSMENT FOR TAXATION.

An act approved December 23, 1896 (Acts 1896, p. 247), constitutes the charter of the city of Tallapoosa. Section 9 of that act contains provision for the making of tax returns by property owners, and for the assessment for taxation of all the lots and parcels of land within the city at their reasonable and just value. It provides, further, that the council of said city shall make out, between the 1st days of April and July in each year, a complete list of all lots of land in the city, which list shall show the names of the owners and matters of description, as well as the value of each lot or parcel of land as assessed by the city council; and it further provides: "If the owner of any real or personal property conceives that said city council have placed too great a value on such property, such owner or his agent may have such assessment reviewed by the mayor and council of said city, who shall assess such property at its reasonable and just value, and their decision shall be final in the premises; and if any taxpayer in said city think that said city council have placed too low an estimate on any property therein, such person shall have the right to have such assessment reviewed by the said mayor and council, whose action shall be final as aforesaid. The list of all real estate assessed as herein provided, and all personal property returned by the owner, or assessed as herein provided, shall be completed by said city council on or before the 15th day of August, and within 15 days thereafter said mayor and council shall ascertain and declare the rate to be levied and collected from such assessment and returns." The remainder of said section relates to the time when the taxes so levied shall become due and to the collection of the same. *Held*, that section 9 of the quoted act is not violative of the provisions of the Constitutions of the United States and of the state of Georgia, which declare that no state shall deprive any person of property without due process of law, on the ground that the section under consideration "attempts to make final the action of said mayor and council in the assessment of property for taxation, whatever may be the value at which they may assess the property, and irrespective of whether their action in the premises is done in good faith or fraudulently, and attempts to deny to property owners any right of review of the justice and fairness of such assessments, and attempts to confer on the mayor and council of said city authority to confiscate property in said city under the guise of assessing the same for taxation, and in that said section does not provide for notice to property owners of the assessment of their property, nor does said charter elsewhere provide for such notice, nor does said charter, or said section thereof, provide them a reasonable opportunity to be heard, nor does said charter, or said section thereof, provide for any notice whatever of the time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and place for a review of an assessment made by said council." 4 Dillon on Municipal Corporations (5th Ed.) § 1365; City Council of Augusta v. Pearce, 79 Ga. 98, 4 S. E. 104; Bower v. Mayor, etc., of Bainbridge, 116 Ga. 794, 43 S. E. 87.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 893-896; Dec. Dig. § 284.*]

2. INTERLOCUTORY INJUNCTION REFUSED—NO ERROR.

The other questions in the case arise out of the issues of fact made under the evidence submitted at the hearing, and under the evidence contained in the record the court did not err in refusing the interlocutory injunction.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by W. C. McWilliams and others against the City of Tallapoosa. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. M. & H. J. McBride, for plaintiffs in error. Lloyd Thomas and M. J. Head, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 354)

BAUGHMAN AUTOMOBILE CO. v. EMANUEL.

(Supreme Court of Georgia. Jan. 10, 1912.)

(Syllabus by the Court.)

BAILEMENT (§ 18*)—MECHANICS' LIENS—SUBJECTS OF RELIEF—RIGHT TO LIEN.

A court of equity will not entertain jurisdiction to enjoin the owner of personal property from asserting his title by appropriate remedy at law to recover the property, as against one who is seeking to subject it by the foreclosure of a mechanic's lien for labor performed and material furnished to repair the property at the instance of the vendee, who had not paid the purchase price thereof, and where the vendor had retained the title to the property, and the contract of sale was duly recorded, although the vendor knew of the labor performed and the repairs being made on the property, and that the vendee was insolvent.

(a) The mechanic's remedy in such case is by paying the vendor the balance of the purchase price of the property due by the vendee, and then subjecting the property to the mechanic's lien for the labor and material furnished, as the property of the vendee.

(b) Where labor and material are furnished to improve personal property at the instance of the vendee, in such a way that the vendor has no choice but to accept them, such acceptance would create no liability against the vendor, or his property so improved.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-84; Dec. Dig. § 18.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Baughman Automobile Company against J. H. Emanuel and another. Judgment for defendant Emanuel on demurrer, and plaintiff brings error. Affirmed.

The Baughman Automobile Company filed its equitable petition in the superior court

of Decatur county against J. H. Emanuel, of that county, against whom it prayed substantial relief, and J. Douglas Harrell, formerly of Decatur county, but now living in Florida, and alleged the following: J. H. Emanuel is the owner of a certain Buick automobile, and some time prior to May 20, 1910, he made a contract in which he agreed to sell the automobile to Harrell for a named price, and, in order to secure the purchase price of the same, "took a retention of title to the automobile, which was properly recorded." After Harrell had used the automobile for some time, it became badly out of repair, and he took it to the plaintiff, requesting it to put the machine in thorough repair and do everything necessary to put it in thorough running order. In compliance with this request the plaintiff proceeded to rebuild the automobile and put it in thorough condition, putting into the machine material (an itemized statement of which is set forth in the petition) amounting in the aggregate to the sum of \$330.16. When the machine was brought to the plaintiff, it was practically worthless, would not run, and would not have brought \$300; but after it was repaired it was practically as good as new. Harrell is insolvent, and was insolvent at the time the repairs were made, and the defendant Emanuel knew this fact, and that the only hope the plaintiff had of getting its money was out of the machine, which has been claimed and is now in possession of Emanuel under bail trover proceedings against the plaintiff. Plaintiff was unable to get Harrell to settle the bill for repairs, and on August 5, 1910, it sued out a mechanic's lien for work and material furnished on said automobile against Harrell; and, an order to sell said machine having been obtained, Emanuel filed claim thereto. Emanuel and Harrell both knew that plaintiff was repairing the automobile, and was expending large sums for material, labor, etc.; but Emanuel remained silent, did not object, and has accepted the fruits of the plaintiff's labor and material, and neither has ever paid nor offered to pay therefor, though requested so to do. The suit is not brought on the contract made with Harrell, but for the value of the material and labor necessary to put the automobile in proper condition, all to the value of \$330.16. The prayers of the petition are: (1) That defendant Emanuel be restrained and enjoined from entering up judgment against the Baughman Automobile Company on the bail trover proceedings instituted by him, and from proceeding with said bail trover suit in any way until the further order of the court. (2) That said defendant either be enjoined from using said automobile and impairing the value of the material furnished and repairs made by the plaintiff, or, in lieu thereof, that said defendant be required to give bond in such sum as

will be sufficient to secure plaintiff against loss. (3) For general relief. To the petition the defendant Emanuel filed a general demurrer and moved to dismiss the case: (1) Because the petition sets forth no cause of action, legal or equitable, against him. (2) Because it is not alleged that the plaintiff ever tendered to defendant the amount due by Harrell to him on the purchase of the automobile described. The court, at the appearance term, after argument had, sustained the demurrer and dismissed the petition, at the cost of the plaintiff. To this judgment the plaintiff excepted.

Erie M. Donalson, for plaintiff in error.
M. E. O'Neal and Russell & Custer, for defendant in error.

HILL, J. (after stating the facts as above). The general demurrer filed to the equitable petition was properly sustained by the court. The plaintiff's remedy was not by equitable petition, but by paying the balance of the purchase price due by Harrell to Emanuel, in whom the title to the automobile was, and then proceeding to subject the property to the mechanic's lien as the property of Harrell, the vendee, at whose instance the improvements were made. It is insisted, however, that this rule would work a hardship where the mechanic is not financially able to pay the balance of the purchase money due on the machine in order to subject it to the mechanic's lien for labor and material furnished in repairing and improving it. But the reply is that, in the present case at least, the plaintiff knew, at the time the labor was performed and the material furnished, as appears by the petition, that the title to the property improved was in another person than the one for whom the work was being done and the material furnished, and that that person was insolvent. The plaintiff, therefore, furnished the labor and material to repair the property with full knowledge of the insolvency of the vendee, for whom the work was being done, and that the title to the property was in the vendor, J. H. Emanuel. It would be a hardship, also, to one who had parted with personal property by conditional contract of sale, and who had taken the necessary legal steps to protect the title by taking a written contract reserving title in himself, and put the world on notice of that fact by having the contract duly recorded, to have the property subjected to the debts of other creditors, who have not thus secured themselves.

It is also contended by the plaintiff in error that the vendor, Emanuel, knew of the improvements being made on the machine, and accepted them, and therefore that this created a liability which would subject the vendor's property to the mechanic's lien. The petition which alleged the above facts shows that, as soon as the vendor of the au-

tomobile had notice that an effort was being made to subject it to the foreclosure of the mechanic's lien, he filed his action in bail trover to recover the property. There are authorities to the effect that, where services are of such a nature that one has no choice but to accept them, it cannot be said that the party accepted them voluntarily, and such acceptance would create no liability. Keener on Quasi Contracts, 360; 2 Page on Contracts, § 776, and cases cited; Woodruff v. McDonald Furniture Co., 96 Ga. 86, 23 S. E. 195; Englehart-Hitchcock Co. v. Central Investment Co., 136 Ga. 564 (2), 71 S. E. 787; Civil Code 1910, § 6038.

Judgment affirmed. All the Justices concur.

(187 Ga. 218)

WASHINGTON v. STATE.

(Supreme Court of Georgia. Dec. 14, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§§ 203, 215*)—EVIDENCE—"DYING DECLARATIONS"—ADMISSIBILITY.

It is not necessary for the state to show affirmatively that a person who has been shot said he was in a dying condition, in order to admit proof of his declarations, if in point of fact he was in articulo mortis, and the circumstances were such that he must have known that he was in a dying condition, so that the jury might be instructed by the court as to whether the statements made by the deceased were spoken, knowing of the immediate prospect of death.

(a) It is not error for the court to allow a witness to testify that the deceased, under the circumstances detailed in the foregoing headnote, said that "he [meaning the defendant] shot me for nothing," over objection that this was a mere expression of opinion by the deceased, and not a declaration of the fact.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430, 456; Dec. Dig. §§ 203, 215.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

2. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS—MANSLAUGHTER—APPLICABILITY TO EVIDENCE.

Where a defendant is on trial, charged with murder, and the court refuses to charge the jury on involuntary manslaughter in the commission of a lawful act without due caution and circumspection, such refusal is not error, where the evidence shows that the charge is not applicable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 652; Dec. Dig. § 309.*]

3. CRIMINAL LAW (§ 825*)—TRIAL—INSTRUCTIONS—REQUESTS.

Where, on the trial of a defendant charged with the crime of murder, the defense relied on is that the homicide was the result of accident or misfortune, and the court has correctly charged the jury the law in relation thereto, it is not error for the court to omit to define what would constitute accident or misfortune, in the absence of a request so to do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

4. HOMICIDE (§ 804*)—TRIAL—INSTRUCTIONS—ACCIDENT.

It is not error for the court to charge the jury, on the trial of a defendant charged with

murder and relying on the defense of accident or misfortune, that "while he [defendant] admits that he did the shooting as alleged by the state, on or about the time alleged by the state," where the court follows that language immediately with the words: "He [defendant] contends that the shooting was without malice aforethought, express or implied, and contends that it was not his intention to kill, but was entirely an accident or misfortune, and that he would not be guilty of any offense under the law and evidence in this case."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. § 304.*]

5. HOMICIDE (§ 219*)—EVIDENCE—DYING DECLARATIONS—IMPEACHMENT.

Where the state relies mainly upon the dying declarations of the deceased to the effect that the defendant "shot him for nothing," it is reversible error for the court to refuse to allow a witness for the defendant to testify that, shortly after deceased was shot by the defendant, the deceased told the witness that he and the defendant had had no difficulty, and that the shooting was an accident; the defense relied on by defendant being that the shooting was accidental, and the testimony being admissible for the purpose of impeaching the dying declarations of the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 460; Dec. Dig. § 219.*]

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Richard Washington was convicted of murder, and brings error. Reversed.

Eugene M. Baynes, for plaintiff in error. Jos. E. Pottle, Sol. Gen., A. Y. Clement, and T. S. Felder, Atty. Gen., for the State.

HILL, J. Richard Washington was indicted in Jasper superior court for the offense of murder, and at the August term, 1911, of said court he was found guilty by the jury trying him, with the recommendation that his punishment be life imprisonment in the penitentiary. A motion for a new trial was made on the general grounds, which was afterwards amended. The motion, as amended, was overruled by the court, and the defendant assigns this ruling as error.

The case made by the state is substantially as follows: On the night of the homicide defendant and deceased were at the house of William Smith. "There was no frolic there that night." Neither deceased nor defendant had had any previous difficulty, so far as the evidence discloses, just before the shooting, but were sitting down, laughing and talking. Just before the pistol fired the deceased asked the defendant for a cigarette, and the defendant asked the deceased if he wanted it "rolled hard or soft, and shot him." The witness who testified to these facts was standing behind the defendant, in another room, and did not see the defendant when he fired, and did not know where he got the pistol. But one shot was fired. The defendant did not say anything after he shot the deceased, but "stood out there in the floor with his head hung down, and then went out of the door with his head hung down."

The deceased just said, "O Lordy!" This witness and the deceased were sweethearts, and were to be married at Christmas. She was also a niece of the defendant, and had never heard of any trouble between the defendant and the deceased; but defendant always told her "he thought a lot of Sidney Roberts," the deceased. Two other witnesses, Margaret and Nellie Folds, also testified to substantially the above facts, except that one of them, Nellie Folds, said that defendant got his pistol out of his front pocket. "Didn't see defendant bring anything else out with his pistol. After defendant asked deceased if he wanted it rolled hard and tight, he shot immediately. * * * Richard [the defendant] did not point any pistol at him to make me expect that he was going to shoot. I did not hear Richard make any remark afterwards, nor anybody else." Mr. Will Reid testified: "The night Sidney Roberts was killed, Richard Washington came over to my house, which was 400 or 500 yards from William Smith's house. Richard called me, and woke me up, and told me he had shot Sidney Roberts. He walked up on the porch and called me, and said he had shot Sidney, and I asked him what he shot him for, and he said he didn't know, and I told him to go home, and he said he was scared to go home. Richard [defendant] did not say what he shot him for, and said he didn't know. Richard stayed in the cotton seed hulls on my place that night, and I woke him up next morning. I went to see Sid, and when I came back Richard was standing on the doorsteps. I said I didn't believe Sid would live until dinner; and Richard told his wife to get his clothes, he was going to leave. I told him not to do that. I gave him his pistol. Richard did not say what he intended to do." Mr. W. F. Persons testified that he made an effort to arrest the defendant after the homicide was committed. "I arrested him three weeks ago in Florida. I had been searching for him and trying to find him before that." Dr. J. H. Bullard testified that he was called to attend Sid Roberts, the deceased; did not probe for the ball, as "the man's condition did not justify it. The wound on his body was from a pistol ball, I suppose." The wound was right in front of his body, and caused his death. If two men of about the same size were facing each other, and one fired a pistol at the other, the ball would enter about as this one did. When he got there "the man was suffering greatly, and was sinking rapidly, not in a comatose state, but showing extreme weakness and pain; and I stated to him I couldn't do him any good—could probably give him a little relief; and he was speaking about the occurrence, and said the man shot him for nothing, that he had not done a thing to him; and he gradually grew weak."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

er and weaker. I remained around there for some time, and he went into a state of coma."

The theory of the defense was that the homicide was accidental. In his statement to the jury the defendant said that he and the deceased had been joking around the fireplace and playing, and, when the deceased asked him for a cigarette, he asked deceased if he wanted it rolled hard; that the deceased replied, "Yes," and defendant said he would roll it for him; that he intended to get the tobacco out of his pocket, and when he pulled the pistol out he did not know that there was a cartridge in it; that the pistol must have been already cocked in his pocket. He didn't remember putting any finger on the trigger, "and after the thing fired, it hurt me so bad; it almost burst my heart." He stood there a few minutes, and went over to Mr. Reid's, and told Mr. Reid about it, and asked if he could stay there that night. "I knew I done this thing accidental, and couldn't help it, and didn't want to meet none of his folks." The accused further stated that he did not get his pistol out of his front pocket, but out of his hind pocket; that his pistol, tobacco, and a rule were all in his overalls pants pocket; that he had no idea in the world that the pistol was going to shoot; that he had never had a cross word with deceased, or any of his folks; that the reason he left was that the next morning he went to Mr. Mobley and told him about it, and the latter said, "Stay out of the way three or four days, to keep Lucius Roberts from hurting you," and until Mr. Mobley got well, and he would settle it; that he went off, as Mr. Mobley told him to do, and when he heard Mr. Mobley was still sick he "went on"; that he told Mr. Henderson that morning in the room that he did not feel like going off, because he did not do the thing intentionally; that he did not try to hide, but wrote back home twice every week, and he left home because Mr. Mobley said he would settle it, and keep defendant from "having trouble with the boy's folks, and Mr. Mobley hasn't got able to settle it yet."

[1] 1. The court permitted Dr. Bullard, the attending physician, to testify, over the objection of the defendant's counsel, that "when I got there the man was suffering greatly, and was sinking rapidly, not in a comatose state, but showing extreme weakness and pain; and I stated to him I couldn't do him any good—could probably give him a little relief, and he was speaking about the occurrence, and said the man shot him for nothing, that he had done nothing to him; and he gradually grew weaker and weaker. I remained around there for some time, and he went into a state of coma. I stayed some little time after I had this little conversation. I don't know that he died the next day or the day following. I don't know the hour he died." Movant objected to the foregoing

testimony on the grounds that it was irrelevant and immaterial: (a) That the circumstances of the case did not show that the declarations of the deceased were dying declarations, and in order for them to be admitted as such the deceased must be "in extremis"; (b) that the statement made by the deceased that "he shot me for nothing" was a mere expression of opinion by the deceased. We think the evidence was material and admissible. This court has held that, in order to render dying declarations admissible, it is not necessary for the state to show that the deceased affirmatively said that he was in a dying condition, or used language of similar character. It is proper to allow the declarations to be proved, if the deceased was in fact in articulo mortis, and the circumstances were such as that he must know this to be so, that the jury may be instructed by the court as to whether the statements made by the deceased were conscious utterances in the apprehension and immediate prospect of death. *Young v. State*, 114 Ga. 849, 40 S. E. 1000; *Perdue v. State*, 135 Ga. 278 (8), 69 S. E. 184; *Darby v. State*, 79 Ga. 63, 3 S. E. 663. Nor was it error, under the facts of this case, to allow the witnesses to testify that the deceased said that "he shot me for nothing," over objection that this was a mere expression of opinion by the deceased, and not a declaration of the fact. *White v. State*, 100 Ga. 659 (2), 23 S. E. 423; *Darby v. State*, 79 Ga. 63 (2), 3 S. E. 663.

[2-4] 2-4. Under the facts of this case it was not error for the court to refuse to charge the jury the law of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. If the defendant desired a fuller charge on the subject of a homicide alleged to have been committed by misfortune or accident, such a request should have been made to the court. The court did charge the jury: "As I said to you just now, the defendant contends that he is not guilty of any offense. While he admits he did the shooting, he contends that the shooting was an accident or misfortune, without any malice, either express or implied, and without any intention to kill whatever, and that under the law and facts in this case he would not be guilty of any offense whatever. The law says a person shall not be found guilty of any crime or misdemeanor committed by misfortune or accident, and where it satisfactorily appears that there was no evil design or intention, or culpable neglect." We think this clearly states the rule, and that there is no merit in the contention that the court omitted to define what would constitute accident or misfortune. We do not see how the jury could have misunderstood the language; but, if the defendant wanted the charge to be more full and explicit, a request to that effect should have been made. And this ruling applies to the other ground of the motion, that "the charge of the court is correct as far as it

goes." If the charge is not full enough, a request should be made to amplify it.

We do not think there is any merit in the tenth ground of the motion, and that the construction placed upon the language in the charge is not fairly inferable from the language itself, when fairly understood. The court charged the jury that "the defendant, on the other hand, contends that he is not guilty of any offense. While he admits that he did the shooting, as alleged by the state, on or about the time alleged by the state, he contends that the shooting was without malice aforethought, either express or implied, and contends that it was not his intention to kill, but was entirely an accident or misfortune, and that he would not be guilty of any offense under the law and evidence in this case." We do not think that this charge is susceptible of the construction contended for by the plaintiff in error, to the effect that the charge misstated the contention of the defendant, because "defendant did not contend or admit that he did the shooting as alleged in the indictment; for, if such admission had been made, he would be guilty of murder." Taken in connection with the context, it is clear that the court did not so intend, nor could the jury have reasonably so understood.

[5] 5. It is also insisted by the plaintiff in error that the court erred in refusing to allow the witness John Henderson to answer the following: "You and several other white men went down to see Sidney Roberts right after he was shot; and didn't Sidney at that time tell you that he had no trouble with Richard Washington, and the thing was an accident?" The plaintiff in error contends that the witness, if permitted, would have answered "Yes" to this question, and that the presiding judge was then and there informed what would be the answer of the witness. We think the court erred in excluding this question and answer from the jury. It was not admissible as a dying declaration, or as a part of the *res gestæ*; but where the state relied largely upon the dying declarations of the deceased to convict the accused, it is admissible to show that after the deceased was shot he made statements in conflict with such dying declarations. *Battle v. State*, 74 Ga. 101. In other words, it was admissible for the purpose of impeachment. In addition to other methods, a witness may be impeached by proof of contradictory statements. And this court has held that dying declarations may be impeached by proving contradictory statements made by the deceased. In the case of *Battle v. State*, supra, this court said: "It cannot be easily seen, if the dying declarations of the deceased, made *ex parte*, in the presence of his own friends and relatives, and not in the presence of the accused or his friends, without a cross-examination, and testified to by his friends

and relatives, are to be admitted against the accused from the necessity of the case, why the declarations of the deceased after the mortal blow is given, to other persons and at other times, different from the dying declarations, should not be admitted in evidence to impeach the dying statement. If the one is admitted contrary to the general rule, why should not the other likewise be admitted? The former is admitted in favor of public justice; why not the latter in favor of life and liberty?" See, also, *Bates v. State*, 4 Ga. App. 486, 61 S. E. 888; *Columbus R. Co. v. Peddy*, 120 Ga. 589 (2), 48 S. E. 149; *Jordan v. State*, 120 Ga. 864, 48 S. E. 352; *Cox v. State*, 124 Ga. 95, 52 S. E. 150.

The dying declaration of the deceased, relied on for conviction by the state, was that the defendant had "shot him for nothing." In reply to this, the defendant sought to show by the testimony excluded that, soon after the deceased was shot, he said that he had had no trouble with the defendant, and "the thing was an accident." This statement is at variance with the dying declaration, and utterly inconsistent with it; and the defendant was entitled to show, if he could, that, soon after the shot was fired, the deceased said that the shooting was accidental, as being in conflict with his dying declarations. As the defendant was entitled to this testimony, for the purpose stated, and the same having been excluded from the jury, we think that the court erred in so doing, and that the judgment of the court below, overruling the motion for a new trial, should be reversed.

Judgment reversed. All the Justices concur.

(187 Ga. 290)

DICKSON v. WAINWRIGHT.

(Supreme Court of Georgia. Dec. 15, 1911.)

(*Syllabus by the Court.*)

ACCORD AND SATISFACTION (§ 25*)—PAYMENT (§ 59*)—EVIDENCE (§ 166*)—ISSUES AND PROOF—BEST AND SECONDARY EVIDENCE.

Where, in a plea to a suit on account, the only defense set up is a denial of the account, it is not error to exclude the testimony of the defendant "that the account sued on by the plaintiff had been fully paid, and that in the last settlement he had with the plaintiff that plaintiff was indebted to him about \$1.80, and that defendant derived his knowledge from his book of account, which he kept himself." This is so, because there was no plea of payment, or of accord and satisfaction, and because the defendant only offered to swear to the contents of his account book, which was the primary evidence of what it contained. *Birmingham Lumber Co. v. Brinson*, 94 Ga. 517 (5), 20 S. E. 437.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 151-161; Dec. Dig. § 25;* *Payment*, Cent. Dig. § 143½; Dec. Dig. § 59;* *Evidence*, Cent. Dig. §§ 556, 557; Dec. Dig. § 166.*]

Error from Superior Court, Charlton County; T. A. Parker, Judge.

Action by R. T. Wainwright against J. W. Dickson. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilson, Bennett & Lambdin, and W. M. Olliff, for plaintiff in error. A. E. Cochran, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(127 Ga. 323)

BARTON et al. v. JOHNSON et al.
(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. EJECTMENT (§ 93*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

The evidence required a verdict for the defendant, and there was no error in directing it.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.*]

(Additional Syllabus by Editorial Staff.)

2. WILLS (§ 421*)—PROBATE—COLLATERAL ATTACK.

Though Civ. Code 1910, § 3923, provides that the birth of a child to a testator subsequently to the making of the will, in which no provision is made in contemplation of such event, shall be a revocation of the will, the proper place to determine the question whether a will is revoked is in the ordinary court on a motion to vacate the judgment of probate, and after the will has been probated a judgment of probate cannot be collaterally attacked.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 904-910; Dec. Dig. § 421.*]

3. ESTOPPEL (§ 70*)—EQUITABLE ESTOPPEL—GROUNDS—TITLE TO REAL PROPERTY.

Where one of two lots of equal value owned by the same parties was sold at judicial sale, and the purchasers went into possession of the lot pointed out to them as the one sold, but the conveyance described the other lot, after the purchasers had remained in possession for over 20 years, and the other lot had been sold to other purchasers, who gained title by adverse possession, the former owners were estopped to deny the title of the purchasers at the judicial sale to the lot of which they took possession.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 183-187; Dec. Dig. § 70.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Ejectment on the several demises of W. M. Barton and others against W. R. Johnson, administrator, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Claud Estes and Walter Defore, for plaintiffs in error. L. D. Moore, for defendants in error.

EVANS, P. J. [1] This is an action of ejectment on the several demises of W. M. Barton, C. W. Barton, H. S. Barton, and Fannie Barton, against A. E. Johnson, J. C. Johnson, and W. R. Johnson, to recover the

east half of lot No. 130, the east half of lot No. 129, and the west half of lot No. 131, in the Fifth district of formerly Houston, now Bibb, county, Ga. The defendants in their plea set up title by judicial sale, title by adverse possession, and res adjudicata as to three of the plaintiffs, and equitable estoppel as against all. Upon the conclusion of the evidence a verdict was directed for the defendants, and the plaintiffs excepted.

The case as made by the evidence was as follows:

It was admitted that John Barton was the common propositus. John Barton on July 16, 1864, executed his will. The material parts, as affecting this case, are the second and third items thereof: "(2) My will and desire is, and I so desire and bequeath, that all my property, real, personal, and mixed, shall remain together under the control and management of my wife, Frances F. Barton, for the joint support and maintenance of herself and my child or children during her widowhood, with these qualifications, viz.: Upon the arrival of my present son, John F. Barton, at 21 years, he is to have one undivided half of my property, unless I leave a posthumous child; or if there be one and it be a daughter, then John Francis is to have the half as stated. If there be a posthumous son, he is to take his one third on reaching 21 years, and the other third to belong to my wife during her life or widowhood—in each of which events her part of the property is to belong equally to my children or child in life. It will be seen that I make this will in view of the uncertainty of my return from the army, where I expect to go in a few days. I also desire here to explain that the provision made in the event of a second marriage is done in no unkind spirit towards my wife, but simply because I prefer my children to have all my property rather than any of it should go to the support of or be managed by a stepfather. (3) In case my wife shall outlive my children or child, they leaving no issue, then at her death I will and bequeath all my property equally to be divided between my brothers and sisters."

John Barton died in May, 1879, leaving a widow and four children, the plaintiffs' lessors. The child, John F. Barton, mentioned in the will, died before his father. The will was admitted to probate, and letters testamentary issued to Frances F. Barton. In 1879 a 12 months' support was duly set apart in the sum of \$1,200 in money to Frances F. Barton and her four minor children out of the estate of John Barton. An execution issued on this year's support judgment, and was levied upon the east half of lot 129 and the east half of lot 130, and these two lots were purchased at sheriff's sale by one Thomson, as trustee for Mildred Johnson. The

land was pointed out by Frances F. Barton, and the purchaser at sale was put in possession of the east half of lot 129 and the west half of lot 131, under the impression that the latter lot was the east half of lot 130, and the land was bid off by the purchaser under this mistake. The widow and the plaintiffs were in possession of the east half of lot 130 until the year 1893, when they sold it to Mrs. Satira R. Grace; all of them joining in the conveyance. The present defendants are privies in estate with the purchaser at sheriff's sale, and have been in the continuous adverse possession of the east half of lot 129 and the west half of lot 131 since the sheriff's sale in 1881. In 1893 W. M. Barton and C. W. Barton brought their several suits against J. O. Johnson to recover the east half of 129, which suits resulted in verdicts for the defendant, upon which judgments were duly entered by the court. In the same year Fannie Barton brought suit against Mrs. A. E. Johnson to recover the west half of lot 131, alleging in her abstract of title that her mother and brothers had conveyed their interest in this lot to her. This suit terminated in a verdict for the defendant, upon which a judgment was entered in 1895.

[2] Under the will of John Barton it is clear that he contemplated his early demise, and intended to devise his property to his wife and son, John F., and an expected posthumous child. John F. predeceased his father and there was no posthumous child. It was argued that the will could not be relied on as a muniment of title, because it was revoked by the birth of children, which contingency was not provided for in the will. The statute provides that the birth of a child to the testator subsequently to the making of the will, in which no provision is made in contemplation of such event, shall be a revocation of the will. Civil Code 1910; § 3923. It may be that the birth of other children than those referred to in the will would operate to revoke the same; yet the proper place to determine that question is in the ordinary's court on a motion to vacate the judgment of probate. After the will has been probated, the judgment of probate cannot be collaterally attacked. We do not find it necessary to decide what interest, if any, the plaintiffs in error take as devisees of their father. It is clear that, until the will is set aside, the mother would take at least a one-third interest in the property, which would pass to the plaintiffs in error upon her death; and they would be entitled to recover at least her interest, unless they are barred by some of the defenses averred in the plea and cross-petition. We will therefore immediately take up the several defenses and discuss their merits.

As to the east half of lot 129, there can be no doubt that the defendants acquired title by virtue of the sale of the same under the year's support *fi. fa.* in favor of Frances

F. Barton and her four minor children. The year's support proceedings and the sale all appear regular upon their face, and no attack is made thereon by the plaintiffs in error. Besides, as against three of the plaintiffs, that title has been confirmed by judicial decree. As to the east half of lot 130, there is no contention that the defendants or their predecessors in title from the purchaser at the sheriff's sale ever entered into possession of it, and the defendants neither claimed possession of it nor title to it.

[3] As to the west half of lot 131, we think that the plaintiffs are equitably estopped from claiming title to it. It appears that the land was pointed out to the sheriff for levy by Mrs. Barton, and was misdescribed by the wrong number. It was sold by the sheriff, and purchased by the successful bidder at the sale, under the belief that it was the west half of lot 131. The purchaser was put into possession of the west half of lot 131, as being the lands conveyed to him by the sheriff, and he and his grantees have remained continuously in the possession of the land for nearly 30 years prior to the institution of this suit. The deed from the sheriff was promptly recorded. In 1893 Mrs. Barton and three of the children, who were then of full age, joined in the conveyance to Mrs. Grace; and three years thereafter, upon the arrival at age of the other plaintiff, she ratified the conveyance. Mrs. Grace went into possession of the land purchased by her, and, as there is nothing in the record impugning her good faith, her adverse possession for more than 7 years has ripened into a prescriptive title as against the defendants to the east half of lot 130. There is no dispute that the east half of lot 130 and the west half of lot 131 were of equal value. In their pleadings the defendants prayed that the sheriff's deed be reformed, so as to correct the misdescription of the land, and the sheriff and his grantee were made parties to the suit.

The ground for equitable estoppel consists in the sale of two adjacent lots of equal value, where the purchaser is put in possession of one lot, when the other lot was the one described in the sale. The owners of these two lots have received the full value of both of them, one in the proceeds of the sheriff's sale and the other in the purchase money from Mrs. Grace. Under these circumstances the plaintiffs, even if they, with their mother, were clothed with the entire title to the land, would be estopped from asserting title against the defendants in error. *Swatts v. Spence*, 68 Ga. 496. We have not alluded to the 30 years' adverse possession of the defendants, more than 7 years of which continued after the majority of the youngest plaintiff in error, for the reason that so long as the judgment of probate stands they were not entitled to the interest which their mother took under the will until after her death in 1908, and for the further

reason that the plaintiffs in error are equitably estopped from recovering the land.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 284)

HAYES v. TOWNS.

(Supreme Court of Georgia. Dec. 15, 1911.)

(*Syllabus by the Court.*)

SPECIFIC PERFORMANCE (§ 123*) — PROCEEDINGS—NONSUIT.

Upon the trial of an action for the specific performance of a parol contract relating to the purchase of land, the evidence submitted in behalf of the plaintiff tended to show the following facts: Plaintiff and defendant entered into a parol agreement, under the terms of which they were to purchase from a third person a described lot of land, plaintiff and defendant each to pay one-half of the purchase price. Defendant was to negotiate the purchase, take from the seller a bond for title to both plaintiff and defendant, and to make the payments, one of which was to be cash, and the balance in one and two years thereafter. Upon payment of all of the purchase price to the seller, plaintiff was to get a deed to the south half and the defendant to the north half of the lot. Defendant took a bond for title in his own name, informing plaintiff, who was unable to read, that the bond was in the names of both himself and plaintiff. Thereupon plaintiff paid to defendant half of the first payment, which defendant paid to the seller. Plaintiff, upon the maturity of the second payment, offered to pay his half of the same to defendant; but defendant refused to accept the same, saying that he was unable to pay his half, and would arrange with the seller in reference to the second payment. Upon maturity of the last payment, plaintiff tendered to defendant the balance due by plaintiff as his half of the remaining purchase money, which defendant refused to accept, and for the first time denied that he had made any contract for the purchase of the land with plaintiff, and claimed that the contract had been made between plaintiff and defendant's wife. Defendant had lived on the north half of the land several years, cleared 10 acres thereon, and had leased the timber on the whole lot for sawmill purposes. The amounts received by defendant for the timber, when added to the amount of money plaintiff had paid defendant, amounted to more than plaintiff's half of the purchase price. *Held*, that a nonsuit was properly granted, for the reason that there was no evidence tending to show that the seller had conveyed the land, or any portion thereof, to defendant, or that the seller had been paid all of the purchase price of the land, or that defendant had title to the land, or any portion thereof, from any source.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 123.*]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by I. Hayes against Charles Towns. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Bennett, for plaintiff in error. Graham & Graham, for defendant in error.

FISH, C. J. Judgment affirmed. All the justices concur, except HILL, J., not presiding.

(137 Ga. 165)

BAUMGARTNER v. MCKINNON.

(Supreme Court of Georgia. Dec. 12, 1911.)

(*Syllabus by the Court.*)

1. LIMITATION OF ACTIONS (§ 83*)—TEMPORARY ADMINISTRATOR—"REPRESENTATION."

The appointment of a temporary administrator does not constitute "representation" upon the estate of a decedent, within the purview of Civil Code 1910, § 4376, which provides that "the time between the death of a person and representation taken upon his estate * * * shall not be counted against his estate, provided such time does not exceed five years," so as to cause the statute of limitations to begin to run against the estate upon the appointment of such temporary administrator.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 83.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6108-6110.]

2. TEMPORARY ADMINISTRATOR.

The decision in *Scott v. Atwell*, 63 Ga. 764, upon review, is affirmed.

Certified Question from Court of Appeals. Action between Fred Baumgartner and S. T. McKinnon, as administrator. From the judgment, Baumgartner appealed to the Court of Appeals, which certified the question to the Supreme Court. Question answered.

See, also, 73 S. E. 519.

The Court of Appeals certified to the Supreme Court the following question: "Does the appointment of a temporary administrator constitute 'representation' upon the estate of the decedent, within the purview of Civil Code 1910, § 4376, which provides that 'the time between the death of a person and representation taken upon his estate * * * shall not be counted against his estate,' for the purposes of the statute of limitation of actions? In this connection counsel for plaintiff in error has requested the right to review the decision of the Supreme Court in the case of *Scott v. Atwell*, 63 Ga. 764, for the purpose of having the same modified or overruled."

R. D. Meader, for plaintiff in error. Harry F. Dunwoody, for defendant in error.

LUMPKIN, J. It is true that the Code declares that a temporary administrator may sue to recover debts due the estate (Civil Code 1910, § 3937); and upon the general analogy of the law, that where a person has the capacity to sue, and fails to exercise the right, the statute of limitations will run against him, an argument may be based that, on account of the provision of this section, the right and duty are correlative, and the statute runs against the estate. But, on the other hand, the section of the Code to which reference has been made arose, not from legislative enactment, but from the codification of the decision in *Ewing v. Moses*, 50 Ga. 264. The decision in that case

was rendered before the one in *Scott v. Atwell*, 63 Ga. 764. The opinion in the case last cited expressly referred to the fact that the court had held that temporary administrators had the right to sue in certain cases, but nevertheless construed the statute suspending the running of the statute of limitations against an estate until "representation taken," provided the time elapsing was not greater than five years, to refer to the grant of permanent letters. The members of the court doubtless had before them the decision in 50 Ga. 264, *supra*, as well as other cases, at the time this construction was placed upon the statute; and we do not think the codification of the decision in 50 Ga. 264, and the adoption of the Code containing that provision, is sufficient to change the ruling thus made.

A temporary administrator occupies a somewhat peculiar position. He is appointed to act only until a permanent administrator is appointed, for the purpose of collecting and taking care of the effects of the deceased; and from the order appointing him no appeal is allowed. Civil Code 1910, § 3935. By Civil Code 1910, § 3936, he is required to give a bond for double the amount of the personal property; but it has been held that no action can be brought on the bond until the appointment of a permanent administrator. *Webster v. Thompson*, 55 Ga. 431. His duties are principally of preservative character. *Banks v. Walker*, 112 Ga. 542, 37 S. E. 866; *Neal v. Boykin*, 129 Ga. 676, 682, 59 S. E. 912, 121 Am. St. Rep. 237. A permanent administrator is required to give bond in a sum equal to double the amount of the estate to be administered. Civil Code 1910, § 3972. A temporary administrator may take steps with a view of collecting and preserving the estate, including certain litigation; but he is not clothed with the full power of a permanent administrator. Thus, he cannot sue for the recovery of land. *Banks v. Walker*, 112 Ga. 542, 37 S. E. 866. He cannot distribute the estate; nor will notice to him of an application for dower be sufficient. *Langford v. Langford*, 82 Ga. 202, 8 S. E. 76. Section 3997 of the Code of 1910 declares that an administrator shall be allowed 12 months from the date of his qualification to ascertain the condition of the estate, and that creditors falling to give notice within that time lose all rights to an equal participation with creditors of equal dignity to whom distribution is made before notice of such claim is brought to the administrator. Evidently this did not contemplate a temporary administrator, who had no right to make any distribution. The language of Civil Code 1910, § 4377, touching the suspension of the statute in favor of an estate, is the same as that relating to the running of the statute

against it. If the estate could practically be wound up by litigation pro and con with a temporary administrator, and the statute of limitations be applied to such administrator, as well as to a permanent one, section 3997 would be of little avail to the estate. Moreover, a judgment against an administrator is conclusive evidence that he has in his hands assets of the decedent, if he fails to plead *plene administravit* or *plene administravit præter*. Neither of these pleas could be filed by a temporary administrator. It will thus be seen that, comparing the functions of a temporary administrator with those of a permanent administrator under the statutes of this state and the decisions construing them, it would produce much confusion and conflict to hold that the estate should be barred by the omission of the temporary administrator to sue.

The ruling announced in the first headnote follows the decision in *Scott v. Atwell*, 63 Ga. 764, and that decision answers the question propounded by the Court of Appeals, unless, upon review, it is overruled or modified by this court. Upon request of counsel, the Court of Appeals has certified the question to this court, so that application may be made for such a review. The decision mentioned was rendered in 1879, and has stood unquestioned from that time until the present. Upon a review of it, we decline to modify or overrule it. All the Justices concur.

(10 Ga. App. 219)

BAUMGARTNER v. McKINNON.

(No. 3,161.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 83*)—TEMPORARY ADMINISTRATOR—"REPRESENTATION."

"The appointment of a temporary administrator does not constitute 'representation' upon the estate of a decedent, within the purview of Civil Code 1910, § 4376, which provides that 'the time between the death of a person and representation taken upon his estate * * * shall not be counted against his estate, provided such time does not exceed five years,' so as to cause the statute of limitations to begin to run against the estate upon the appointment of such temporary administrator." *Baumgartner v. McKinnon*, Administrator, 137 Ga. —, 73 S. E. 518.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 83.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6108-6110.]

2. PAYMENT (§§ 38, 39, 41*)—PRINCIPAL AND SURETY (§ 113*)—APPLICATION—RIGHTS OF CREDITOR.

"As a general rule, the debtor has a right to appropriate payments. If he does not, the creditor may. If neither does, the jury will make the application under the direction of the court." *Newton v. Nunnally*, 4 Ga. 357; Civ. Code 1895, § 3722 (Civ. Code 1910, § 4316). A surety cannot claim a release from liability to pay a promissory note, which he indorsed,

upon the ground that the payee, who was also the payee of notes junior in date and maturity, executed by the same maker, to the notes which he had indorsed, failed to apply payments made by the principal debtor (without direction as to their application) to the oldest note. All of the obligations of the principal debtor being ordinary promissory notes indorsed by different parties, and none of them creating any lien, there was nothing to affect the creditor's statutory right under the foregoing section of the Code.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-120; Dec. Dig. §§ 38, 39, 41; **Principal and Surety*, Cent. Dig. §§ 235-239; Dec. Dig. § 113.*]

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by L. T. McKinnon, as administrator, against Fred Baumgartner and others. Judgment for plaintiff, and defendant Baumgartner brings error. **Affirmed.**

It appears from the record that P. W. Fleming borrowed \$500 from John A. Ward, and gave therefor the promissory note which is the subject-matter of this suit, dated February 6, 1903, and due one year after date, with interest from date at the rate of 8 per cent. per annum. This note was indorsed by B. A. White, Jr., M. Elkan, and Fred Baumgartner. On May 1, 1903, Fleming borrowed \$200 from Ward on his (Fleming's) note indorsed by George R. Krauss, and \$300 on his (Fleming's) note indorsed by R. R. Hopkins and C. D. Ogg. Both of these latter notes fell due May 4, 1903. Thus Fleming owed Ward \$1,000 in all (exclusive of interest), payable in three notes, each indorsed by different parties. So far as appears, Fleming paid Ward nothing until March 2, 1906, when a payment of \$80 was made, and this was followed by various other payments, up to the death of the creditor, aggregating \$736.60, and one payment of \$5-credited upon the note after the death of the intestate. Of these payments \$217.50 only was applied toward the satisfaction of the note indorsed by White, Elkan and Baumgartner, and on April 12, 1910, suit was instituted for the remainder of the debt evidenced by this note. Neither the maker, Fleming, nor White, filed a defense. Elkan was not served, and Baumgartner alone set up a defense.

Baumgartner pleaded that he was only an accommodation indorser, or guarantor, on the note, and had heard nothing about it from the time he indorsed it, which was February 6, 1903, up to the time he was served with copy of the suit, and he naturally supposed it had long since been paid. He further alleged that, Fleming having borrowed the \$500 on the two notes, as stated above, and having paid Ward in all \$741.60 on his general indebtedness, it was the duty of Ward to apply all of the payments to the note indorsed by himself; it being the oldest item in Fleming's indebtedness, and that the note would thereupon have been paid, where-

as, as he alleged, Ward credited the note indorsed by Hopkins and Ogg with the sum of \$334.50, and the note indorsed by Krauss with the sum of \$189.60, and only credited the note indorsed by the defendant with \$217.50; that this act of the creditor injured him (Baumgartner) as a security on the note, and increased his risk thereon, and exposed him to greater liability, and he was thereby discharged. This portion of the plea was stricken by the court, and exception is taken to this ruling.

The defendant also pleaded that the note was barred by the statute of limitations at the time suit was filed, for the reason that more than six years had elapsed since the maturity of the note, and that during the period which had elapsed, to wit, on April 23, 1909, a temporary administrator was appointed, with power and authority to bring suit upon the note. It was contended that his failure to bring suit caused the bar of the statute to attach. According to the evidence the plaintiff's intestate died April 16, 1909, and no permanent letters of administration were granted until July 7, 1909, but temporary letters of administration were granted on April 23, 1909. Upon a trial before the court, without intervention of a jury, the court, finding against the plea of the bar of the statute of limitations, rendered judgment in favor of the plaintiff against the defendant surety along with the other defendants, who interposed no defense. Exception was taken to this judgment.

R. D. Meader, for plaintiff in error. Harry F. Dunwoody, for defendant in error.

RUSSELL, J. (after stating the facts as above). Inasmuch as a finding in favor of the defendant in the court below upon the plea of the statute of limitations would have worked a total disposition of the case, regardless of the ruling upon the plea of release, and in view of the fact that this court requested the instruction of the Supreme Court upon that branch of the case, we shall consider in inverse order the defenses as presented by the pleas of the defendant in the court below. The decision of the Supreme Court (73 S. E. 518), in answer to the certified question, which follows, disposes of the defendant's plea of the statute of limitations, and sustains the final judgment of the trial judge, unless the judge erroneously struck that portion of the plea wherein the defendant attempted to set up his release as surety; and it is only upon this phase of the case that this court will be called to pass.

[1] The question certified to the Supreme Court was as follows: "Does the appointment of a temporary administrator constitute 'representation' upon the estate of the decedent, within the purview of Civil Code

1910, § 4376, which provides that 'the time between the death of a person and representation taken upon his estate * * * shall not be counted against his estate,' for the purposes of the statute of limitation of actions? In this connection counsel for plaintiff in error has requested the right to review the decision of the Supreme Court in the case of *Scott v. Atwell*, 63 Ga. 764, for the purpose of having the same modified or overruled." And the instruction is contained in the following opinion, delivered by Justice Lumpkin:

[This opinion is published in full at 73 S. E. 518.]

[2] 2. As to whether the action of Ward in failing to credit all of the payments made upon the general indebtedness due him by Fleming, and evidenced by the three notes to which we have referred (in the absence of any direction upon Fleming's part as to the application of the payments), effected a release of Baumgartner as a surety, it is contended by learned counsel for plaintiff in error that, though ordinarily a creditor, in the absence of instruction or direction from the debtor, generally has the right to apply payments made to him, as he may see fit, to any one or more of different obligations due him by the same debtor, still this rule is varied where the rights of others are affected, and the creditor in this case should have applied a larger proportion, if not all, of the payments made by Fleming to the note indorsed by Baumgartner. The rulings in *Cofer v. Benson*, 92 Ga. 794, *Newton v. Nunnally*, 4 Ga. 353, *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 438, *Simmons v. Cates*, 56 Ga. 609, and *Hughes v. Johnson*, 38 Ark. 285, and *Jones on Chattel Mortgages*, § 640 are cited in support of the principle that the rights of third persons must be considered by a creditor in making application of payments made by his debtor.

It is further insisted that the intention of the parties in making the payments is a question for a jury to pass upon, and that in rendering his judgment the court did not give effect to this circumstance, as required by the ruling in *Pritchard v. Comer & Co.*, 71 Ga. 18. In the case last cited it was held that when the debtor fails to make a direction as to how payments shall be applied, and the creditor applies the payments to suit himself, the question of intention in making the payments should have been submitted to the jury. But in that case there were circumstances developed from the very nature of the transaction itself which evidenced the intention of the parties, and which the Supreme Court held was "equivalent to a direction of the application of the money." Judge Blandford, in making this ruling, said: "To hold otherwise would operate as a fraud upon the indorser, as he made this indorsement with the full knowl-

edge that his principal had made the mortgage to secure the payment of the \$1,500 note upon which he gave his indorsement." In the case now before us there is no evidence of any kind to indicate an intention on the part of Fleming, who made the payments, that these payments should be applied to any one of the notes in preference to the other, and so the point seems to be without merit. We do not think there is anything in the allegations of the plea which would take the case out of the general rule, which gives a creditor the right to apply payments as he sees fit, in the absence of a direction on the part of the debtor as to how the payments should be applied. Certainly no reason is found in the statement that the other notes held by Ward were junior in date to the one which Baumgartner indorsed, nor, in fact, that the amount of both of these later notes only equaled the first one. Even if Ward had applied all of the payments made by Fleming to the junior notes, this would not have been such an act, within the contemplation of the law, as injured the surety, Baumgartner, or increased his risk, or exposed him to greater liability, so as to discharge him.

Section 3722 of the Civil Code of 1895, now section 4316 of the Civil Code of 1910, relating to the application of payments is as follows: "When a payment is made by a debtor to a creditor holding several demands against him, the debtor has a right to direct the claim to which it should be appropriated. If he fails to do so the creditor has a right to appropriate at his election. If neither exercise this privilege the law will direct the application in such manner as is reasonable and equitable, both as to parties and third persons. As a general rule the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties." As we construe this section, its latter portion imposes no limitation on the right of either of the parties, as previously stated, if either has exercised the option conferred by law, the debtor having first the privilege of directing the application of the payment he makes, for the direction by law occurs only "if neither exercise this privilege." Of course, where a fund is brought before the court for distribution according to law, and it is discovered that by reason of a legal priority the rights of a third person are involved and are superior to those of the creditor who has received a payment the previous disposition of that fund, whether it has been applied upon the creditor's demand at the instance of the debtor, or in the absence of such direction by the creditor himself, becomes immaterial, and the provisions of section 3722 have no application to the case. As said by Judge Lumpkin in *Newton v. Nunnally*, 4 Ga. 357:

"As a general rule, the debtor has a right to appropriate payments. If he does not, the creditor may. If neither does, the jury will make the application under the direction of the court." And as the Newton Case was a case in which the priority of liens was involved, he quotes from Chief Justice Marshall in *Rankin & Schatzell v. Scott*, 12 Wheat. 177, 6 L. Ed. 592: "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to satisfaction."

In all of the authorities cited by counsel for the plaintiff in error it appears that there was outstanding some superior lien in the hands of some third party which was entitled to a priority over the indebtedness to which the payment in question was sought to be applied, and as the answer of the defendant, which was stricken, distinctly states "that in making said payments to said Ward said Fleming paid them on his general indebtedness, which consisted of said three notes aforesaid, and did not advise or request that same be applied to any particular note," it is manifest that these decisions have no bearing, but that the case is rather controlled by the provisions of section 3722 of the Civil Code. The note that Baumgartner indorsed had no superior right to the money paid by Fleming which would, under the law, have required its application to that note, rather than to the other two notes, which Baumgartner had not indorsed. When Fleming did not direct the application of the payments, Ward had the right to apply them as he pleased.

So much of the defendant's plea as attempts to set up the defense that the plaintiff was guilty of laches, in that he did not bring suit earlier, and thereby increased the risk of the surety, was properly stricken, because there was no allegation that there was a consideration for the postponement, nor an averment that the security had given a written notice to sue. Under the ruling in *Thomas v. Clarkston*, 125 Ga. 78, 79 (3), 54 S. E. 77, 81 (6 L. R. A. [N. S.] 658): "The surety could not, at common law, be discharged by failure of the payee to sue, and the plea setting up such defense was necessarily without merit." "A mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety." Civil Code 1895, § 2972.

There was plainly no merit in the defenses which were stricken by the court, and the answer of the Supreme Court to the certified question, and its affirmation upon review of the decision in *Scott v. Atwell*, 63 Ga. 764, sustains the judgment of the lower court.

Judgment affirmed.

(19 Ga. App. 290)

MONK-SLOAN SUPPLY CO. et al. v. QUITMAN OIL CO. (No. 3,630.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 331*)—VERDICT—DEFINITENESS.

Verdicts are not to be set aside for indefiniteness, if they are capable of being reduced to reasonable certainty by an application of the ordinary canons of construction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 783; Dec. Dig. § 331.*]

2. TRIAL (§ 336*)—VERDICT—CERTAINTY—SURPLUSAGE.

The maxim, "utile per inutile non vitiatur," authorizes the rejection of surplusage, and saves from the implication of uncertainty a verdict which is definite, complete, and certain, upon the rejection of the surplusage in which indefiniteness inheres.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 789; Dec. Dig. § 336.*]

3. TRIAL (§ 327*)—VERDICT—CONSTRUCTION—DESIGNATION OF PARTIES—SINGULAR FOR PLURAL.

Under the common canon of construction, that the singular or plural number each includes the other, unless the contrary plainly appears from the context, a verdict finding in favor of "the defendant" will be construed as a finding in favor of all the defendants, where the suit is against two or more persons.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 768½; Dec. Dig. § 327.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by the Quitman Oil Company against the Monk-Sloan Supply Company and another. Judgment for plaintiff, and defendants bring error. Reversed.

T. W. Mattox and W. F. Way, for plaintiffs in error. Shipp & Kline, for defendant in error.

POWELL, J. The Quitman Oil Company brought suit against the Monk-Sloan Supply Company (a corporation, of which one Sloan was president) and C. E. Whitfield. The jury rendered the following verdict: "We, the jury, find for the defendant our verdict for Sloan and Whitfield"—signed by the foreman. During the same term, the plaintiff moved to set the verdict aside on the grounds (1) that it is ambiguous and uncertain; (2) because it is in favor of only one defendant, when there are two defendants in the case. The court granted the motion, and the defendants have excepted.

[1] 1. A verdict so uncertain as to be void may be set aside on motion. But "verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." Civil Code 1910, § 5927.

[2] 2. A canon of construction, often applied to verdicts, is that all surplusage may be disregarded. The maxim, "utile per inutile non vitiatur," saves a verdict from the taint of any ambiguity or uncertainty brought

about by rejectable surplusage. See, for example, the case of Southern Ry. Co. v. Oliver, 1 Ga. App. 734, 58 S. E. 244, and the instances there cited of the perfecting of verdicts by the rejection of surplusage or the application of other cognate canons of construction. The words, "We, the jury, find for the defendant," are a full, definite, and complete verdict. If the added words, "our verdict for Sloan and Whitfield," relate to the defendants named in the pleadings, as they probably do, no harm is done by rejecting them, as they add nothing to the legal effect of the verdict. If the jury, in using these words, were referring to persons outside of the record, their reference to the outsiders is rankest surplusage, and, of course, is to be rejected; for the only meaning which could then be given to the added words would be that the jury intended their finding in favor of the defendants also to operate in favor of certain outsiders—a matter as to which they had no concern. So, by construing the added words as referring to the defendants, or as not referring to them, the legal effect is the same. The added reference is mere surplusage.

[3] 3. The point that the verdict is bad, because the jury used the word "defendant," when there were two defendants, is not well taken. It is a common canon of legal construction that "the singular or plural number shall each include the other, unless expressly excluded." Civil Code 1910, § 4 (4).

Judgment reversed.

(10 Ga. App. 350)

RAWLINGS v. SHEPPARD. (No. 3,525.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 19*)—INTERFERENCE WITH RELATION—RIGHT OF ACTION—ELEMENTS.

To establish a right to recover under the act of December 17, 1901 (Acts 1901, p. 63), as amended by the act of August 2, 1903 (Acts 1903, p. 91), now contained in Civil Code 1910, §§ 8712-8715, giving damages to a landlord for wrongful interference by an outsider with his contract with his tenant, the plaintiff must prove (1) a valid, definite contract, duly executed with the formality prescribed in the statute (Polk v. Thomson, 130 Ga. 542, 61 S. E. 123; Orr v. Hardin, 4 Ga. App. 382, 61 S. E. 518); (2) the fact that the defendant employed the tenant for such a period and in such a manner as that injury resulted to the landlord from the giving of the employment, or that the defendant rented lands to the tenant or furnished him lands "to be cropped"; (3) the amount of the damages, except in so far as the statute fixes them. To prove that the defendant allowed the plaintiff's tenant to move into a house on his place is not sufficient. Pearson v. Bass, 132 Ga. 117, 63 S. E. 798.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 19.*]

2. LANDLORD AND TENANT (§ 19*)—INTERFERENCE WITH RELATION—ACTIONS—EVIDENCE.

The plaintiff in the case at bar offered no direct proof that the defendant employed the tenant or rented lands to him, but relied on circumstantial evidence to prove that element of his case. The jurors were authorized to find against the theory of the evidence contended for by the plaintiff, though the defendant offered no proof. A verdict is not necessarily demanded for the plaintiff, because he makes such a prima facie case as to make the refusal to grant a nonsuit proper, though the defendant introduces no evidence.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 19.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by C. G. Rawlings against N. F. Sheppard. Judgment for defendant, and plaintiff brings error. Affirmed.

Hardwick & Wright, for plaintiff in error. Evans & Evans, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 237)

SMITH v. SEABOARD AIR LINE RY. CO.
(No. 3,163.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 226*)—REGULATION—ACCOMMODATIONS AT DEPOTS.

A rule or regulation promulgated by the Railroad Commission of this state relating to the reception of passengers by railroad companies and the keeping open of their depots and stations must be presumed to be just and reasonable, and whether such rule or regulation is reasonable or not is a question of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 740; Dec. Dig. § 226.*]

2. RAILROADS (§ 226*)—REGULATION—ACCOMMODATIONS AT DEPOTS.

The fact that a rule or regulation prescribed by the Railroad Commission for the conduct of the railroad companies with reference to the keeping open of their depots and stations and the reception of passengers therein may in a particular case result in hardship or injury is not a criterion by which to test the reasonableness of the rule. If the rule or regulation conduces to the interest of the railroad company and works no hardship to the traveling public generally, it must be considered as reasonable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 740; Dec. Dig. § 226.*]

3. CARRIERS (§ 247*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS—PERSONS AWAITING TRANSPORTATION.

A person coming to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is within a reasonable time before the departure of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

4. CARRIERS (§ 238*)—RAILROADS (§ 226*)—REGULATIONS—ACCOMMODATIONS AT DEPOTS—"PASSENGER."

Rule No. 10 of the Railroad Commission of Georgia, which provides: "At junction points railroad companies shall be required to open their depot waiting room, for the accommodation of the traveling public, at least 30

minutes before the schedule time of the arrival of all passenger trains. At local or nonjunction points all such waiting rooms shall likewise be opened, provided that the same shall not be required to be opened nor kept open after 10 o'clock p. m., except for delayed trains due before that hour, in which case such rooms shall be kept open until the actual arrival of such delayed trains"—is reasonable; and one who comes to the depot for the purpose of taking a train is not a "passenger," unless his coming is within the limitations of the rule.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 973; Dec. Dig. § 238; **Railroads*, Dec. Dig. § 226.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

5. CARRIERS (§ 314*)—TRANSPORTATION OF PASSENGERS—INJURIES—ACTIONS—PLEADING.

The allegations of the petition, construed in the light of the above-quoted rule, set up no cause of action, and the trial judge properly sustained the demurrer and dismissed the petition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1273-1280; Dec. Dig. § 314.*]

Russell, J., dissenting.

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by Ida Smith against the Seaboard Air Line Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error brought suit in the county court of Liberty county against the Seaboard Air Line Railway Company to recover damages for a tort. The court sustained a general demurrer to the petition, and the plaintiff petitioned for a writ of certiorari. On the hearing of the certiorari in the superior court the judgment of the lower court was affirmed, and on exceptions to this judgment the case is here for review. The petition makes in substance the following case:

At 8 o'clock at night the petitioner, in company with two other persons, went to the railway station at Riceboro, Ga., for the purpose of becoming passengers on the Seaboard Air Line train going to Savannah and due at Riceboro at 10 minutes after 10 o'clock on said evening. The night was extremely cold, and the waiting room at the station was well heated by a large fire, and the petitioner and her friends went into this room. The train due to arrive at 10:10 o'clock was delayed, and did not arrive until 1:15 o'clock that morning. A little after 9 o'clock the station agent, acting within the scope of his authority in the discharge of his official duties, notified the petitioner and her friends that it was time for him to go home, and he closed the station, and they could not remain in the waiting room. Petitioner informed him that they intended becoming passengers on the train for Savannah, and protested against being turned out into the cold, and begged the agent, if he must close the office, to permit the waiting

room to remain open, so they could stay therein and be comfortable while waiting for the arrival of the delayed train. This request he refused, and put the petitioner out into the cold. As there was no other shelter, she was compelled to remain out in the cold from 9 o'clock to 1:15 o'clock a. m. This exposure to cold made her ill. She contracted a severe cold, which compelled her to go to bed, where she suffered greatly from aches and pains in her chest and from annoyance attendant upon the cold. She alleges that under the circumstances above detailed she had a right to remain in the station room until the overdue train arrived; that the defendant owed her the duty to permit her to remain therein, where it was warm and comfortable; and that the company, through its employé, violated its direct duty to her in denying her the legal right to remain in the waiting room, where comfort was already provided, and in compelling her to vacate this room, and to go out in the intense cold, resulting in the personal injuries narrated. She left the waiting room only under the order and demand of the station agent, and after doing so did everything in her power to protect herself from the cold, and in no way consented or contributed to her injuries. She charges that her injuries were directly and proximately due to a breach of duty on the part of the defendant. She sues to recover damages for a breach of the public duty which the railway company owed to her as a passenger, which resulted in the personal injuries to her above set out. She charges, also, that the action of the agent was willful and wanton, in utter disregard of her right, and she also sues to recover punitive damages.

In support of a demurrer the railway company relied upon rule No. 10 of the Railroad Commission of Georgia, of which the courts take judicial cognizance, and which is as follows: "At junction points railroad companies shall be required to open their depot waiting room for the accommodation of the traveling public at least 30 minutes before the schedule time of the arrival of all passenger trains. At local or nonjunction points, all such waiting rooms shall likewise be opened, provided that the same shall not be required to be opened nor kept open after 10 o'clock p. m., except for delayed trains due before that hour, in which case such rooms shall be kept open until the actual arrival of such delayed trains." It is insisted that under this rule there was no duty upon the railway company to open or heat its waiting room at the hours stated in the petition, when the plaintiff entered the waiting room, and when she was directed to leave by the station agent, for the reason that the train which she intended to take was scheduled to arrive after 10 o'clock p. m.

The plaintiff, to overcome the effect of this rule, insists that it is unreasonable and void, and consequently that the company would not be protected under its provisions; that, even if valid, it is not applicable in the present case, for the reason that the company having heated and opened its waiting room, and having received therein passengers intending to take a train scheduled to arrive after 10 o'clock p. m., the provisions of this rule were waived; that at common law it is the duty of a railway company to provide a comfortable waiting room for its passengers a reasonable length of time before the arrival of its trains; that it was beyond the power of the Railroad Commission of Georgia to change the common law by the promulgation of a rule; and that, irrespective of the rule, the railroad company owed a common-law duty to plaintiff, which it violated, and for which a recovery may be had, since there is no legislative action changing the common-law duty.

Twiggs & Gazan, for plaintiff in error.
Thos. F. Walsh, Jr., and Anderson, Cann & Cann, for defendant in error.

HILL, C. J. (after stating the facts as above). The basic principle of liability for negligent torts is a breach of duty, and in this case the plaintiff sues the railroad company to recover damages for a breach of its public duty as a carrier of passengers. If the railroad company, under the allegations in the petition, owed her any duty which was violated, and without any fault on her part damages thereby resulted to her, she would have a right to recover. Did the railroad company owe her any duty? Learned counsel for the plaintiff contends that at common law it was the duty of railroad companies to provide comfortable waiting rooms for passengers a reasonable length of time before the arrival of trains. Learned counsel for the defendant insists that this was not so at common law; that under the common law railroad companies were under no duty to maintain comfortable waiting rooms at their stations for persons proposing to become passengers.

There is authority for both contentions, the weight of authority being in favor of the latter proposition. This is immaterial, however, for in this state, in so far as cities of 1,000 inhabitants are concerned, the statute makes it the duty of railroad companies operating passenger trains to have station accommodations for passengers, and to keep them open at least one hour before the arrival of and a half hour after the departure, according to the scheduled time for the arrival of and departure of said trains, and to keep the waiting room lighted and comfortable between the hours of 6 o'clock a. m. and 6 o'clock p. m., for the comfort and convenience of passengers. Civil Code 1910, § 2727. This statute law applies only to towns

and cities of more than 1,000 inhabitants. The law of this state, however, as declared by the Supreme Court, makes it the duty of railroad companies to provide accommodations at their stations for passengers, and makes them liable for such damages as proximately flow from a violation of this duty. In *Brown v. Georgia, Carolina & Northern Railway Company*, 119 Ga. 90, 46 S. E. 71, Mr. Justice Lamar announces the general rule on this subject as follows: "Railroad companies are bound to provide reasonable accommodations at their stations for passengers who are invited to travel on their roads; and will be liable for such damages as proximately flow from a violation of this duty. The character of the accommodations required, of course, varies with the amount of business done at a particular point; and the company might be relieved altogether of the obligation to furnish depots at flag stations, or points where trains stop for the accommodation of occasional travelers. But even where waiting rooms are maintained, the company is only required to keep them open for a reasonable time before and after the departure of trains." The learned justice cites many authorities in support of this proposition. It cannot be doubted that the railroad company was under a duty to keep open and in a comfortable condition the waiting room at Riceboro for the comfort and convenience of passengers.

[3] Was the plaintiff in this case a passenger when she was turned out of the waiting room by the agent of the defendant? If she was, the railroad company owed her extraordinary diligence in taking care of her. If she was not, the defendant owed her no duty in connection with the waiting room. Elliott, in his admirable work on Railroads, lays down the true rule for determining whether or not the plaintiff was a passenger, under the allegations of her petition. In volume 4, § 1579, he uses the following language: "We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such a place is open for the reception of passengers intending to take passage on the trains of the defendant." And he cites many decisions in the notes in support of this general rule. He makes, however, to this general rule the following material qualification: "Where, however, by reasonable rules or regulations a railroad company designates the times at which places will be ready for the reception of passengers, a person cannot become a passenger by entering such places in violation of the rules, or at an unreasonable time." He cites many authorities in support of this qualification to the general rule. As stated by the Supreme Court in the case of *Riley v. W. & T. Railroad Co.*, 133 Ga. 417, 65 S. E. 890, 24 L. R. A. (N. S.) 879, a person going to a station has no absolute

right to require the waiting room to be kept open and in comfortable condition for passengers an unreasonable length of time before that fixed for the departure of trains, or for using the rooms for lying down and sleeping. The Supreme Court of North Carolina in *Phillips v. Southern Ry. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, announces the general rule with the qualification as follows: "A person coming to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is within a reasonable time before the departure of the train."

[4] Was the plaintiff, under the allegations of the petition, a passenger a little after 9 o'clock, when she was turned out of the waiting room by the station agent? It is wholly immaterial to consider whether she was a passenger when she went to the station at 8 o'clock and went into the waiting room, for the time when her rights should be determined is the time when she was deprived of the privilege and comforts of the waiting room, and not when she first entered into it. The train which she intended to take was due at 10:10 p. m. She was in the waiting room, intending to be a passenger, about one hour before the train was due, according to its schedule. In the absence of any express rule on the subject by the railroad, or Railroad Commission of this state, we would be inclined to hold that she was in the waiting room at a reasonable time before the arrival and departure of the train on which she intended becoming a passenger; at least, that the question should be determined by the jury. But the Railroad Commission of Georgia has promulgated a rule exactly in point, and this rule provides that railroad companies shall only be required to open their depot waiting rooms for the accommodation of the traveling public at least 30 minutes before the schedule time for the arrival of passenger trains. Under this rule the railroad company was not required to open its waiting room at Riceboro, Ga., for the accommodation of passengers until 30 minutes before the arrival of the train, which is due at 10:10 p. m. It was immaterial that it opened the waiting room before that time. That was a mere voluntary act on its part. The rule provides, further, that the railroad company shall not be required to open or keep open its waiting room after 10 o'clock p. m., except for delayed trains due before that hour. The train in this case was delayed, but it was not scheduled to arrive before 10 o'clock. It was scheduled to arrive at 10 minutes after 10 o'clock. Therefore it was not within the terms of this rule. We are compelled to conclude that the petitioner was not a passenger when she was turned out of the waiting room by the station agent.

[5] It is insisted by counsel for plaintiff in error that, without any reference to the rule promulgated by the Railroad Commission on

the subject, the railroad company as a matter of fact had its waiting room open and warm and comfortable at 8 o'clock, when the petitioner came to the station for the purpose of becoming a passenger, and she was received into the room by the company, and that this conduct amounted to a waiver of the conditions and terms of the rule, and that, having received her into the room, it had no right subsequently to turn her out into the cold, knowing that she intended to take passage on the delayed train, and that in doing so it was guilty through its agent of a willful and wanton tort. There is no allegation in the petition that the station agent knew at what hour she came into the station room, or for what purpose she had entered, until he went to her a little after 9 o'clock and told her that he must close and she must get out. Of course, it cannot be said that railroad companies receive every person who goes into their waiting rooms at unreasonable times as passengers. She had no right in the waiting room as a passenger until she went there at the time when, under the rules, it was the duty of the company to keep open the waiting room for the accommodation of passengers.

[1] Was the rule relied upon by the railroad company and promulgated by the Railroad Commission a reasonable rule or regulation on the subject? Whether a rule or regulation of the character in question is or is not reasonable is to be determined as a matter of law by the court. *Central of Georgia Ry. Co. v. Motes*, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223; 1 *Elliott on Railroads*, § 199. And especially is this true where, as in this state, the rules and regulations are intrusted by the Legislature to the wisdom of the Railroad Commission. Every presumption must be indulged in favor of the reasonableness of a rule or regulation prescribed by the Railroad Commission. A rule or regulation of the Railroad Commission relating to passengers, or the reception of passengers at depots or elsewhere, should be manifestly unjust to the general public and its enforcement a hardship to the traveling public or to the railroad company before it should be declared unreasonable.

[2] The fact that the rule worked a hardship in a particular or individual case, under the peculiar facts of that case, is not a criterion by which to judge of its reasonableness. In this case, according to the allegations of the petition, the operation of the rule resulted in great discomfort and injury to the plaintiff. It seems to us that this hardship might have been avoided, or greatly alleviated, by the exercise of some discretion on the part of the agent of the railroad company. In view of the circumstances, it would have been a wise exercise of discretion on the part of this agent to have permitted the plaintiff to remain in the station room; but the rule did not require

him to do so, and his obedience to the rule, although it resulted in hardship and damage to the plaintiff, was not such a tort on his part as would make the company responsible. Certainly it cannot be said that railroad companies are required to keep their waiting rooms open all night for the reception of passengers at stations of the character of Riceboro. They could only be expected and required to keep their station open a reasonable length of time before and after the departure of trains. In the case of *Central of Georgia Ry. Co. v. Motes*, supra, in the body of the opinion, Mr. Chief Justice Simmons says: "It seems reasonable to assert that a railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting room until an hour or so before the departure, on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting room open all night for the accommodation of its patrons, permitting them to enter it at any time they choose."

But it would be profitless to extend the discussion. The rule or regulation in question has been prescribed by the Railroad Commission of this state, and no reason is shown why the rule in its operation as regards the business and interest of the railroad company and the convenience and comfort of the general public is not a reasonable rule; and this court, although in the particular case the operation of the rule may have worked a hardship, is not willing to condemn a rule as unreasonable which has been promulgated by the Railroad Commission presumably with due regard to both the interest of the railroad company and the traveling public. We therefore hold that the court did not err in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

RUSSELL, J. (dissenting). With all due respect to the rule of the Railroad Commission, and without being prepared to declare unreasonable the rule which permits railroad companies to close their offices and waiting rooms in towns of less than 1,000 inhabitants at 10 o'clock p. m., except for delayed trains which are due before that hour, and leaving entirely out of consideration the fact that in the particular case the train was due to arrive only 10 minutes after 10, I feel compelled to dissent from the opinion of the majority of the court in this case.

It is plain to me, from the allegations of petition, that the defendant, by the conduct of its agent, waived the rule in this case. He knew, or by the exercise of ordinary diligence could have known, that the plaintiff was intending to take passage on the train to Savannah; and as it is alleged in the petition that the train was not expected to arrive until quarter past 1, he also knew

that the train was several hours behind time. Therefore, to my mind, the keeping open of the waiting room in the earlier portion of the night was an invitation to her to use the waiting room, and the case does not differ materially from that of *Riley v. W. & T. R. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379, where the agent of the railroad invited the plaintiff to enter, and thereafter forced her to leave the waiting room. See *Riley v. W. & T. R. R. Co.*, 133 Ga. 417, 418, 65 S. E. 890, 24 L. R. A. (N. S.) 379, supra; *Phillips v. Southern Railway Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163. To my mind the entry of this plaintiff into the depot (which must be construed to have been permitted by the company's agent, because the depot was warmed and lighted, and because it is the duty of the agent to know who is in the depot) constituted her a passenger; and a tacit invitation was equivalent to the express invitation set forth in the *Riley Case*. The conduct of the agent implied a promise that in this instance the rule, which permitted the railroad company to close the office, would be waived for her benefit.

Furthermore, in my opinion, the railroad company owed the plaintiff a common-law duty, irrespective of the rule. It is the duty of a railroad company to provide a comfortable waiting room for its passengers a reasonable length of time before the arrival of trains. *International & G. N. R. Co. v. Doolan* (Tex. Civ. App.) 120 S. W. 1118. The defendant railroad company having received Mrs. Smith in their waiting room, which was heated and lighted, and thereby waived the regulation of the Railroad Commission in its favor, thereafter violated the common-law duty in not providing a comfortable place for the passenger while waiting for her train, irrespective of the Railroad Commission's rule. Any other rule, in my opinion, would in many instances enable railroad companies, where trains are delayed, to take advantage of their own wrong.

We have been unable to find a copy of *Sayles' Annotated Civil Statutes of 1897*, so as to examine the statute cited in the foregoing case; but we can fairly determine its contents by the reference made to it in the decision in the *Doolan Case*. In fact, it is stated in the tenth headnote of the decision that that article requires carriers to keep passenger stations warmed for at least one hour before and after the departure of trains, and yet it is stated in the eleventh headnote in the *Doolan Case* that it is the duty of carriers to keep their passenger stations comfortably heated during all the time passengers are reasonably authorized to use the same irrespective of the statute. Upon the authority of the *Doolan Case*, as well as the natural inference arising from the ruling in the *Riley Case*, supra, it seems to me that the plaintiff in the present case suffered an actionable wrong when she was ejected from

the railroad station after being tacitly invited to occupy it, and that if she was damaged by being exposed at night to the rigors of winter in a place where she could not obtain a shelter, the carrier is liable for these damages.

(10 Ga. App. 376)

HIGDON v. WILLIAMSON. (No. 3,589.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 700*) — CONCLUSIVENESS — JUDGMENT AGAINST FIRM.

In this state a judgment on a suit against a partnership binds all partners, so far as the partnership property is concerned, and also binds individually such of the partners as are served. The execution issued on the judgment may be levied either on partnership property or on individual property of the partners served. If all the partners are served, the judgment stands just as an ordinary judgment against joint debtors, except that the partnership assets are also subject to levy under the execution issued thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1225; Dec. Dig. § 700.*]

2. EXECUTION (§ 348*) — PAYMENT BY ONE PARTNER—CONTRIBUTION—"JOINT DEFENDANT."

The right given by the Code of Georgia to one joint defendant in execution, paying off the execution, to control the judgment and execution against his codefendants, for the purpose of compelling contribution by having the fact of payment entered thereon by the collecting officer, applies to judgments against partners based on service upon all of them.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1065; Dec. Dig. § 348.*]

3. JUSTICES OF THE PEACE (§ 135*)—PAYMENT BY JOINT DEBTOR—CONTRIBUTION—"COLLECTING OFFICER."

A justice of the peace is a collecting officer as to debts sued in his court, and may make upon an execution issued from his court against joint defendants the entry of payment by one of them, which is required that he may control the judgment against the others.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 135.*]

4. APPEAL AND ERROR (§ 1026*)—HARMLESS ERROR.

No judgment will be reversed for mere harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4029; Dec. Dig. § 1026.*]

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by the Southerland Medicine Company against Higdon & Williamson. Judgment for plaintiff, and on payment thereof by Williamson, who caused the execution to be levied on property of the other defendant, on filing of an affidavit of illegality, judgment was rendered for Williamson, and Higdon brings error. Affirmed.

The Southerland Medicine Company obtained a judgment in a justice's court against Higdon & Williamson. After execution was issued, Williamson, one of the partners, paid off the debt; and the justice of the peace

who had issued the execution entered thereon a recital of the fact of Williamson's having made the payment, and thereupon transferred the execution to him. Williamson then caused the execution to be levied on certain property of Higdon's, whereupon Higdon filed an affidavit of illegality; the substantial points raised by it being that the execution could not lawfully be levied on his individual property, since there was in existence sufficient partnership property to pay off the debt, and that the payment made by Williamson operated to satisfy the judgment and discharge its lien. At the trial before the magistrate Williamson moved to strike the affidavit of illegality as being insufficient in law, and the magistrate overruled the motion. Higdon then moved to dismiss the levy, because it appeared that Williamson, one of the defendants, had paid the judgment, and that the justice of the peace who made the entry transferring the judgment to him had no authority to do it, it being contended that a justice of the peace is not a collecting officer; and the magistrate sustained this motion. Williamson obtained certiorari. While the matter was thus pending in the superior court, counsel for Williamson filed a writing in which they stated that they credited the execution with one-half of the amount due under it and claimed against Higdon only the other half. Upon this being done, the court sustained the certiorari and granted a new trial. To this judgment of the court, as well as to the action of the court in allowing counsel for Williamson to file the paper crediting the execution with half of the amount due under it, Higdon brings error.

A. S. J. Hall, for plaintiff in error. Wm. Butt and T. A. Brown, for defendant in error.

POWELL, J. (after stating the facts as above). [1] 1. In this state a judgment against partners binds the partnership and such of the individual partners as are served; and the execution that issues upon it authorizes levy upon the property of the partnership or upon the individual property of such of the partners as are served, to the same extent as if they were ordinary joint defendants. Civil Code 1910, § 5592. The rationale is that the law does not look upon the partnership as a completely distinct and separate legal entity, but as somewhat so, the partners as to partnership debts are joint contractors, and each is the agent of the other to a limited extent. When suit is brought for a debt due by the partnership, the plaintiff may hold the individual partners liable by serving them. If there be two partners, and one is served and the other is not, the judgment stands as any other personal judgment so far as concerns him who is served. As to the other partner,

the service, and consequently the judgment, is only partially binding; that is to say, it is binding only so far as the partner served is the agent of the partner unserved, and that is only so far as concerns the property devoted to the purposes of the partnership. If both partners are served, the judgment is a personal judgment against each and both of them, and the execution thereon may be levied upon either partnership or individual property. In the case at bar there is no contention that both partners were not served; hence the judgment stands just as if they were ordinary joint debtors.

[2] 2. It is provided by Civil Code 1910, § 5971, that, "when judgments have been obtained against several persons and one or more of them has paid more than his just proportion of the same, he or they may, by having such payment entered on the fl. fa. issued to enforce said judgment, have full power to control and use said fl. fa. as securities in fl. fa. control the same against the principals, or cosecurities, and shall not be compelled, as heretofore, to sue the co-debtors for the excess of payment on judgment." The language, "power to contract and use said fl. fa. as securities in fl. fa. control the same against principals or cosecurities," has reference to Civil Code 1910, § 3558, which provides that any person standing in the relation of surety, who shall have paid off or discharged a judgment against himself and others, may "have the fact of such payment by him entered on the execution by the plaintiff, or his attorney, or the collecting officer," and thereupon shall have the right to control the execution and judgment against the other defendants to the same extent as if he were the plaintiff therein, so far as is necessary to his just reimbursement.

The language of section 5971, supra, seems fully broad enough to include the case where one partner has paid off a judgment binding personally on himself and a copartner. Indeed, this section, taken in connection with the other section to which it refers (section 3558), would seem to give to the partner paying off the judgment the right to enforce it to its full amount against the partnership assets, though there may be something growing out of the general rule that a partner cannot sue the partnership, except in equity (see *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145, and citations), which would forbid him having direct recourse at law upon the partnership assets. As between the two partners themselves, the rendition of the judgment subjecting each and both of them to individual liability takes the transaction out of the partnership relation to such an extent as to make it one of those exceptions referred to in the *Paulk* Case, supra, wherein one partner may proceed at law against the other. In *Neel v. Morris*, 73

Ga. 406, it is held that equity has jurisdiction to compel contribution in a case such as the one at bar. Undoubtedly this is true; but, in our opinion, that jurisdiction is concurrent, and not exclusive. In the *Neel* Case, supra, it is stated in the course of the opinion that some members of the court leaned to the view that the statute now contained in Civil Code 1910, § 5971, does not apply to executions issued upon judgments against copartners. However, no decision of the question was made. As intimated above, there may be reasons for refusing an application of the statute to cases where only one of the partners is served; but we see no reason why it is not applicable to cases like this, where both partners have been served and have become jointly and individually bound by the judgment. The affidavit of illegality presented no defense and should have been stricken. Upon like reasoning, it follows, also, that the magistrate erred in dismissing the levy, so far as his ruling was based on the proposition that payment by one of the partners operated to discharge the judgment in toto.

[3] 3. As to the point that the magistrate was not such a collecting officer as could receive payment and make the entry required by the Code, in order to give the paying defendant control of the fl. fa. against the other defendant, it is necessary only to refer to the case of *Bryan v. Meaders*, 9 Ga. App. 326, 71 S. E. 491, where it held (with a citation of the authorities) that as to debts sued in justice courts the magistrate is a collecting officer.

[4] 4. The exception that the court allowed the plaintiff to file a writing while the certiorari was pending in the superior court, whereby he disclaimed any right to collect from his partner more than half the amount due on the execution, amounts to nothing. From a technical standpoint the court should not have considered the paper, as the judge on the hearing of the certiorari has no right to consider aliunde matters, or to allow additions or amendments to the pleadings or the proof; but since this writing which was filed declared no more than the law recognized as being the legal status in its absence, and since the judgment sustaining the certiorari was absolutely correct, this harmless error is of no moment.

Judgment affirmed.

(10 Ga. App. 384)

MOORE v. CITY OF WINDER. (No. 3,601.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 642*)—POLICE COURTS—CERTIORARI—JURISDICTION OF PROCEEDINGS.

The Constitution of this state gives to the superior courts the power to review by cer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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tionari the judgments of all inferior judicatories, including municipal police courts, and a general statutory scheme regulating the procedure by certiorari has been provided, but no specific provision has been made as to the review of judgments of police courts in cities the territorial limits of which extend into two or more counties. In such cases, the person convicted in the police court has the right of certiorari established in his favor, and the fact that the Legislature has not made the remedy specific and definite will not operate in derogation of this right. Therefore, wherever the Legislature creates a municipality out of territory located in more than one county, and does not make any provision as to which of the superior courts of the respective counties involved shall have jurisdiction for the purpose of review by certiorari of a conviction in the police court of such a city, the certiorari may be brought to the superior court of any of the counties in which the municipality is located; and it is error to dismiss it on the ground that it was not brought to the superior court of the particular county in which the officer presiding in the police court happened to sit at the time he tried the case to be reviewed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 642.*]

(Additional Syllabus by Editorial Staff.)

2. MUNICIPAL CORPORATIONS (§ 636*)—"MUNICIPAL OFFENSES"—"CRIMES"—"VENUE."
"Municipal offenses" are not "crimes," within the purview of the constitutional provision relating to the venue of actions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 636.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1736-1740; vol. 8, p. 7623; vol. 5, p. 4628.]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Reuben Moore was convicted of crime in the police court of the city of Winder. From a judgment dismissing certiorari to review the conviction, he brings error. Reversed.

Lewis C. Russell, for plaintiff in error. G. A. Johns, for defendant in error.

POWELL, J. The corporate limits of the city of Winder include in their territory parts of three counties, Walton, Gwinnett, and Jackson. The plaintiff in error was convicted in the police court of that city, and sought certiorari. The petition was addressed to the judge of the superior court of Gwinnett county, and was filed in the office of the clerk of that court. It appears from the testimony in the record that the municipal offense of which the plaintiff in error was convicted was committed in that portion of the city which lies in Gwinnett county. It also appears that the police court sat for the trial of the case in that portion of the city which lies in Jackson county. The charter of the city makes no provision as to where the police court shall sit, or where the principal office, so to speak, of the municipality shall be, or as to what court shall have jurisdiction for the purpose of suits against the city, or for the purpose of reviewing proceedings had in the municipal court. When the certi-

orari came on for hearing, the judge of the superior court dismissed it, on the ground that it had been brought in the wrong county; that it should have been brought in the county of Jackson, in which the police court sat at the time of the trial which the certiorari was brought to review.

[1] This presents a situation without a precedent. There are in this state a number of municipalities with territorial limits located in two or more counties, and in some cases (e. g., Arlington, in Calhoun and Early, counties) lying in two different judicial circuits; but, so far as we can find, the point here presented has never previously been before any court for decision. There is no statute specially covering such cases. The question is to be determined entirely by general principles of law, and by the application of statutes which do not have this particular case especially within their purview. Article 6, § 4, par. 5, of the Constitution of Georgia (Civ. Code 1910, § 6514), confers upon the superior courts of this state the "power to correct errors in inferior judicatories, by writ of certiorari," and there is a general statutory scheme set forth in Civil Code 1910, § 5180 et seq., regulating and prescribing the procedure by certiorari. It has been held that this right of reviewing judgments of inferior judicatories by certiorari, being constitutionally given, cannot be taken away from the superior courts by the General Assembly, either by direct enactment to that effect or by omission to provide for it in special cases; and even where another method of review is provided, it is cumulative only, and does not exclude the right of certiorari. *Hayden v. State*, 69 Ga. 731; *Maxwell v. Tumlin*, 79 Ga. 570, 4 S. E. 858.

The maxim of the common law, "Ubi jus ibi remedium" (there is no wrong without a remedy), may originally have been a platitude, a mere boast as to the scope and adequacy of the particular writs and remedies that had been provided; but when this maxim was given, not only a more beneficent construction, but also new life and broader scope, by the statute of Westminster II (13 Edw. I, c. 24), which required that a writ should be framed to enforce each new right as it might arise, though there might be no precedent, it became a fundamental legal principle of English law, in effect declaring that no man should be deprived of any legal right which was given him because of any failure to provide a remedy to meet its particular circumstances. We have placed this principle in our Code in the following language: "For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civ. Code 1910, § 5506. There is another legal maxim, "Quod remedio destituitur ipsa re valet ei culpa absit" (that which is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without remedy avails of itself, if there be no fault in the party seeking to enforce it. "The benignity of the law is such," observed Lord Bacon, "that when, to preserve the principles and grounds of law, it deprives a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own; sometimes it will give him a more beneficial remedy." *Broom's Legal Maxims* (7th Ed.) 171. This principle has not been specifically codified in this state, but it is nevertheless a part of our law. It has never been given specific application to just such a case as this, and we do not now mean to say that by its terms it covers this case; but reference has been had to it as showing that lack of a previously formulated remedy never diminishes an established right, or the ability of the courts to enforce it, or to give such redress as is appropriate; that the man for whom a particular remedy has not been framed may be in even a better position than ordinarily, so far as what may be called flexibility or choice of remedy is concerned.

Now, here is a case in which the right of certiorari from this municipal court is thoroughly established—is even constitutionally given. The general provisions of the law relating to the form of remedy and modes of procedure by certiorari have made no particular provision for the enforcement of the right. As to those municipalities whose police courts have jurisdiction to try for municipal offenses throughout territorial limits of a city or town lying in more than one county, there is no provision as to where the certiorari shall be filed. The right to apply for and to file the certiorari must nevertheless be recognized and enforced, and the failure of the Legislature to provide for the particular case must not diminish the right of the applicant. In the argument of counsel for the respective sides of the case, two conflicting theories have been presented. Counsel for the petitioner in certiorari addressed his petition to the superior court of Gwinnett county (and filed it in that county), on the theory that, since the municipal offense was shown by the proof to have been committed in that county, the review proceedings should also be filed there. He also argued that, since the Constitution of this state fixes the venue for the prosecution of crimes in the county where the crime is committed, analogy would fix the jurisdiction in cases such as this in the county where the proof shows the municipal offense to have been committed.

[2] It must be remembered, however, that these municipal offenses are not crimes within the purview of the constitutional provision. *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101; *Pearson v. Wimblish*, 124 Ga. 701, 52 S. E. 751. Besides, to lay down the rule that

the proceedings to obtain certiorari from police courts located in municipalities, where the territorial limits extend over more than one county, must be brought in the county where the alleged offense was shown by the proof to have been committed, would at once be subject to the objection that a large class of cases would still be left unprovided for. An examination of the reports of this court and of the Supreme Court will show that perhaps no ground of certiorari is more frequent than that the proof failed to locate the place where the alleged offense was committed; and if the rule contended for were adopted, it would follow that in cases where the proof failed to show venue, no petition for certiorari could be brought.

Counsel for the defendant in certiorari present the view (and the judge of the superior court acted upon this theory) that the superior court of the county in which the police court happened to sit has exclusive jurisdiction. This seems more tenable, and still is not satisfactory. No statutory provision so regulates the procedure. Generally appellate proceedings are to be filed, not in the county where the judicial officer who rendered the judgment may have happened to be presiding at the time he rendered his judgment, but in the county where the court or judicatory is located in contemplation of the law. For example, a judge of the superior court may lawfully hear and decide in Fulton county an injunction, a motion for a new trial, or any similar matter not involving the use of a jury, though the matter is a court proceeding of another county, say Chatham; and in that event a bill of exceptions filed to review his judgment should be filed, not in the county where the judge physically sat and rendered judgment, but in the county where the court of which he was acting as the judicial officer is located by law. This point was decided long ago. See *Rowell v. Neves*, 21 Ga. 125. In that case a demurrer to a petition filed in Baker superior court was heard by Judge Perkins at Albany, in Dougherty county. The bill of exceptions to his judgment on the demurrer was filed in Dougherty county. The Supreme Court dismissed the case, holding that the record should have come through the office of the clerk of Baker superior court. Other examples may be given to show that the place where the judge whose decision is to be reviewed physically sits does not govern the bringing of review proceedings. If Judge Crossland, judge of the city court of Albany, should be presiding for Judge Harrell in the city court of Bainbridge, but should actually render his decision in his home in Albany, and the losing party should decide to obtain certiorari, of course, he would file his petition in the superior court of the county of Decatur, in which Bainbridge is located.

Now, if the charter of the city of Winder had fixed the place of holding the municipal

pal court in one of these counties, it might be that the superior court of that county would alone have jurisdiction; but, as has been said, the charter is silent on this subject. It seems to us that the right of certiorari in cases such as this would be abridged if we confined the jurisdiction of review to any one of the counties in which the municipality is located, unless the Legislature first makes the matter certain by specifying one of the counties. We therefore hold that proceedings by certiorari brought to review judgments of the police court of Winder may be brought to the superior court of any one of the three counties in which the city is located. Consequently we hold that the judge erred in dismissing the certiorari on the ground that it was brought in the county of Gwinnett, and not in the county of Jackson, where the police court sat.

Judgment reversed.

(10 Ga. App. 336)

CENTRAL OIL & FERTILIZER CO. v. MATHEWS et al. (No. 3,482.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

HARMLESS ERROR.

While there were certain verbal inaccuracies and minor errors in the charge, all of them, when closely considered in the light of the whole record, plainly fall within the category of harmless error. The verdict is consistent with the justice of the case and the preponderance of the evidence.

Error from City Court of Cordele; U. V. Whipple, Judge.

Action between the Central Oil & Fertilizer Company and J. W. Mathews and others. From the judgment, the Fertilizer Company brings error. Affirmed.

M. M. Eakes, for plaintiff in error. Crum & Jones, for defendants in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 350)

CLEMENTS v. UNION SAVINGS BANK. (No. 3,523.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The evidence demanded the verdict as directed for the plaintiff.

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action between W. S. Clements and the Union Savings Bank. From the judgment, Clements brings error. Affirmed.

Williams & Bradley, for plaintiff in error. A. E. Smith, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 408)

HARRIS v. CITY OF ROME. (No. 3,558.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 832*)—CHANGE OF GRADE—FLOODING CONTIGUOUS LOT—NUISANCE—LIABILITY.

If a municipal corporation, in grading a street, so changes the natural flow of the drainage from a contiguous lot as to create a pond, and to render a street drain necessary to prevent the hurtful accumulation of standing water, and in pursuance of its duty the municipal corporation opens a ditch necessary for the discharge of this water, but thereafter permits it to become obstructed, and fails to remove the obstruction, though requested to do so, and if, by reason of the filling of this ditch, which is in the street, and under the control of the municipality, a nuisance is created, the municipality would be liable for the damages caused by the continuance of the nuisance, even though the pond might be located on private property. The liability for the damages caused by a nuisance rests primarily upon the party whose act created the nuisance, and especially is this true where it is within the power of such party to discontinue the condition which gave rise to the nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1782; Dec. Dig. § 832.*]

Error from City Court of Floyd County; John H. Reece, Judge.

Action by J. H. Harris against the City of Rome. Judgment for defendant, and plaintiff brings error. Reversed.

Eubanks & Mebane, for plaintiff in error. Max Meyerhardt & Maddox & Doyal, for defendant in error.

RUSSELL, J. The present case is distinguished by its facts from Mayor of Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101. In the Wilson Case the ditch on private property contained the obstruction that caused the injury. The owner of the hotel controlled the hotel, sewer, ditch, obstruction, and pond, and was consequently responsible for the nuisance. Neither the nuisance nor its cause was under the control of the city, nor on city property. In the case at bar the petition, with the amendments, alleged that the nuisance was created by the city's having raised the sidewalk and cut ditches along, in, and through the sidewalk and street for the purpose of letting the surface water escape, and that, after having cut the ditches for this purpose, the city permitted and allowed the ditches in the street to fill up, and that by reason of the filling up of the ditches in the sidewalk and street a pond of foul and fetid water, alleged to be a nuisance, accumulated; that the obstruction was permitted to gather in the ditch, so that there was no outlet for the water through the embankment, which the city itself had made, in raising the street, and that the city, with knowledge of this fact, allowed the obstruc-

tion to remain, refusing the plaintiff's demand that it be removed, and the pond be allowed to drain. It will therefore be seen that the two cases are not identical. In the *Wilson Case* the cause of the obstruction and nuisance was that the hotel permitted foul and fetid matter to accumulate in a ditch and pond on its own private property. The hotel controlled the ditch made for the purpose of outlet, and which was allowed to fill up and furnish the matter which accumulated. In other words, the city of Dalton did not create the nuisance, but only stood by and failed to abate it. In the case at bar the ditches are in the street and under the control of the city, according to the allegation of the petition, and it is alleged that after these ditches, which it is the duty of the city to keep open, are filled up, the city refuses to abate the nuisance for which it is responsible.

According to the allegations of the petition, the place where the nuisance is now said to exist and the raising of the sidewalk by the city caused the necessity for the digging of the ditch through the sidewalk and street. This ditch upon the city's property, which the city's act rendered necessary, and which it is the city's duty to keep open, is the ditch in which the obstruction, which has caused the pond to form, exists and is permitted to remain, according to the allegations of the petition. In the *Wilson Case* the cause of the nuisance was on a private lot. In the case at bar the cause of the nuisance is in the street and sidewalk. In the *Wilson Case* the owner of the lot could have abated the nuisance; but the owner of the lot in the present case would have no right to go into the street and dig open ditches, or otherwise drain the pond by excavations upon the street. While it is true the pond was on private property, as in the *Wilson Case*, the sole and only cause for the formation of the pond is traceable to the act of the city. The judgment was reversed in the *Wilson Case* because it did not appear that the municipality was in direct control of the property upon which the alleged nuisance existed, or the ditch or sewer; in other words, because it was not alleged in terms that the municipality maintained, controlled, or operated the alleged nuisance. In the case at bar it is distinctly alleged that the city controls the ditch that brought about and continues the nuisance.

The petition as originally filed was, perhaps, subject to demurrer; but under the amendment, showing that the pond was due solely to the fill made by the city in the street, and that the city undertook, as was its duty, to prevent a nuisance by running a ditch across the sidewalk into the main gutter of the street, the municipality would clearly be liable, if it is shown that a nuisance was created by the fact that the city

allowed the only outlet for this water, which was through its sidewalk, to become obstructed, so as to create a nuisance with consequent damages. We therefore think that the trial judge erred in sustaining the demurrer and dismissing the petition. If a municipal corporation, in grading a street, so changes the natural flow of the drainage from a contiguous lot as to create a pond, and to render a street drain necessary to prevent the hurtful accumulation of standing water, and in pursuance of its duty the municipal corporation opens a ditch necessary for the discharge of this water, but thereafter permits it to become obstructed, and fails to remove the obstruction, though requested to do so, and if, by reason of the filling of this ditch, which is in the street and under the control of the municipality, a nuisance is created, the municipality would be liable for the damage caused by the continuance of the nuisance, even though the pond might be located on private property. The liability for the damage caused by a nuisance rests primarily upon the party whose act created a nuisance; and especially is this true where it is within the power of such party to discontinue the condition which gave rise to the nuisance.

Judgment reversed.

(10 Ga. App. 387)

WHITEHEAD v. MAYOR, ETC., OF VIENNA. (No. 3,493.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 79*)—WORKING CITY STREETS—VALIDITY OF LAW.

A provision in the charter of a city, authorizing the mayor and council to require all male residents of the municipality between the ages of 16 and 50 years who have resided in the city for 30 days to work the streets of the city, or to pay a commutation tax in lieu thereof, is valid and enforceable as provided therein, although the general law of the state designated the persons subject to road duty, where the alternative road law is in effect as "between the ages of 21 and 50 years."

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 79.*]

2. MUNICIPAL CORPORATIONS (§ 79*)—WORKING CITY STREETS—VALIDITY OF LAW.

A local law for the county of Dooly, in which the city of Vienna is located, providing that the county convicts shall work the main streets through the city of Vienna, does not affect the validity of the charter provision stated in the first headnote. Both local law and charter provision can be enforced, and there is no conflict between the two.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 79.*]

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Proceedings by the Mayor and Council of Vienna against Lewis Whitehead to enforce

the road law. Judgment for plaintiff, and defendant brings error. Affirmed.

George & Woodward, for plaintiff in error.
D. L. Henderson, for defendant in error.

HILL, C. J. [1, 2] The state has various schemes, subject to county local option, as to working the rural public roads. Various ages are prescribed as to persons subject to road duty under these different schemes. See *Wright v. Sheppard*, 5 Ga. App. 298, 63 S. E. 48, and citations. None of these enactments relate to the working of streets in towns and cities. As to this the municipal charter in each case controls.

Judgment affirmed.

(10 Ga. App. 321)

H. C. DRAPER & CO. v. BURR MFG. CO.
(No. 3,474.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 97*)—PROCEDURE—APPEAL TO JURY.

This was a suit in a justice's court upon an open account, verified by the affidavit of the plaintiff. When called for trial, no counter affidavit was filed, and the case was in default, and judgment was rendered for the plaintiff. Subsequently the defendant appeared and filed a plea, and entered an appeal from the judgment to a jury in the justice's court. When the appeal was reached for trial, the justice struck the plea, because filed too late, and dismissed the appeal. On certiorari the justice was sustained. *Held*, no error. Civil Code 1910, § 4730; *O'Dell v. Meacham*, 114 Ga. 910, 41 S. E. 41; *Rockmore v. Cullen & Newman*, 94 Ga. 648, 21 S. E. 845.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 97.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Burr Manufacturing Company against H. C. Draper & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Jno. R. Wilson, for plaintiffs in error. Russell & Custer and W. O. Fleming, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 375)

JONES v. O'PRY et al. (No. 3,573.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 70*)—GROUNDS.

No error of law is complained of, and the question made by the record being only an issue of fact, on which the evidence was sufficient to support the verdict, there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 70.*]

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action between J. W. Jones and W. H. O'Pry and others. From the judgment, Jones brings error. Affirmed.

J. D. Shannon and L. D. Moore, for plaintiff in error. H. F. Griffin and R. A. Harrison, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 286)

ESTEVE BROS. & CO. v. ROSENGRANT.
(No. 3,870.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 353*)—DOCUMENTARY—BILL OF SALE.

A bill of sale of staves, which states the number sold, where located, the length, and number of staves of each length, and that 44 per cent. were made of red oak, and that all were to be shipped from the place where located to designated consignees, was sufficient to admit the bill of sale in evidence. This description pointed out with sufficient definiteness and certainty the property sold, and any deficiencies as to identity could be supplied by parol. *Thomas Lumber Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333; *Beatty v. Sears & Bennett*, 132 Ga. 516, 64 S. E. 321; *Tiedeman on Sales*, § 235.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 353.*]

2. REVIEW ON APPEAL.

No error of law appears, and the evidence fully supports the verdict.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by George M. Rosengrant against Esteve Bros. & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

O'Byrne, Hartridge & Wright, for plaintiffs in error. Wilson & Rogers, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 307)

ATKINSON v. FOUNTAIN. (No. 3,448.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. CHARGE OF COURT—CONSTRUCTION AS A WHOLE—NO ERROR.

The charge, considered in its entirety, presented the law applicable to the issues made by the pleadings and evidence clearly and correctly, and most favorably to the contentions of the defendant. Portions of the charge, to which exceptions are taken, when considered separately from the context, contain slight inaccuracies but could not have confused or misled the jury, and, when considered in connection with the charge as a whole, are without any material error.

2. RAILROADS (§ 299*)—OPERATION—ACCIDENTS AT CROSSINGS—CARE REQUIRED.

Persons crossing the track of a railroad company at a public road crossing are entitled to the protection of the statutes regulating the approach of locomotives and cars to the crossing, no matter how the road or crossing

came into existence; and there was evidence from which the jury could have inferred that the plaintiff was injured at a public crossing by the negligence of the defendant in the violation of these statutes.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 299.*]

3. OPERATION OF RAILROADS—SPEED OF TRAIN.

Irrespective of the question whether the plaintiff was injured at a public crossing, or at a private crossing, there was evidence that he was injured by the defendant in running at too high a rate of speed, and in failing to exercise ordinary care and diligence at the place of the injury, especially in view of the proof that it was frequently used by the public with the knowledge of the defendant company.

4. SUFFICIENCY OF EVIDENCE—NO ERROR.

No error of law appears. The verdict was small, in the light of the injuries shown, and amply supported by the evidence.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by J. M. Fountain against H. M. Atkinson, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

B. Whitfield and Elkins & Wall, for plaintiff in error. L. Kennedy and McDonald & Grantham, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 360)

CITY OF SANDERSVILLE v. STANLEY.

(No. 3,560.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. DEMURRER TO PETITION—AMENDMENT.

The objections raised to the allegations of the petition by the demurrer were fully met by appropriate amendments, and, as amended, the petition set forth a good cause of action.

2. MUNICIPAL CORPORATIONS (§ 741*)—ACTIONS—NOTICE OF CLAIM FOR INJURY.

The act of December 20, 1899 (Acts 1899, p. 74), providing that notice of the time, place, and extent of injury to persons or property claimed to have been inflicted by a municipal corporation shall be given to its officers before suit is brought, is sufficiently complied with where information is given in the notice with sufficient definiteness to locate the property alleged to have been injured, the amount of damages claimed, and sufficient data to enable the city authorities to examine into the alleged injuries and determine whether the claim should be adjusted without suit. In other words, a substantial compliance with the statute is enough, and exactness of description or nicety of pleading is not required. *Smith v. City of Elberton*, 5 Ga. App. 286, 63 S. E. 48; *Langley v. City of Augusta*, 118 Ga. 590 (11), 45 S. E. 486, 98 Am. St. Rep. 133.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Where suit is brought against a municipality to recover damages caused to the property of a private citizen by extending through the property an open sewer containing poisonous sewage, and thus destroying to a large extent its value for pasturage, for which pur-

pose a large portion of it was used, testimony tending to show that water impregnated with the sewage passing through the land was so poisoned thereby that stock drinking it were killed, and that the use of the land for pasture had to be abandoned, was admissible in evidence, for the purpose of showing the deterioration in value of the property. *Langley v. Augusta*, supra.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 845.*]

4. NO ERROR—EVIDENCE SUFFICIENT.

No error of law appears, and the evidence supports the verdict.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by Mrs. E. M. Stanley against the City of Sandersville. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Hyman, Evans & Evans, and J. J. Harris, for plaintiff in error. J. S. Adams, W. E. Armistead, and Hines & Jordan, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 351)

CENTRAL OF GEORGIA RY. CO. v. MARSHALL.

(No. 3,526.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW—DECISIONS OF INTERMEDIATE COURT—QUESTIONS OF FACT.

This is a case of certiorari, brought to review a verdict and judgment for \$17, and raising only issues of fact, on which the evidence was in conflict. The judgment of the superior court, approving the verdict and overruling the certiorari, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by W. J. Marshall against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

West & Dasher, for plaintiff in error. O. C. Hancock, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 346)

BROOKE et al. v. A. WALLER & CO.

(No. 3,506.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 592*)—DISMISSAL—FAILURE TO FILE BRIEF OF EVIDENCE.

Counsel for the defendant in error has moved to dismiss the bill of exceptions, because it sets out both the oral and the documentary evidence, without briefing in accordance with the statute. Upon an inspection of the record the motion is found to be well taken, especially

as to the documentary evidence. The motion is granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618, 2620, 3126; Dec. Dig. § 592.*]

Error from City Court of Cartersville; A. M. Fonte, Judge.

Action between George W. Brooke and others and A. Waller & Co. From the judgment, Brooke and others bring error. Affirmed.

Finley & Henson, for plaintiffs in error. Paul F. Akin and Watt H. Milner, for defendants in error.

POWELL, J. Writ of error dismissed.

(10 Ga. App. 401)

FLAHIVE v. STATE. (No. 3,843.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. FORMER DECISIONS CONTROLLING.

The legal questions raised by the assignments of error in this case in the main are of the same general character as those dealt with by this court in the cases of Cassidy v. State, 72 S. E. 939, and Jackson v. State, Id. 941, decided November 20, 1911, and are fully controlled by the decisions in these cases.

2. CRIMINAL LAW (§§ 865, 1174*)—DELIBERATIONS OF JURY.

After the jurors had been out for some time considering of their verdict, it was not error for the trial judge to have them brought into court, and to inquire if they were likely to make a verdict, and how they stood. While the practice of asking a jury in a criminal case how they stand is not approved by a majority of this court, yet where the trial judge says nothing by way of intimation or expression of an opinion on the facts, or to induce the jury to make a verdict, the mere inquiry would be presumptively harmless and especially so in a case like the present one, where the evidence for the prosecution demanded the verdict of guilt. Ball v. State, 9 Ga. App. 162, 70 S. E. 888.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2069, 3170-3178; Dec. Dig. §§ 865, 1174.*]

3. INTOXICATING LIQUORS (§ 139*)—KEEPING LIQUORS ON HAND AT "PLACE OF BUSINESS."

The following charge of the court, not only embodied a correct principle of law, but was concretely applicable to the evidence in the case: "I charge you that if one lives at or near his place of business, and keeps on hand alcoholic, spirituous, or intoxicating liquors in his dwelling house, and said dwelling house is used in connection with his place of business as part of the place of business, and the purpose of keeping such liquors in said dwelling is to have such liquors conveniently located to the immediate place of business, such dwelling house would be in law a part of the 'place of business,' and such keeping on hand with such purpose would be a violation of the law, and would be having and keeping on hand alcoholic, spirituous, and intoxicating liquors at one's place of business."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 139.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

4. INTOXICATING LIQUORS (§ 139*)—KEEPING LIQUORS ON HAND AT PLACE OF BUSINESS.

The following excerpt from the charge contains a correct principle of law and one pertinent to the evidence in the case: "I charge you that all parts of one's place of business, including rooms, closets, stairs, yards, and courts used in connection with the place of business itself, are a part and parcel of the place of business."

No error of law appears and the evidence strongly supports the verdict.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 139.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Mrs. J. J. Flahive, alias M. C. Flahive, was convicted of keeping intoxicating liquors on hand at her place of business, and brings error. Affirmed.

Jno. P. Ross, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 289)

QUEEN INS. CO. v. PETERS. (No. 3,402.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES (§ 109*)—REMANDING CAUSE TO STATE COURT—EFFECT.

The judgment of the United States Circuit Court, remanding a case to the state court from which it has been removed, is final, and it is the duty of the state court to receive jurisdiction and proceed with the trial.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 235; Dec. Dig. § 109.*]

2. INSURANCE (§ 156*)—VALIDITY OF CONTRACT—DECEASED PERSON AS INSURED.

Courts will draw every reasonable deduction to uphold contracts of insurance. A contract of insurance issued in the name of a dead man as the insured will not for that reason alone be held invalid. Unless it appears to the contrary, the company will be presumed to have known the fact that the person named as the insured was dead, and that the contract was made for the benefit of the person or persons representing the estate. And especially is this true where the policy itself expressly provides that, "wherever in this policy the word 'insured' occurs, it shall be held to include the legal representatives of the insured."

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 156.*]

3. INSURANCE (§ 624*)—ACTION ON POLICY—PARTY.

The administrator on the estate of the insured is the proper personal representative of the insured intestate to sue on a policy contract issued in the name of the insured intestate.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 624.*]

4. INSURANCE (§ 675*)—ACTIONS ON POLICIES—ATTORNEY'S FEES AND DAMAGES.

Where the amount of the verdict is substantially less than the amount claimed in the proofs of loss and sued for, a verdict for attorney's fees and damages was unauthorized. Besides, the question of law involved in the present case was sufficiently doubtful and important to rebut the existence of bad faith on the part

of the company in its refusal to pay the policy and in contesting its validity.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 875.*]

Error from City Court of Moultrie; J. D. McKenzia, Judge.

Action by Beulah Peters, administratrix, against the Queen Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

King, Spalding & Underwood, for plaintiff in error. J. A. Wilkes and Shipp & Kline, for defendant in error.

HILL, C. J. Mrs. Beulah Peters, administratrix of M. Mathis, sued the Queen Insurance Company upon a policy of insurance issued in the name of M. Mathis, covering a building and the furniture therein. The verdict was for plaintiff for \$1,300 on the building, \$250 as attorney's fees, and 12½ per cent. damages. At the proper time application was made to remove the case to the Circuit Court of the United States upon the ground of diversity of citizenship. The judge of the state court refused to pass an order of removal, being of the opinion that the attorney's fees sued for under Civil Code 1910, § 2549, were part of the costs and could not be computed in calculating the necessary jurisdictional amount. There was no exception to this judgment of the state court. Subsequently the record was filed in the United States court, and on a hearing before the judge of that court the case was remanded for trial to the state court, Judge Speer concurring in the view of the former court, and over objection by the defendant the case proceeded to trial in the state court. The evidence is not in conflict, and briefly stated is as follows:

The policy of insurance sued upon was issued by the Queen Insurance Company January 2, 1908, in the name of "M. Mathis" as the insured; no other person being mentioned, nor any words of description added. The fire which destroyed the property covered by the policy took place on December 8, 1909. The policy was in force at the time of the fire. On February 1, 1909, the plaintiff, Mrs. Beulah Peters, was duly appointed administratrix upon the estate of M. Mathis, who was dead when the policy was issued, having died in January, 1897. He left surviving him a widow and six children, the plaintiff being one of them, and the widow was still in life when the suit was filed. M. Mathis left no debts, and left other property besides that covered by the policy. No other administration was ever had upon his estate. Except proof of the value of the property insured and destroyed, and what would constitute reasonable attorney's fees, no oral testimony was introduced. The documentary evidence consisted of exemplified copies of letters of administration, deeds

showing title to the property in M. Mathis, the policy of insurance declared upon, proofs of loss by the administratrix, agreed statement as to the removal proceedings, and admissions of death of M. Mathis, relationship, etc., recited above. While there are several grounds of error in the motion for a new trial, all of them can be properly condensed into two: (1) As to the jurisdiction of the court; (2) as to the validity of the policy contract.

[1] 1. We do not deem it necessary to decide the question of jurisdiction, or to determine whether the attorney's fees claimed should be regarded as costs or as damages. In view of the language of the statute of this state in allowing the recovery of 25 per cent. on the liability in addition to the loss, and the decisions of this court and the Supreme Court, we are inclined to think that attorney's fees allowed in such cases are a substantive part of the damages, and are not "costs." Civil Code 1910, §§ 2549, 5992; Missouri Insurance Co. v. Lovelace, 1 Ga. App. 449 (6), 58 S. E. 93; Traders' Insurance Co. v. Mann, 118 Ga. 385, 45 S. E. 426. Irrespective of this question, however, the decision of the learned judge presiding in the United States Circuit Court is final on the subject of jurisdiction. Peters v. Queen Ins. Co. (C. C.) 182 Fed. 112. Even if the judge of the state court had granted an order of removal when the application was made to him, when the federal court remanded it to the state court, it was the duty of the state court to receive jurisdiction and proceed as if the erroneous order of removal had not been granted. 4 Fed. St. Ann., pp. 258, 259, and citations. In other words, the jurisdiction of the state court would not have been lost, but only suspended, and when the case was remanded the question of jurisdiction was finally settled. We do not mean to say that the defendant, when the application was made in the state court to remove and was refused, could not have preserved exceptions pendente lite, or that, when the judge of the federal court remanded the case to the state court for trial, an appeal could not have been had to the United States Circuit Court of Appeals. But neither was done, and the question of jurisdiction is settled by the decision of the federal court, remanding the case for trial to the state court.

[2] 2. Was the contract valid? The plaintiff in error says not, because M. Mathis was dead when the policy was issued, and a dead man cannot contract, and there must be "parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject-matter upon which it can operate." Civil Code 1910, § 4222. Certainly the insurance company made a contract of insurance with some one. It received from some one the premium

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as a consideration for the contract, and there was the property insured as the subject-matter. It may be conceded that a "dead person" cannot make a contract. But cannot a person having an insurable interest in the property make a contract of insurance in the name of the dead person, for the benefit of his estate or some one having an insurable interest in the property covered by the contract? Would not the "other party" to the contract, who had paid the company the premium, or the party having an interest in the property, be the applicant for the insurance? As matter of common knowledge, we know that business is frequently continued in the names of individuals or firms long after the individuals, or all the members of the original firm, have died. Is it unusual, unreasonable, or illegal for the heirs of an estate, before division, or the legatees before distribution, or the legal representatives of an estate, to continue the business and to make contracts in the name of the testator or intestate? It cannot be doubted that if the insurance company in the instant case had knowledge when the policy was issued that "M. Mathis" was dead, and knew who were the real parties at interest, it would be bound. It could not in good faith with such knowledge make the contract and receive the premium, and then deny the validity of the contract.

Every reasonable intendment and every reasonable presumption must be indulged in to uphold the contract. Is it unreasonable that the company should be deemed to know with whom it contracted, and whether M. Mathis was then alive, or, if dead, whether the person who paid the premium was presumptively interested in the property? The evidence does not positively disclose who did in fact take out this policy, or who paid the premiums. Probably M. Mathis during his life took out the original policy, and his children and heirs renewed it from year to year in his name. There had been no division of the estate. We hold it fairly inferable that some person with an insurable interest in the property made the contract with the company and paid the premiums, in the absence of positive evidence to the contrary, and we are unwilling to declare the contract of insurance invalid at the instance of the insurance company. *It was alive*, made the contract, received consideration therefor in the premium, and the loss insured against admittedly occurred. To declare the contract invalid would certainly damage the "other party." To uphold it cannot damage the company, for it agreed to pay the loss to the one having an insurable interest in the property or to his personal representatives, and the contingency insured against happened.

Besides, we think the provisions of the policy contract itself cover the very question now discussed. The policy expressly provides:

"Whenever in this policy the word 'insured' occurs, it shall be held to include the legal representatives of the insured." We are aware that this provision is inserted in policies of insurance to meet any change in the title caused by the death of the insured; but it is broad enough to embrace the facts of the present case. Under this provision the contract was made, not only for the benefit of the "insured," but for his "legal representatives." Here the facts show that the plaintiff is not only the "legal representative" of the insured, but is part owner of the property insured, in both capacities having an insurable interest. This clause in the policy establishes a privity between the company and the legal representatives of the insured. Where no hurtful fraud is proved in the procurement of a contract of insurance, and the premiums are paid at the time of the loss, the company should be held to performance, unless some reason stronger than mere technical objection is presented, and one demanded by substantial justice and clear law. We conclude that the trial judge did not err in holding that the contract was valid.

[3] 3. Neither do we think that there was any necessity to reform the contract, or that the administratrix was not the right party plaintiff. We presume, from the fact that an administratrix was appointed, in view of the admission that the intestate left no debts, that the estate had not been settled by consent of the heirs. The administratrix was the personal representative of the intestate, to collect debts due the estate. Indeed, we think the insurance company could legally have required the appointment of an administrator before paying the loss. Under Civil Code 1910, §§ 3657, 3929, and 3933, and the decision in *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44, the heirs of the intestate insured could not bring suit on the policy without alleging and proving that there was no administration.

[4] 4. The verdict for attorney's fees and damages was not warranted, for two reasons: First, the amount claimed to be due on proof of loss and sued for was \$1,500, and the verdict was for \$1,300. This was equivalent to finding that the company was justifiable in resisting the claim. *Southern Mutual Insurance Co. v. Turnley*, 100 Ga. 303, 27 S. E. 975; *Insurance Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006; *Insurance Co. v. Shepherd*, 85 Ga. 765 (2), 12 S. E. 18. The evidence did not show bad faith in refusing to pay the loss, and the legal questions made were sufficiently doubtful and important to warrant the company in contesting the suit.

The judgment is affirmed, with direction that the plaintiff write off from the judgment the amount received as attorney's fees and damages.

Judgment affirmed, with direction.

(10 Ga. App. 296)

MAYOR, etc., OF CITY OF MACON v. MORRIS. (No. 3,423.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.**

The evidence, though apparently preponderating against the verdict, is nevertheless not legally inadequate to make the finding of the jury conclusive on this court as to the facts of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. MUNICIPAL CORPORATIONS (§§ 759, 821*)—TORTS—DEFECTS IN STREETS—QUESTION FOR JURY.

Where territory is lawfully annexed to a city, the new area becomes "a part of the city for all municipal purposes," and the public highways therein become streets of the city, and the city becomes chargeable with the duty of using reasonable diligence in seeing that they are placed and kept in such condition as will make passage thereon reasonably safe. As to defects existing in the highway at the time of the annexation, the city does not become chargeable with liability until it has discovered them, or, in the exercise of ordinary and reasonable diligence, should have discovered them, and until it has then had a reasonable opportunity to remedy them.

(a) What is a reasonable time or opportunity in these respects is ordinarily a question for the jury, to be determined upon a consideration of all the illustrative facts as they may appear.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1595-1600, 1745-1757; Dec. Dig. §§ 759, 821.*]

3. MUNICIPAL CORPORATIONS (§ 790*)—TORTS—DEFECT IN STREETS—NOTICE OF DEFECT.

Policemen, unless what may be called their common-law duties have been enlarged, are mere peace officers, not chargeable with the duty of observing or inspecting the condition of the city highways, and in such cases are not channels for the communication of implied notice to the city of defects in a street; but the city may enlarge their powers by ordinances, rules, or instructions affecting their employment, and putting on them the duty of inspecting for, and of reporting as to, defects, and in that event notice and negligence may be implied through them.

(a) A like rule applies as to employees of the sanitary department. Primarily they would be concerned only with matters relating to the public health; but the city may put on them the duty of observing and reporting the condition of other things (e. g., the condition of drains and sewers in the highways), and in that event notice and negligence may be implied through them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1645, 1648; Dec. Dig. § 790.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Ruth Morris against the Mayor and Council of the City of Macon. Judgment for plaintiff, and defendant brings error. Affirmed.

On March 4, 1910, certain contiguous suburbs of considerable area were annexed to the city of Macon, as a result of an elec-

tion held under a special act of the General Assembly. In this new territory there were a number of highways previously kept up by the county authorities; and one of these was known as Giles street. Early in the night of March 11, 1910, Mrs. Morris, plaintiff, started to the home of her sister, who lived on Giles street. She had never previously been on the street. She left the street car at a nearby point, and as she was going down Giles street on what was not, strictly speaking, a sidewalk, but was a part of the street (on its edge nearest the property line) which was commonly used by pedestrians, she fell into an unguarded sewer opening and was injured. The contour of the street surface was such as to hide the opening from any one approaching from the direction she came, especially at night, but could easily be seen by any one traveling the street in the opposite direction. The danger of the situation was inherent in the method of its original construction, which was done by the county authorities. She sued the city for damages because of her injury, and recovered a verdict of \$1,000. No negligence on the plaintiff's part is asserted. It is also practically conceded that the sewer was originally constructed and maintained by the county authorities in a negligent way. The defense of the city is that it did not know of this defect in the highway, and that it had not had control over this new territory long enough for negligence to be imputed to it for not discovering and relieving the dangerous situation. The case comes to this court on exceptions filed by the city to the overruling of a demurrer to the petition and to the refusal of a new trial.

Lane & Park, for plaintiff in error. J. F. Urquhart, Jno. P. Ross, and Akerman & Akerman, for defendant in error.

POWELL, J. (after stating the facts as above). [1] 1. If we had the power of a trial judge as to granting a new trial on the facts of a case, we would grant one in this case. If we had been on the jury, we would not have found the city liable. There are in the record complete photographs of the scene of the injury, and when we look at them, and see how little there was to attract any immediate attention to the danger incident to the method in which this sewer had been located and constructed, when we consider what short time the city had had to look over its vast newly acquired area, and to discover and remedy such previously existing conditions as were likely to cause hurt therein, when we ask ourselves if any body of prudent men, situated as the municipal body of Macon was situated, would likely have discovered and remedied this particular defect in the mere week's time that had elapsed between the date of the annexation

of the territory and the date of the injury, it seems to us that the jury's finding of negligence rests on a very meager basis. But it is nothing new for us to say that the jurisdiction of the jury to settle the facts is as final as is this court's jurisdiction to determine the law, and their finding of fact is entitled to the same respect from us as our decision on the law is entitled to receive from them. And no doubt, if a reciprocity of criticism were allowable, some of our decisions as to the law would seem as absurd to the jurors as their finding of facts seems to us in this case. There is a point at which facts cease to be issuable and the jurisdiction of the jury is withdrawn for the lack of anything for them to decide, when all the evidence and all the inferences to be drawn therefrom so irresistibly point to only one way as to leave no "scope for legitimate reasoning by the jury," and the only conclusion deducible from the facts is a matter of law, which the court may declare; but we cannot say that that point has been reached in this case. Hence we must abide by the finding of the jury, as much as it may shock us.

[2] 2. When the borders of the city of Macon were so enlarged as to take in new territory, that territory became at once "a part of the city for all municipal purposes," and such public highways as had been previously maintained thereon became city streets, and the city became chargeable with the duty of using reasonable care and diligence to place them in reasonably safe condition for public passage. *City of Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749. As to dangerous and defective conditions existing in the highways at the time of the annexation, the city did not become chargeable with liability until after it had discovered them, or until after such a length of time had elapsed that in the exercise of ordinary diligence it should have discovered them, and after it had then had reasonable opportunity to take the necessary steps to remedy them. The case of *City of Richmond v. Mason*, 109 Va. 546, 65 S. E. 8, is relied on by the plaintiff in error. The decision in that case is very strongly written, and runs along the line that a city does not become immediately liable for the defective condition of highways in annexed territory, that it must have a reasonable time in which to discover and then to remedy such conditions, that even five months may not be an unreasonable length of time for that purpose, and that what is a reasonable time is a mixed question of law and of fact. It is to be seen that the ruling there is perfectly consistent with what we are now deciding. In that case the verdict in the plaintiff's favor was set aside because the trial court refused to allow the city to show the recency of the annexation and the extent and condition of the new area, and to show what it had done to remedy conditions therein. In the present case proof of all these things was allowed by the trial court, and was passed on by the

jury under full, fair, and appropriate instructions.

[3] 3. The other serious question in the case is as to how far the city was responsible for the failure of its sanitary inspectors and its policemen to acquire knowledge of the dangerous condition of this sewer, which was not a part of the city's system of sanitary sewerage, but was used for surface drainage. As to the sanitary inspectors, the City Code put on them the duty of daily general sanitary inspection of "the condition of streets, sidewalks, pavements and street gutters, and the relative level of lots and streets and the system of drainage and sewers, in every lot, street and alley." Also in a book which denominated itself on its title page as the "Rules and Regulations Adopted by the Mayor and Council of the City of Macon for the Government of the Department of Police of said City," and which according to the testimony was the official book of rules kept in the headquarters of the police department and furnished to the policemen by the mayor and council for their guidance, were two rules requiring policemen to observe the condition of streets, sidewalks, and alleys, and to report anything likely to produce danger. In *City of Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709, it is decided that, unless the city has enlarged what may be called the common-law powers of its policemen, they are mere peace officers, charged with no duty respecting the condition of streets and sidewalks, and that, therefore, they were no such agents of the city as to be channels for the communication of implied notice of defects in the streets. In the same case, as reported in 102 Ga. 293, 29 S. E. 749, it is held that "an ordinance making it the duty of policemen to report to the lieutenants of police all footways, bridges, and sidewalks requiring repairs necessarily renders it incumbent on the lieutenants to report upon the same to the authorities whose duty it is to have the needed repairs made, and therefore under such an ordinance notice to a policeman or a lieutenant of a defective or dangerous place in a sidewalk is notice to the city." It seems that a like rule should apply as to sanitary inspectors. Primarily the sanitary department is concerned only with matters affecting the public health, but its officers may be charged by action of the city council with the further duty of observing and reporting other matters.

Now, the city cannot discharge the duty it owes the public of being reasonably diligent to discover defects in its streets without having some agents or agent to perform the service of observation and inspection. It is a very appropriate service to place upon the police department. Likewise, so far as the safety of the streets for public passage is affected by the location and condition of drains, sewers, and culverts, it is an appropriate service to require of the employés in the department having drains and sewers

in charge. We do not think that the court erred in allowing these ordinances and rules to be read in evidence, or in submitting to the jury the question as to whether through these employes notice to the city and negligence were to be implied. A distinction is asserted between ordinances placing the duty of inspection on policemen, and mere rules or instructions issued to the police department to the same effect. We see no reason for making a difference. The important thing is that this was one of the methods resorted to by the city of performing its duty of acquiring knowledge of the condition of its streets. It is plain from the evidence that policemen in Macon were employed with respect to these rules, and that the governing body of the city was accustomed to act upon the reports made under them. No one can read the testimony on this subject in the record, and doubt that the policemen of Macon are more than mere peace officers.

There are some assignments of error in the record which we have not taken up for discussion; but they are either controlled by the points that have been discussed, or are of too small importance to justify the grant of a new trial, even if they are well taken.

Judgment affirmed.

(10 Ga. App. 317)

ILLINOIS CENT. R. CO. v. DOUGHTY.
(No. 3,463.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 52*)—TRANSPORTATION OF GOODS
—LIABILITY FOR LOSS OR DAMAGE.

Under the Mississippi statute (Code Miss. 1906, § 4851), which provides, "Every bill of lading or other instrument in the nature or stead thereof, acknowledging receipt of property for transportation, shall be conclusive evidence in the hands of a bona fide holder for value, whether by assignment, pledge or otherwise, as against the person or corporation issuing the same, that the property has been so received," where a transportation company has issued a bill of lading for so many bales of cotton, weighing so many pounds, and describes it as being marked with certain letters of the alphabet, and the company tenders to a bona fide holder of the bill of lading the specified number of bales, which in fact weigh less than the weight stated, and are marked with different letters, and the holder of the bill of lading accepts the cotton, but stipulates that he does not accept it in satisfaction of the bill of lading, and sues the carrier, and it appears that the marks on the cotton were immaterial in fixing its value, *held*, that the carrier may show that the cotton tendered by it was the identical cotton received by it, despite the discrepancy in marks; but it is liable for the shortage in weight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 152; Dec. Dig. § 52.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by L. G. Doughty against the Illinois Central Railroad Company. Judgment

for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error. O. H. & R. S. Cohen, for defendant in error.

POWELL, J. A dealer in cotton at Granada, Miss., caused a compress company to deliver on his behalf to the Illinois Central Railroad Company a lot of cotton for shipment to Savannah, Ga., and received therefor a bill of lading describing it as 100 bales of cotton, weighing 51,990 pounds, marked "PAYK." This bill of lading was transferred to the plaintiff, Doughty, who took it as a bona fide holder for value. He demanded the 100 bales of cotton of this weight and marking. The delivering company at Savannah (the Illinois Central Company having undertaken to deliver it through connecting carriers) was unable to find any such cotton, but tendered 100 bales, marked "PARK," and of some 200 pounds less weight. Under an agreement between the plaintiff and the railroad company, he accepted this cotton without prejudice and sold it for the benefit of whom it might concern. He showed that he had bought the cotton as being of a certain grade, though he had no information as to the grade, except what the seller represented, and the seller, it appeared, had not actually graded the cotton before shipment. The railroad company undertook to show that the cotton which was delivered to it was marked "PARK," and not "PAYK," and that the cotton which it received was the identical cotton which it tendered in delivery (indeed, contended that the letters designated as "PAYK" in the bill of lading were not the letters "PAYK," but were the letters "PARK," and that what the plaintiff claimed to be a "Y," was in fact an "R"; but as the judge who tried the case without the intervention of a jury found that the bill of lading contained the "Y," that finding is binding on this court).

The showing, under the defendant's proof, which was first tentatively admitted and then ruled out, was very conclusive that it tendered in delivery the same cotton which it had received. The court ruled out this evidence, on the ground that its admission was forbidden by a statute of the state of Mississippi, where the shipment was made, which is contained in the Mississippi Code (section 4851), as follows: "Every bill of lading or other instrument in the nature or stead thereof, acknowledging receipt of property for transportation, shall be conclusive evidence in the hands of a bona fide holder for value, whether by assignment, pledge, or otherwise, as against the person or corporation issuing the same, that the property has been so received." It was conceded that the marking of the cotton was imma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

terial, except for purposes of identification; that it neither added to nor detracted from its value in any sense; that it designated neither weight nor grade.

We think that the court erred in ruling out the testimony offered by the defendant. The bill of lading was conclusive upon the company, both as to the number of bales and as to the weight, and, so far as these things tended to fix value, bound the company to deliver to the bona fide holder of the bill of lading cotton of that value. The proof which was offered was, therefore, not admissible for the purpose of contradicting the bill of lading in these respects, but was admissible to show the other element—that the cotton which the plaintiff shipped was not of the grade he represented it to be—and this was a material element in fixing the liability of the carrier. The bill of lading made no representation as to the grade of the cotton, and it was essential as a part of the plaintiff's case for him to prove what the grade was. The mere fact that the person who sold to him represented that it was of a certain grade would not supply that element of the case. And even if there had been testimony from him that the cotton which he delivered was in fact of a certain grade, it, nevertheless, would have been permissible for the company to show that it delivered this identical cotton, and that it did not come up to the grade which the plaintiff's testimony had tended to establish.

The rejected testimony should have been admitted; and, under the law as applied to this bill of lading, the carrier should have been held liable for the deficiency in weight, but not liable for the deficiency in grade. We think this is in harmony with the decisions of the Supreme Court of Mississippi, construing the statute of that state. See *Yazoo Ry. Co. v. Bent*, 94 Miss. 681, 47 South. 805, 22 L. R. A. (N. S.) 821; *Lloyd v. Kansas City R. Co.*, 88 Miss. 422, 40 South. 1005; *Ill. Cent. R. Co. v. Lancashire*, 79 Miss. 114, 30 South. 43; *Hazard v. Ill. C. R. Co.*, 67 Miss. 32, 7 South. 280.

Judgment reversed.

(10 Ga. App. 375)

MOORE v. KENDALL (No. 3,537.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 194*)—CLAIMS OF THIRD PERSONS—EVIDENCE.

The presumption of ownership, arising from the recital made by the levying officer in the entry of the levy that the property levied upon was in the possession of the defendant in *fi. fa.* at the time of the levy, was fully rebutted by the undisputed evidence in behalf of the claimant. The verdict in the justice's court finding the property subject was contrary to law, because it was without any evidence to support it and in direct conflict with the undisputed evidence. The certiorari by the claimant

should have been sustained by the judge of the superior court.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 194.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Claim case between Indiana Moore and T. B. Kendall. Verdict for defendant before a justice was affirmed on certiorari, and claimant brings error. Reversed.

C. D. McGregor, for plaintiff in error. F. M. Richards, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 286)

HAMMOND v. JACQUES (No. 3,371.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 17*)—GROUNDS—DEPOSITIONS—FAILURE TO GIVE NOTICE.

It not appearing to the satisfaction of the court that the opposite party was served with notice of the depositions which the court had admitted in evidence, and it subsequently appearing, upon the hearing of the motion for new trial, that the attorney, who was notified, did not in fact represent the defendant at the time that the notice of the taking of the depositions was given to him, it was not error to grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 23; Dec. Dig. § 17.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by Mrs. E. H. Hammond against G. A. Jacques. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Affirmed.

R. G. Hartsfield and Will H. Krause, for plaintiff in error. Russell, Fleming & Custer, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 329)

CHARLESTON & W. C. RY. CO. v. FINLEY
(No. 3,480.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 256*)—INJURIES TO SERVANT—ACTIONS—PLEADING.

The petition set out a cause of action both in form and substance, and the demurrer, general and special, was properly overruled.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 256.*]

2. PLEADING (§ 369*)—ELECTION BETWEEN ACTS CHARGED—NECESSITY.

In cases where two or more acts of negligence, or other wrongs, are set forth, either one of which alone, or in connection with others alleged, caused or contributed to the injury for which suit is brought, the plaintiff is not required to elect upon which alleged act of negligence or wrong he will go to trial, but he can recover such damages as he has sustained, whether the damages arise from one

or from all of the acts of negligence or wrongs alleged, provided the evidence shows that the injury was proximately caused by some one of the acts of negligence or other wrongs; that is, the plaintiff is entitled to recover damages either for negligence or willful misconduct as alleged on the part of the defendant, according to the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

3. SUFFICIENCY OF CHARGE—No ERROR.

Excerpts from the charge in effect embodying the foregoing principle of law were not erroneous.

4. NEW TRIAL (§ 105*) — GROUNDS — NEWLY DISCOVERED EVIDENCE — CUMULATIVE AND IMPEACHING EVIDENCE.

A new trial will not be granted for newly discovered testimony merely cumulative and impeaching in character, and which would probably not produce a different result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221-223, 229; Dec. Dig. § 105.*]

5. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—ACTION—SUFFICIENCY OF EVIDENCE.

The record discloses no material error, and the verdict is supported by some evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by W. F. Finley against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Miller, for plaintiff in error. Isaac S. Peebles, Jr., and Sidney Smith, for defendant in error.

HILL, C. J. W. F. Finley, employed by the Charleston & Western Carolina Railway Company as a freight train hand running from McCormick to Anderson, S. C., sued to recover damages for personal injuries received June 14, 1907, at a station called Hesters, in South Carolina. A verdict was returned in his favor for the sum of \$1,500, and the company's motion for a new trial was overruled. The petition alleged, in substance, that the injury for which suit was brought was received by the plaintiff in the following manner: The freight train stopped at a station called Hesters for the purpose of unloading freight; part of the freight consisting of a barrel of kerosene oil weighing about 600 pounds. The conductor of the train entered the freight car which contained the barrel of oil at a point opposite to where the freight was usually unloaded, and rolled this barrel of oil to an open door of the freight car, and ordered the plaintiff, who was standing on the ground at the door of the car, to take hold of the barrel of oil and place it upon the ground; that on giving this order the conductor pushed the barrel of oil half clear of the threshold of the car door, so that one end of the barrel was held by the plaintiff and the other was resting on the door sill of the car. While the

barrel was in this position, the plaintiff objected to the order of the conductor, and complained that the barrel was too heavy, and that he could not lift and handle it alone. Thereupon the conductor, repeating his order with an oath, without warning pushed the barrel of oil clear of the side of the car, upon the plaintiff. He attempted to get from under the barrel, but its weight was on him before he was aware of the intention of the conductor to push the barrel out upon him. The barrel, falling upon him, caused the injury for which he seeks to recover damages, and he alleges that the proximate cause of this injury was the negligent act of the conductor in pushing the barrel of oil upon him without giving him time to get from under the same, and without warning him of his intention. He also alleges that this act of the conductor in pushing the barrel of oil upon him without giving him warning of his intention, so that the plaintiff could escape the consequences of the conductor's act, was wanton conduct, for which the company is liable in punitive damages. He alleges, further, that the defendant company was negligent in failing to furnish a sufficient number of hands to handle the freight; the regular complement of a freight train consisting of four brakemen or train hands, and there being at the time only two employed by the company. He also alleges that the company was negligent, in that it failed to furnish proper appliances, such as planks or skids, with which to handle and unload this heavy barrel of oil from the box car.

The defendant filed a demurrer, on general and special grounds, which was overruled, and exceptions pendente lite were preserved. The general demurrer was based upon two grounds: (1) That the allegations of the petition failed to show a cause of action; and (2) that the allegations affirmatively showed that the injury was caused by an assumed risk of the employment. The special demurrer was based upon the two grounds that the plaintiff failed to allege why he alone took hold of the barrel of oil, when he saw its size and voluntarily assumed a position of danger, and that he failed to allege the names of the train crew who were absent.

[1] 1. There was no error in overruling the demurrer. The allegations plainly set forth a cause of action resulting from the conduct of the conductor as specifically described. The act of the conductor in pushing the barrel of oil without warning upon the plaintiff was not an assumed risk of the plaintiff's employment. The petition alleges plainly that the plaintiff took hold of the barrel of oil, notwithstanding its size, in obedience to the order of the conductor, assuming that he would have the assistance of the conductor in rolling the barrel from the car to the ground. The names of the two absent mem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bers of the train crew were wholly immaterial, if in fact four were needed, as alleged, and only two were furnished. Counsel for the plaintiff in error contends that, whatever danger there was in the unloading of this heavy barrel of oil, it was open and obvious to the plaintiff; that he was not misled, and therefore he cannot recover, either under the laws of Georgia or of South Carolina, where the injury occurred; and that it was simply a case where the plaintiff made a miscalculation as to his strength or as to the weight of the barrel; and he relies in support of his position upon those cases decided by the Supreme Court which hold that under such facts no cause of action is shown, such as *Worlds v. Georgia Railroad*, 99 Ga. 283, 25 S. E. 646, where the employé was ordered to lift and carry cross-ties unaided some 100 yards, *Central Railway v. Henderson*, 6 Ga. App. 459, 65 S. E. 297, where the employé was ordered to work under a crossbar resting on two posts, and the crossbar fell on him, and *Freeman v. Savannah Electric Co.*, 130 Ga. 449, 60 S. E. 1042, where the employé attempted to work a defective brake. The present case is clearly distinguishable from these cases and kindred cases, in that the petition alleges that the proximate cause of the injury was the conduct of the conductor in pushing the heavy barrel of oil, without warning, upon the plaintiff, and without giving him an opportunity of getting from under it.

[2, 3] 2, 3. Certain excerpts from the charge are assigned as error. These excerpts relate to the allegation that the master was negligent in failing to supply a sufficient force of workmen for the operation of the train, and in failing to supply its employées with suitable machinery and appliances for unloading heavy freight. It is insisted that these instructions were not applicable to the case, in that the plaintiff's positive evidence proved that the proximate cause of his injury was the act of the conductor in pushing the barrel of oil directly upon him without warning, and thus excluded the other allegations of negligence. Unquestionably the excerpts objected to contain correct principles of law. They were certainly applicable to the allegations of the petition. But, even if they were wholly inapplicable to any of the evidence, we do not think that the defendant was injured thereby, or that the jury were misled in thinking, from the fact that these principles were charged, that there was evidence in the case to which they applied.

As a matter of fact the plaintiff testified that there was an insufficient number of hands, and that there was a failure to furnish proper appliances to enable to unload safely the heavy freight. But, regardless of these allegations of negligence, it is manifest that the jury were authorized to find a verdict for the plaintiff, if they believed his testimony as to the act of the conductor in pushing the barrel of oil upon him without

warning, irrespective of all the other allegations. In other words, where the evidence shows that the plaintiff was entitled to recover the amount of damages awarded him under one of the allegations on which he relied for recovery, we do not feel that we are required to grant a new trial because there were other allegations as to acts of negligence which he did not prove were the proximate causes of his injury. If the jury believed the evidence of the plaintiff, and they had a right to believe it, he was entitled to recover, notwithstanding the fact that there were other allegations on which there was no proof. In our opinion, where two or more causes of negligence are set out in a petition, and damages are also claimed because of the willful and wanton act done by an employé in the scope of his employment, the plaintiff would have a right to recover, either upon one or more of the acts of negligence alleged, or upon the willful and wanton act, according to the proof. He would not be required to elect between the acts of negligence and the willful and wanton conduct; but he could submit his whole case to the jury, and if he proved either one, and this one was the proximate cause of the injury, either alone or in connection with the others, it would be sufficient to sustain a verdict in his behalf.

It is not necessary for the jury to agree on one act of negligence, or on the willful and wanton act. Some of the jury might believe one, and some the other, and the verdict would be authorized, although in arriving at it the jurors pursued different routes. And in such case certainly the defendant would have no right to complain because the judge in his general instructions charged the jury separately as to the rights and defenses relating to the allegations of negligence, and as to the claim of willful misconduct. This, we think, is what is meant by the decisions of this court in *Central of Georgia Ry. Co. v. Moore*, 5 Ga. App. 564, 63 S. E. 642, and the Supreme Court in *Southern Ry. Co. v. Davis*, 132 Ga. 812, 65 S. E. 131. See, also, the case of *Boggero v. Southern Ry. Co.* (Supreme Court of South Carolina) 64 S. C. 104, 41 S. E. 822, relating to the statute of South Carolina applicable to the present case. In this latter case the following charge substantially was approved: "I charge you that, in all cases where two or more acts of negligence or other wrongs are set forth in a complaint as causing or contributing to the injury for which suit is brought by plaintiff, the plaintiff is not required to elect upon which alleged act of negligence or wrong he will go to trial, but he is entitled to submit his whole case to the jury, under the instructions of the court, and recover such damages as he has sustained, whether such damages arise from one or all of such acts of wrong alleged in the complaint, provided the jury believe from the evidence that plaintiff was injured, the result of which was due

to the negligence of the plaintiff, which was the proximate cause of any or all of the alleged acts of negligence or wrong; that is, the plaintiff is entitled to recover damages both for negligence and willful misconduct on the part of defendant or its agents according to proof." What we have said here is applicable to all the excerpts from the charge which are objected to.

[4] 4. The plaintiff in error insists that the employé was not injured to the extent that he alleged; that the hernia from which he was suffering was not caused by the heavy barrel of oil being pushed upon him, and by his effort to extricate himself from the danger caused thereby, but that he had previously suffered from this trouble; and to support this allegation it submits, as a part of its motion for a new trial, alleged newly discovered testimony. This question was squarely made an issue on the trial, and the evidence was in direct conflict. The alleged newly discovered testimony would simply be cumulative and impeaching in character, and we do not think it would be likely to produce a different result on another trial. This being so, we cannot hold that the trial judge abused his discretion in refusing a new trial on this ground.

[5] After giving to all the assignments of error a careful consideration, we are satisfied that there was no material error of law committed against the defendant; that, while some of the charge was inapplicable, it was not misleading or prejudicial; that the justice of the verdict rests upon the willful act of the conductor in pushing the barrel of oil on the plaintiff without warning and without giving him an opportunity of escaping the result consequent upon such act. If this was the proximate cause of the injury, the plaintiff was entitled to recover damages, and the jury had the right to believe the evidence of the plaintiff on this subject. The amount of the verdict is not excessive, in view of the injury shown by the testimony of the plaintiff, and of the further fact that the jury were authorized to find that the wrong complained of was attended by circumstances of aggravation.

Judgment affirmed.

(10 Ga. App. 245)

FRANKLIN LIFE INS. CO. v. BOYKIN.
(No. 3,502.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

INSURANCE (§ 141*)—ACTION FOR PREMIUM—DEFENSES.

It being undisputed in the evidence that the insured retained in his possession the policy of insurance (with a receipt acknowledging the payment of the first premium attached thereto), and made no effort to return the contract of insurance to the insurer, merely expressing dissatisfaction therewith and inability

to pay the note given for the premium, a verdict for the defendant in a suit brought by the insurance company upon a note given for a premium upon the policy was contrary to law.

The insured cannot defeat payment of the premium upon a policy of insurance issued at his instance while he still retains the contract, the very issuance and delivery of which depend upon a cross-obligation that the premiums will be paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 253-262; Dec. Dig. § 141.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by the Franklin Life Insurance Company against W. S. Boykin. Judgment for plaintiff, and defendant brings error. Reversed.

E. T. Moon, for plaintiff in error. E. A. Jones, for defendant in error.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 411)

ATLANTIC COAST LINE R. CO. v. CHEEKS. (No. 3,478.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. INJURIES TO TRESPASSEE—PLEADING.

The court erred in not compelling the plaintiff to state his case more definitely in response to the special demurrers.

(Additional Syllabus by Editorial Staff.)

2. PLEADING (§ 8*) — CONCLUSIONS AND FACTS.

If decedent was a trespasser on defendant's tracks, no liability exists in an action against defendant, unless the petition shows by allegations of fact, and not mere statements of conclusion, that the engineer acted with wantonness or willfulness.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. NEGLIGENCE (§ 110*)—PLEADING—DUTY OF CARE.

In an action for death of plaintiff's decedent on defendant's tracks, petition is insufficient which fails to show whether decedent was a passenger, employé, licensee, or trespasser.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 110.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Clara Cheeks against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. K. Miller, for plaintiff in error. C. H. & R. S. Cohen and T. F. Harrison, for defendant in error.

POWELL, J. The nice questions ably argued by counsel for the respective sides cannot be intelligently passed on by the court, because the allegations of the petition are too indefinite to present these questions clearly. There were special demurrers de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

manding greater certainty, and the court overruled them, and exception is duly taken. We think it best to leave the question of ultimate liability open till the petition is made more specific.

[2] To aid the court in the further conduct of the case, let us say that, if the decedent was a plain trespasser on the defendant's tracks, no liability exists, unless the petition is made to show by its allegations of fact, and not by mere statements of conclusions, that the engineer acted with wantonness or willfulness. This is the rule in the state where the case arose, as well as in this state. If the plaintiff relies on prior negligence of the defendant in putting the decedent on its tracks, the full circumstances as to this should be disclosed.

[1,3] The third ground of the original demurrer was well taken, so far as it called for the facts showing whether the decedent was a passenger, employe, licensee, or trespasser, and showing what duty the defendant owed him and the facts from which that duty arose. Likewise, the first paragraph of the demurrer to the petition as amended should have been sustained, so far as it calls for further information, and so far as it points out the ambiguity of allegation as to whether the decedent was actually unconscious, or merely helpless, though not unconscious. The second paragraph of this second demurrer should have been sustained, so far as it points out deficiency of allegation as to how or wherein the defendant was negligent in ejecting the decedent, and as to where the ejection occurred, and wherein the ejection at that place was improper. Let these points be brought out with clearness, and then the court can say whether a cause of action is set forth or not.

Judgment reversed.

(10 Ga. App. 408)

McCULLOUGH v. STATE. (No. 3,854.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. RAPE (§ 53*)—ASSAULT WITH INTENT TO RAPE—CRIMINAL PROSECUTION—EVIDENCE.

Where a negro man is on trial, charged with the crime of making a felonious assault upon a white woman, the jury may, in determining the intent with which the assault was made, take into consideration the difference in race and social customs founded thereon, and, in the absence of any encouragement given by the woman, find that a felonious intent existed, even where the assault was not aggravated, and was immediately abandoned upon show of resentment and indignation.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-81; Dec. Dig. § 53.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Where the general charge embodies in substance legal principles contained in written re-

quests, any error in refusing to charge the latter is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. RAPE (§ 59*)—ASSAULT WITH INTENT TO RAPE—INSTRUCTIONS.

On the trial of an indictment for an assault and battery with intent to rape, where the evidence shows that the lesser offense was committed as a part of the felony, it is ordinarily the duty of the trial judge to define the offense of assault and battery; but an instruction to the effect that if the accused, at the time of making the assault and battery upon the woman, did not entertain the felonious intent charged, he would be guilty of the lesser offense of assault and battery, was substantially equivalent to a definition of assault and battery, as pertinent to the evidence.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 59.*]

4. CRIMINAL LAW (§ 554*)—EVIDENCE—SUFFICIENCY—STATEMENT OF ACCUSED.

While the jury may believe the statement of the accused in preference to the evidence, they should do so only in the event that they believe the statement to be the truth of the transaction. A charge to this effect was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.*]

5. CRIMINAL LAW (§ 1181*)—WRIT OF ERROR—REVIEW—QUESTIONS CONSIDERED.

Objections to rulings on the admission of testimony, that will probably not occur on a second trial, require no decision.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1181.*]

6. CRIMINAL LAW (§ 874*)—TRIAL—VERDICT—POLLING JURY.

The right to poll the jury in a criminal case is an important legal right, that should not in any manner be abridged or rendered nugatory by any action of the trial judge. This right must be demanded when the verdict is published, and before the jury disperses, and before sentence is imposed. It cannot be exercised, with justice to the state or the accused, after the jury have dispersed, or after sentence has been passed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2085-2088; Dec. Dig. § 874.*]

7. CRIMINAL LAW (§ 933*)—TRIAL—VERDICT—POLLING JURY.

In a criminal case, where the evidence did not demand the verdict, and where the jury, after having been out considering of the verdict for some hours, returned into court, and the foreman handed the verdict to the solicitor general, who read it aloud, and immediately upon the conclusion of the reading the trial judge imposed the extreme penalty of the statute, by announcing "twenty years in the penitentiary," before the attorney for the accused had time to demand that the jury be polled, this conduct of the judge requires the grant of another trial. It deprived the accused of the exercise of his right to poll the jury, and the error was not cured by the subsequent permission to poll the jury; for the sentence destroyed the right, or rendered it worthless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 933.*]

(Additional Syllabus by Editorial Staff.)

8. WORDS AND PHRASES—"IMMEDIATELY."

In a recital in the bill of exceptions that "immediately" upon the reading of the verdict

the sentence was passed, the word "immediately" means instantly; at once.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3403-3410.]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Jerry McCullough was convicted of assault with intent to rape, and brings error. Reversed.

O. N. Starr, for plaintiff in error. T. C. Milner, Sol. Gen., for the State.

HILL, C. J. Jerry McCullough, a negro man, was convicted of assault with intent to rape; the alleged victim being a white woman. His motion for a new trial was overruled, and he brings error.

[1] 1. In view of the fact that we have decided that another trial should be granted on one of the special assignments of error, it is unnecessary to state the evidence. It is not improper, however, to say that the evidence for the prosecution makes a clear case of assault and battery, but leaves in doubt the felonious intent charged. But the intent with which an assault and battery was made is peculiarly a question to be determined by the jury, and under the repeated rulings of the Supreme Court illustrating the question of intent in cases where black men assault white women, with special reference to racial differences and the well-established customs which emphasize these differences, we do not feel authorized to disturb the verdict as being without any evidence tending to establish the felonious intent with which the assault and battery was committed. *Carter v. State*, 35 Ga. 265; *Jackson v. State*, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25; *Watkins v. State*, 68 Ga. 332; *Darden v. State*, 97 Ga. 407, 25 S. E. 676; *Dorsey v. State*, 108 Ga. 477, 34 S. E. 135. The doubt, however, on this point, which would unquestionably be sufficient to acquit of a felony, but for the decisions above cited, and which, even in the light of these decisions, under the evidence in the case, arises as to the intention of the accused in laying his hands on the woman without actual violence, and in desisting immediately upon the show of resentment on her part, accompanied by the declaration that he intended no harm, makes us the more readily grant a new trial on the assignment of error hereafter considered. If the evidence demanded the verdict as rendered, we would treat this error (which we deem presumptively to have been prejudicial under the facts of this case) as harmless.

[2] 2. Exceptions are made to the refusal of the court to give certain instructions requested, relating to the question of the necessity for the evidence to show the existence of the felonious intent charged in the indictment. These requests substantially state the law and make a concrete application to the facts; but an examination of the general charge shows that the material portions of

the instructions requested were substantially given, and were sufficiently applied to the facts to make clear the law to the jury.

[3] 3. Objection is also made to the omission of the trial judge to define the offenses of assault and battery and of simple assault. Under the evidence the charge should have defined the offense of assault and battery, but the judge distinctly told the jury that the accused would not be guilty of the felonious assault charged, unless, at the time he laid his hands upon the female, he intended to commit rape, but would be guilty of the offense of assault and battery, and this instruction was sufficient, in lieu of any more specific definition; for the jury could not have failed to understand, from this charge, that the unlawful laying of the hands upon the female by the accused, without a felonious intent, was in law an assault and battery. The indictment charging an assault and battery with a felonious intent, and the evidence showing an assault and battery, the trial judge could not properly have charged on the subject of simple assault.

[4] 4. Referring to the statement of the accused, the judge charged as follows: "You may believe it in preference to the sworn testimony, *provided* you believe it to be the truth." It is objected that the use of the word "provided" was an improper restriction of the unlimited right which the statute gives to the jury to believe the statement in preference to the testimony. We do not construe the statute to give to the jury this unrestricted right. The statute in terms says that the jury may believe the statement in preference to the testimony. It is a matter of discretion with the jury; but it would be absurd to claim that it was intended to give the jury the right to credit the statement, unless they believed it to be the truth of the transaction, and the use of the word "provided" did not restrict any legitimate right of the jury.

[5] 5. Several objections were made to the admission of testimony, but it is not deemed necessary to consider these objections, as they will hardly occur on the second trial.

[6, 7] 6. We come now to the assignment of error upon which we think, under the facts of this case, the accused should be granted another trial. As before stated, the evidence did not demand the finding. It was doubtful as to the felonious intent. The jury, if the evidence had been clear as to the intent, would promptly have rendered a verdict of conviction. They were out considering of the verdict for several hours, and the only matter about which there was any doubt, or which would have caused any hesitation on the part of any juror in promptly agreeing to the verdict as rendered, was the existence of the felonious intent charged. When they finally agreed and returned a verdict for a felony into court, the foreman handed the verdict to the solicitor gen-

eral, who published it. "Immediately" upon the conclusion of the reading of the verdict by the solicitor general, while the jury was still standing, and without giving counsel for the accused time to demand for his client the right to poll the jury, the presiding judge sentenced the accused in the following language: "Twenty years in the penitentiary"—the extreme limit of punishment allowed by the statute. This precipitate and severe sentence could have had but one effect upon the jury, namely, the impression of judicial approbation of the verdict and individual indignation against the accused. The sentence thus imposed deprived the accused of his legal right to poll the jury—at least, it destroyed any possible value which the accused could have acquired by the subsequent polling of the jury; for even if any juror had been reluctant in consenting to the verdict, and had changed his mind and had concluded to withdraw his assent when polled, this strong approval by the court of the verdict would have induced any wavering juror to abandon any intended dissent and to agree to the verdict on subsequent polling.

The manner in which the sentence was imposed was unusual. It was a striking variance from that orderly judicial procedure which has generally characterized the conduct of judges in imposing sentences in cases of such gravity. In a practice of 35 years, 12 years of which was as prosecuting attorney, the writer never knew the presiding judge to impose a sentence of such severity in a case of such grave character without first asking counsel and accused if there was any reason why sentence should not then be imposed, and he has never known the presiding judge in the slightest degree to interfere or prevent the full exercise of the right of the accused to poll the jury after the verdict had been published, or by word or deed to impair the possible value in the exercise of such right. This very unusual conduct of the judge must therefore have made a strong impression upon the minds of each one of the jurors, for it is altogether probable that they had never before seen it occur in court, a place where "justice is judicially administered." The writer does not mean by these remarks to animadvert upon the conduct of the judge in this case. He fully sympathizes with him in the indignation he felt on account of the heinousness of the crime of which the accused had been convicted; nevertheless, above everything else, although convicted, the accused should have been given the full, free, and valuable exercise of any right to which he was entitled under the law.

Practically the act of polling the jury has rarely resulted in beneficial result to the accused. In fact, after the experience above stated, the writer has never seen it result in any practical benefit; but, if there ever

was a case in which it might possibly result in benefit, it would be a case where, under the evidence, there was doubt as to the felonious intent, and where the jury had for several hours considered the evidence before arriving at a satisfactory conclusion as to the existence of such intent; for it must be conceded that nothing short of grave doubt would have caused hesitation in arriving at a verdict and a delay of several hours. The law of this state places a high value in criminal cases upon the right of the accused to poll the jury. In civil cases the right is discretionary with the presiding judge; but in criminal cases polling is not a privilege to be granted in the discretion of the judge, but is a legal right, and it has always been held to be a material and reversible error to refuse the free exercise of this right. *Tilton v. State*, 52 Ga. 478; *Russell v. State*, 68 Ga. 788; *Blankenship v. State*, 112 Ga. 402, 37 S. E. 732. Did the judge deprive the accused of this legal right or impair its value? For the reasons given above, we think that he did, because it made the subsequent exercise of the right which he granted worthless. The polling of the jury amounted to nothing, in the face of what was necessarily implied by the hasty and severe sentence. Besides, no opportunity was given to counsel for the accused to demand the right before the sentence was imposed.

[8] The recital in the bill of exception is that "immediately" upon the reading of the verdict the sentence was passed. The word "immediately" means "instantly; at once." *Standard Dictionary*. And when the judge verifies this recital in the bill of exceptions, it is equivalent to stating that "instantly," "at once," upon the reading of the verdict, he imposed the sentence.

In support of the views here stated we cite the case of *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017. In that case the Supreme Court holds that "it is too late to poll a jury after the sentence of the court has been pronounced." In the *Robinson Case* the jury had not separated and mingled with the public after the verdict had been published. This would destroy the right to poll; but the presiding judge, some minutes after the publication of the verdict, passed sentence, and the reason why it was too late to poll the jury after sentence had been imposed is stated by the court, in the body of the opinion, to be analogous to the reason that the right is lost after the jury have mingled with the public. The language of the opinion is as follows: "The well-settled rule that a request to poll a jury should be made before the members of it disperse and mingle with the bystanders is, of course, based upon the idea that it would be dangerous to allow a juror who might have heard something calculated to change his mind to have an opportunity to recede from

a verdict to which he had really agreed. Certainly nothing would be more likely to have such an effect than a sentence of which a juror did not approve. In this case the punishment inflicted was, we are informed, a term of 15 years in the penitentiary, and it would not have done to allow the jury to be polled after they knew what the judgment of the court was. We think it was a proper one, but no man can tell how the jurors may have regarded it, or that, after it was announced, some of them might not have desired to annul a verdict to which they had deliberately assented." The reason here stated by the Supreme Court for making it improper to poll a jury after the sentence had been passed is that some juror might, on account of the severity of the sentence, be induced to recede from his verdict. Logically the same reason applies where not only the severity of the sentence, but the manner in which it was imposed, might have led a reluctant juror to adhere to the verdict, although he had determined to recede therefrom when polled.

We think, under the principle here decided, that the accused in this case must be granted a new trial. In courts of justice, where order and deliberation should characterize every step of judicial procedure, no necessity should be created for an unseemly contest between the presiding judge and counsel for the accused. The attorney should not be required to be acutely on the alert, to precipitately, and immediately upon the reading of a verdict, jump to his feet and demand the right to poll the jury, for fear that the presiding judge might destroy this right by the too quick imposition of sentence. He should rest content in the knowledge that he will be given every opportunity to demand for his client every right to which he is under the law entitled, and that nothing will be done by the presiding judge to deprive him of this right, or to prevent its exercise in such manner as to secure to his client the full value which the law implies in the bestowal of the right. Judgment reversed.

(10 Ga. App. 392)

STORY v. WILLIAMS. (No. 3,631.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

FRAUD (§ 31*)—FRAUDULENT REPRESENTATIONS—MONEY VERDICT.

There being evidence in this case that the plaintiff was induced to part with the possession of his property by the fraudulent representations of the defendant, and that he was damaged thereby, and that immediately upon discovery of the fraud the plaintiff made an offer to rescind and restore whatever he had received from the defendant by virtue of the contract, a verdict in behalf of the plaintiff, he electing to take a money verdict in lieu of the

property, was authorized. Civil Code 1910, § 4305.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 81.*]

Error from City Court of Douglas; W. C. Lankford, Judge.

Action by Arthur Williams against Sam Story. Judgment for plaintiff, and defendant brings error. Affirmed.

O'Steen & Wallace, for plaintiff in error.
Quincey & McDonald, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 349)

LOUISVILLE & N. R. CO. v. ANDREWS.

(No. 3,518.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR.

The objections made to excerpts from the charge are supported by verbal inaccuracies, but there are no substantial or misleading errors, and the instructions, taken as a whole, fairly and clearly presented the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

There was conflict in the evidence, both as to the negligence alleged and the damages claimed. These conflicts were settled by the verdict, and, as no error of law of a prejudicial character appears, no reason is shown for the grant of another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by D. Andrews against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples, Bryan & Jordan, for plaintiff in error. Walter A. Sims, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 294)

SMITH v. JEWETT. (No. 3,407.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF (§ 38*)—REPRESENTATIONS AS TO CREDIT OF ANOTHER.

The court did not err in awarding a nonsuit. Section 4411 of the Civil Code of 1910, dealing with representations made to obtain credit for another, provides that "no action shall be sustained for deceit in representation to obtain credit for another, unless such misrepresentation be in writing, signed by the party to be charged therewith."

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 60; Dec. Dig. § 38.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by George B. Jewett against J. A. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

R. D. Feagin, O. C. Hancock, and J. F. Urquhart, for plaintiff in error. Guerry, Hall & Roberts, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 266)

HOOKS v. WILLIS. (No. 3,566.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1028*)—REVIEW—HARMLESS ERROR.

The evidence in this case, not only fully authorizes the amount of the verdict which the plaintiff recovered, but shows that he was entitled to a larger verdict than the one found in his favor. Some immaterial errors of law occurred during the trial; but these did not affect the merits of the case, and are not of sufficient gravity to warrant another trial. The material questions raised were issues of fact, on which the jury could only have justly found a verdict in favor of the plaintiff. There is no merit in any of the grounds of the motion for a new trial, and the judgment of the lower court must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Error from City Court of Leesburg; H. L. Long, Judge.

Action by G. Willis against W. W. Hooks, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Martin and Shipp & Sheppard, for plaintiff in error. C. H. Beazley, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 643)

M. E. MAXWELL & CO. v. RICE.

(No. 3,462.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. TRUSTS (§ 151*)—LIABILITY FOR DEBTS OF BENEFICIARY.

The court erred in sustaining the general demurrer and dismissing the petition, because by the trust deed attached to the petition two trust estates were created, the one a life estate in trust for the benefit of W. R. Rice, cestui que trust, and the other an estate in remainder for the benefit of the other cestuis que trustant, the children of W. R. Rice. While a trust created as to the estate in remainder is not liable for the debts sought to be recovered in the plaintiff's action, the life estate held in trust for the benefit of W. R. Rice may, under the allegations of the petition as amended, be

liable to be subjected to the payment of the plaintiff's demand.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 151.*]

2. FORM OF ACTION—JURISDICTION OF CITY COURT.

The cause of action sought to be asserted by the plaintiff is enforceable in a court of law, and, so far as appears from the petition, the city court of Elberton had jurisdiction of the subject-matter.

Error from City Court of Elberton; Geo. O. Grogan, Judge.

Action by M. E. Maxwell & Co. against C. A. Rice, trustee. Judgment for defendant, and plaintiffs bring error. Reversed.

C. P. Harris, for plaintiffs in error. Worley & Nall, for defendant in error.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 379)

HALL v. C. J. ROEHR & CO. (No. 3,590.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. VENUE (§ 21*)—TRIAL (§ 138*)—TROVER—RESIDENCE OF DEFENDANT—QUESTION FOR JURY.

Under the mandatory provisions of the Constitution of this state—article 6, § 18, par. 6 (Civ. Code 1910, § 6543)—the venue of all civil cases is in the county where the defendant resides, except in certain cases specified in paragraphs 1 to 5, inclusive, of said article. A trover suit is a civil case, and is not among the exceptions to the general rule. Where, therefore, a timely and sufficient plea to the jurisdiction of the court was filed, on the ground that the defendant was not a resident of the county in which the suit was brought, it was error for the trial judge to strike this plea, and the issue therein made should have been submitted to the jury.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34; Dec. Dig. § 21; Trial, Dec. Dig. § 138.*]

2. APPEARANCE (§ 8*)—WHAT CONSTITUTES—WAIVER OF JURISDICTION.

The giving of a bond for the forthcoming of the property in a trover suit, where bail is required, is in a sense an appearance by the defendant, yet it is not such an appearance and pleading to the merits of the case as would constitute a waiver of jurisdiction. To complete such waiver there must not only be a general appearance, but also pleading to the merits. Civil Code 1910, § 5664.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. § 8.*]

Error from City Court of Bainbridge; W. A. Custer, Judge pro hac.

Action by C. J. Roehr & Co. against C. O. Hall. Judgment for plaintiffs, and defendant brings error. Reversed.

E. S. Longley, for plaintiff in error. J. C. Hale and W. H. Krause, for defendants in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 451)

BOYD v. STATE. (No. 3,868.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

*(Syllabus by the Court.)***WEAPONS (§ 9*)—CARRYING WEAPONS—ELEMENTS OF OFFENSE.**

The dwelling house of a landlord is not the place of business of a cropper, in the contemplation of the act of 1910 (Acts 1910, p. 134) which prohibits one from "carrying around" a pistol without a license "outside of his own house or place of business." Especially is this true where it affirmatively appears that the cropper did not live in the house with his landlord, but lived in a different dwelling. The verdict of guilty was fully authorized.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 8; Dec. Dig. § 9.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Dave Boyd was convicted of carrying a pistol without a license, and brings error. Affirmed.

M. U. Mooty, for plaintiff in error. Henry Reeves, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 337)

COCHRAN v. MINTER, Constable.

(No. 3,488.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 1092*)—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.**

The first grant of a new trial by the judge of the superior court, on certiorari to review a verdict and judgment in a justice's court, will not be disturbed, unless the verdict was demanded by the evidence. If a verdict was demanded at all, it was in favor of the defendant, and not for the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1092.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by W. L. Cochran against H. W. Minter, Constable. From a judgment granting a new trial after a verdict for plaintiff, plaintiff brings error. Affirmed.

W. E. Spinks, for plaintiff in error. M. V. Sanford and C. D. McGregor, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 323)

CHARLESTON & W. C. RY. CO. v. ANCHORS. (No. 3,479.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 87*)—OPERATION OF RAILROADS—EMPLOYER'S LIABILITY ACT.**

Before the act of Congress of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1909, p. 1171]), known as the "Federal

Employers Liability Act," applies to an action for damages brought against a railroad company by one of its employes for injuries received in the service of the company, it must appear (1) that the railroad company is an interstate carrier; (2) that, as to the transaction through which the injury occurred, it was at the time engaged in interstate commerce; and (3) that the injured employe was at the time engaged in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 87.*]

2. MASTER AND SERVANT (§ 87*)—OPERATION OF RAILROADS—EMPLOYER'S LIABILITY ACT.

Where the foreman of a gang of railroad track hands is injured by being struck in the eye by a particle of iron put in flight by the negligent stroke of a hammer in the hands of one of the men working under him, and it appears that the business on hand at the time of the injury was the taking up and relaying of one of the rails of the track, it is held that the parties were not engaged in interstate commerce, notwithstanding that the track in question may have been devoted to the passage of interstate as well as intrastate trains, and notwithstanding that the railroad in a general sense may have been an interstate carrier. To such a transaction the federal statute does not apply.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 87.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by J. B. Anchors against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Anchors sued the Charleston & Western Carolina Railway Company for the loss of an eye resulting from alleged acts of negligence as set out in the petition. The plaintiff was employed by the defendant as a foreman of a gang of track hands working on the track of said road near McCormick, S. C., over which the defendant operated trains back and forth between Georgia and South Carolina. One of the track hands working under him struck the blow from which the injury to his eye resulted. Paragraph 2 of the petition reads as follows: "Said defendant is a common carrier, owning a line of railroad between the city of Augusta, in the state of Georgia, and the city of Spartanburg, in the state of South Carolina, and on the date of the injury herein complained of was engaging in commerce between the state of Georgia and the state of South Carolina, and between the several states, and the injury hereinafter complained of was sustained by plaintiff while he was employed by said defendant carrier in said interstate commerce, and defendant is liable in damages therefor under the act of Congress of April 22, 1908, which declares that such an employe may recover from such a common carrier for 'injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to

its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." It is further stated that the work in which the plaintiff and the other servants of the company were engaged was taking up and replacing one of the rails of the track, and that the work was being rushed so that an interstate train could pass on schedule. The defendant demurred upon various grounds; the chief ground insisted upon being that the petition set out no cause of action under said act of Congress of 1908, because the plaintiff being a track hand engaged in repairing a track in South Carolina at the time of the injury, was not employed in interstate commerce within the meaning of that act, and that the defendant as to the transaction in question was not so engaged. The demurrer was overruled upon all the grounds, and the defendant excepted.

W. K. Miller, for plaintiff in error. Wm. H. Fleming, for defendant in error.

POWELL, J. (after stating the facts as above). [1, 2] The sole question involved is whether the act of Congress of April 22, 1908, known as the "Federal Employers Liability Act" (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1909, p. 1171]), applies to this transaction. That statute, by its terms, relates only to liability of common carriers by railroad "while engaged in commerce between any of the several states" to persons "while employed by such carrier in such commerce." It will be called to mind that the prior act of Congress on the same subject (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) was declared unconstitutional by the Supreme Court of the United States in *Howard v. Illinois Central R. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, on the ground that it applied to all carriers who were generally engaged in interstate commerce as to all employes, whether the carrier and the employe were at the time of the injury actually engaged with commerce of that character or not. The present law was enacted with its limitations, with the special object in view of cutting out the constitutional objections for which the prior law had been declared invalid. The present law emphasizes three things, which must concur before its provisions are applicable: (1) The railroad company in question must engage in interstate commerce; (2) it must at the time of the injury in question be engaging in that character of commerce, as contradistinguished from such purely local matters as it may also engage in; (3) the injured servant must also at the time of receiving his injury be engaging in interstate commerce. That the carrier in this case was generally engaged in interstate commerce is not in question. The remaining questions are whether, at the time the injury complained of was received, it was engaging in interstate commerce, and

whether the injured employe was engaging in that character of commerce at that time. To narrow the point a little more, the concrete question is whether the work of repairing a defective rail in a track over which a railroad company carries on its transportation, both local and interstate, is of itself an act of engaging in interstate commerce.

It is very difficult to impose the limitations of a definition upon the word "commerce" as used in the federal Constitution. How this term, which originally was considered as almost synonymous in meaning with the word "trade," has been enlarged so as to include contracts, transportation, ways, means, and agencies, and even instrumentalities by which commercial intercommunications are carried on, is a matter of legal history. Still, with all of its enlargement of meaning, the word "commerce" has its limitations, and there are some things which, though touching the field of commercial operation, do not enter into it in such a way as to become of themselves a part of the commerce. The insuring of articles intended for interstate transportation is a matter which touches interstate commerce, but is not "commerce" within the purview of the Constitution. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324. To manufacture goods with the intention of devoting them to interstate commerce is not interstate commerce. *U. S. v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. In the case of *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, in which it is held that a state may prohibit the manufacture of intoxicating liquors within its borders, notwithstanding that the manufacturer intends to use the liquors when manufactured only for exportation beyond the borders of the state, the court, speaking through Mr. Justice Lamar, draws the distinction between "manufacture" and "commerce" thus:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238, 241, is as follows: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the

purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

Again in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, the court held that logs cut in the woods and brought to the landing for the purpose of being transported in interstate commerce did not become a subject of interstate commerce thereby. From these and other cases of the Supreme Court of the United States along the same line, it is clear that a distinction is observed between preparing to engage in interstate commerce and in engaging in interstate commerce. As was pointed out by the United States Supreme Court in *Smith v. Alabama*, 124 U. S. 465, 481, 8 Sup. Ct. 564, 31 L. Ed. 508: "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations. They are constructed within the territorial limits of the state and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the state." And, as the opinion of the court in that case goes on to point out, there are many matters relating to the preparation of a railroad company to engage in interstate commerce which are of a purely local nature, and are not of themselves a part of interstate commerce. From the reasoning and from the illustrations given in the case of *Howard v. Illinois Central R. Co.*, supra, in which the former employer's liability act was declared unconstitutional, it is plain that the court had in mind that there were necessarily a number of activities which an interstate railroad might engage in which would not constitute engaging in interstate commerce. It is true that in a more or less remote sense every act performed by an employé for a carrier that engages indiscriminately in local and interstate commerce tends to promote the latter form of commerce. The porter

who cleans the cuspidors in the general offices of the company for the comfort and convenience of the officers who direct the movement of the trains as they pass from state to state and the other great commercial activities of the carrier is in a certain sense engaged in carrying on that great commerce; but we do not believe that this menial employé in his strictly local duties is within the purview of the act of Congress in question, and we believe that the connection between the services to be performed and the commerce itself must be closer than that.

Just here let us make this point clearer that, wherever this federal statute applies, all state laws give way, and employer and employé alike are bound by its terms. Considering it in its operation throughout the entire United States, and noticing its effect upon the local jurisprudence of the various states, it may be seen that in some states, as to some transactions, and as to some phases of what is commonly known as the "master and servant law," it gives the employé a benefit, while in other states, or as to other transactions, or as to other phases of the master and servant law, it gives the employer the benefit. Whatever it takes from one side it gives to the other, and vice versa. For instance, in the state of South Carolina, where this very injury arose, the federal act is more beneficial to the employé in this particular instance than the state law is, because the defense of fellow service is by the federal act abolished as to the underservant who inflicted this injury upon his foreman; whereas, under the South Carolina statute, the railroad company could have pleaded the doctrine of fellow servant to exempt itself in such a case. And yet in most respects the South Carolina statute on this general subject is more favorable to the servant than it is to the master. So when the court proceeds to lay down the rule that this or that service performed by an employé for a railroad company constitutes engaging in interstate commerce, no person can thereafter enter into the service of an interstate carrier and perform that service for it without surrendering whatever particular benefits may be given him by the state law, so far as they are not also given by the federal law. We mention this in response to the argument presented by able counsel for the defendant in error that this federal statute is one of those beneficent and progressive acts of legislation which should be given the widest possible legal scope, and that the benefit of every reasonable doubt should be given in favor of maintaining jurisdiction under it. Personally we give accord to the sentiment that the federal act is in most respects a wise and beneficent piece of legislation, and a fair and just statute; but that is a matter with which we have no concern at all. All valid statutes enacted by Congress within the scope of its powers are, so far as we as

judges are concerned, wise and beneficent and just acts of legislation. On the other hand, every valid state statute is to be considered to be entitled to the same respect and judicial approval, so far as it is enacted within the scope of the state's powers.

After carefully considering the question, and with no other end in view than to give to the act of Congress just such scope as it is legally entitled to, without any prejudice for or against the legislation as such, we cannot see how the act of repairing a broken rail in a railroad track is engaging in commerce at all, nor how the repairing of a part of the physical properties of a railroad, which are in their very nature permanently fixed within the limits of the state, can be regarded as an interstate transaction at all. To our minds, neither the servant who struck the blow nor the servant whose eye was injured through the blow's being struck was engaged in interstate commerce, since the whole object of striking the blow was merely to drive a spike to hold in place a rail that this defendant might have a railroad track upon which it could thereafter, if it so desired, engage in commerce, either interstate or intrastate. If the distinction between preparing to engage in commerce and the act of actually engaging in it is to be observed, this transaction falls squarely within the domain of preparation.

We are aware that the courts, so far as they have passed upon this and cognate questions, have been widely divided in opinion. To support the view that the federal statute would apply in such cases, see *Zikos v. Oregon R. & N. Co.* (C. C.) 179 Fed. 893; *Colasurdo v. Railway Co.* (C. C.) 180 Fed. 832 (recently affirmed by the Court of Appeals of the Second Circuit, 192 Fed. 901). On the contrary, see *Taylor v. Sou. Ry. Co.* (by Judge Newman of the United States Court of the Northern Circuit of Georgia) 178 Fed. 380. Indeed, the conflict in judicial views on the question is such that, notwithstanding what decisions may be rendered in the meantime, the question can be accepted as an open one until the Supreme Court of the United States itself decides it, as it probably will do at some early date.

In the meantime the judgment is reversed.

(10 Ga. App. 287)

MILLER GROCERY CO. v. EAST PORT SARDINE CO. (No. 3,384.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

SALES (§ 23*)—OFFER TO BUY—NECESSITY OF ACCEPTANCE.

The allegations of the petition were not proved as laid, and it affirmatively appears from the evidence for the plaintiff that the offer to buy, made to the defendant by letter, was expressly refused, and no complete con-

tract was entered into. A nonsuit was therefore properly awarded.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 23.*]

Error from City Court of Albany; D. F. Crosland, Judge.

Action by the Miller Grocery Company against the East Port Sardine Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. J. Bacon and Ben T. Burson, for plaintiff in error. Mann & Milner, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 472)

DUKES v. STATE. (No. 3,918.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

It was for the jury to say whether they would believe the state's witness, who testified directly to a sale of intoxicating liquor by the accused, or credit the witnesses offered to impeach him. The trial judge having approved the verdict, this court will not interfere.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from City Court of Carrollton; James Beall, Judge.

Willie Dukes was convicted of the sale of intoxicating liquor, and brings error. Affirmed.

Buford Boykin, for plaintiff in error. C. E. Roop, Sol., for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 237)

ROBINSON & JOHNSON v. ROTHCHILDS & CO. (No. 3,209.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error, which do not direct the attention of the court to the specific error of which complaint is made, will not be considered. *Crawford v. State*, 4 Ga. App. 789(8), 62 S. E. 501. An assignment of error to a charge not erroneous in the abstract must point out its specific defect, and the attention of the court must be specifically directed to the error in the instruction alleged to be erroneous. A mere general assignment that a portion of a charge excepted to was error presents nothing to the consideration of a reviewing court, except its abstract correctness; and especially is this true when the charge as a whole is not embodied in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

2. SALES (§ 480*)—RECOVERY OF GOODS BY SELLER—EVIDENCE.

The evidence authorized the jury to infer a rescission of the contract, and likewise supports the conclusion that the purchasers of the piano were possessed of sufficient information to give them notice that the piano was not the property of the defendant in attachment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.*]

Error from City Court of Monroe; A. Q. Stone, Judge.

Action by Rothchilds & Co. against Robinson & Johnson. Judgment for plaintiffs, and defendants bring error. Affirmed.

Napier & Cox, for plaintiffs in error. W. O. Dean, for defendants in error.

RUSSELL, J. The defendants in error sold a piano to W. H. Jackson on the installment plan. Jackson was in arrears in his monthly payments, and correspondence between the seller of the piano and the purchaser ensued. Jackson several times offered to return the piano, stating that it was not such an instrument as he thought it was when he made the contract, and also that on account of the altered state of his financial condition he was unable to pay for it. The correspondence resulted in Jackson's final agreement, acquiesced in by Rothchilds, to ship the piano back to the sellers, forwarding them at the same time a bill of lading from Monroe, Ga., to the factory at Stegar, Ill. Jackson himself was in Athens, but he testifies by interrogatories that he gave instructions to his wife to have the piano shipped, and she obeyed his instructions by employing a man to box and pack the piano, and had it carried by a drayman to the railroad depot. There the piano was levied upon by attachments issued at the instance of the plaintiffs in error and other creditors of Jackson. Prior to the levy the constable had been told by Mrs. Jackson, at her house, that they had been unable to pay for the piano in accordance with the contract, and that it was not Jackson's property, but was the property of the original vendors. No notice of the levy of the attachment was given to Rothchilds & Co., and in due course the piano was sold; the plaintiffs in error being the purchasers. Some time later an agent of Rothchilds & Co., inquiring as to the whereabouts of the piano, and being told by Jackson, in Athens, that he had returned it, discovered that it had been seized by the attachments and sold, and thereupon instituted the present action in trover. Upon the trial the jury found in favor of the plaintiffs.

[1] Exception is taken to the judgment overruling a motion for new trial. The motion for new trial is based upon the general grounds, and upon three additional grounds, which attempt to assign error upon certain

quoted excerpts from the charge of the court; but there is no specific assignment of error in any of them, and each is so incomplete as to have presented nothing for the consideration of the lower court in passing upon the motion. Under well-settled rulings of the Supreme Court and this court, these grounds, of course, present nothing for our consideration, because a court of review can pass upon nothing which the lower court did not have fair opportunity to determine. The mere quotation of an extract from the charge of the court, and the general statement that it is error, is an exception to the judge's charge so extremely vague and indefinite as to be fatally defective; and especially is this true in a case in which the charge of the court as a whole is not embodied in the record, so as to enable us to have the opportunity of considering the extract in connection with the context. It is manifest that this court cannot determine from these extracts from the charge whether the trial judge erred in overruling the motion for new trial, in so far as it was based upon the grounds contained in the amendment. Assignments of error which do not direct the attention of the court to the specific error of which complaint is made will not be considered. *Crawford v. State*, 4 Ga. App. 789 (8), 62 S. E. 501. An assignment of error to a charge not erroneous in the abstract must point out its specific defect, and the attention of the court must be specifically directed to the error in the instruction alleged to be erroneous. A mere general assignment that a portion of a charge excepted to was error presents nothing to the consideration of a reviewing court, especially when the charge as a whole is not embodied in the record.

[2] 2. As to whether the judge erred in overruling the motion for new trial is based upon the general grounds. The testimony might have authorized a finding either way. The trial judge, who heard the testimony and saw the witnesses, approved the finding of the jury. It cannot be said that there is no evidence that there was a rescission of the contract between Rothchilds and Jackson, because every circumstance confirms the statement that there was such a rescission, and Jackson himself, in his interrogatories, testifies that the contract was rescinded. The contract between Rothchilds and Jackson itself provided for the retaking of the piano by Rothchilds, and Jackson consented that he should exercise this privilege without legal proceedings. It is true that, in order to have more effectually protected their rights, the sellers should have recorded the conditional bill of sale under which Jackson held the piano; but this failure on their part was at their own risk. In not giving creditors of Jackson notice by record,

they took the risk of other creditors not having notice brought home to them that the title was reserved. The question as to whether the plaintiffs in error in this case had actual notice of the state of the title to the piano, or as to whether the circumstances were sufficient to put them, as prudent men, on such inquiry as would have led to knowledge, was one to be determined by the jury from the facts and circumstances which appear in the record. Our conclusion upon those facts might not have been the same as that reached by the jury in their finding. This, however, does not matter, because we cannot say that the circumstances in proof were not sufficient to authorize the result reached by the jury.

Judgment affirmed.

(10 Ga. App. 384)

DAVIS v. CITY OF WAYCROSS.
(No. 3,849.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

COURTS (§ 217*)—SUPREME COURT—CERTIFICATION—OBJECTIONS TO CONSTITUTIONALITY OF STATUTE—SUFFICIENCY OF ALLEGATIONS.

Attacks upon the constitutionality of a statute, because "the title to the act contains two distinct and separate subject-matters," and because "the body of the act contains matter variant from what is expressed in the title thereof," are too general, vague, and indefinite to raise any question for certification to the Supreme Court. The "two distinct and separate subject-matters," and the "matter in the body of the act variant from what is expressed in the title," should be specifically pointed out. *Parker-Hensel Engineering Co. v. Schuler*, 7 Ga. App. 396, 66 S. E. 1038, and citations.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 217.*]

Error from Superior Court, Ware County; T. A. Parker, Judge.

Charlie Davis was convicted of violation of an ordinance of the City of Waycross, and brings error. Affirmed.

John S. Walker, for plaintiff in error.
Wilson, Bennett & Lambdin, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 389)

ATKINSON v. HARDAWAY. (No. 3,616.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 132*)—PROCEEDINGS TO PROCURE—BRIEF OF EVIDENCE—CORRECTION.

Where, on the day fixed for the hearing of a motion for a new trial, a brief of the evidence is presented and approved, and the judge takes the matter under advisement, and holds it under consideration for a number of days, and, while considering it, discovers that the brief of the evidence is incorrect, he may cause the correction to be made before he acts on the motion, notwithstanding all of this oc-

curs in vacation. Cf. *Atlanta Ry. v. McManus*, 1 Ga. App. 302 (1), 58 S. E. 258.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

2. EXECUTORS AND ADMINISTRATORS (§ 5*)—PROOF OF LACK OF ADMINISTRATION.

Lack of administration upon the estate of a decedent is adequately shown, where there appears in the record the testimony of a witness that he had examined the records in the office of the ordinary in the county where the decedent resided at the time of his death, and that no administration had been granted. The law presumes intestacy until proof of a will is made. *Miller v. Speight*, 61 Ga. 460. Hence lack of representation on a decedent's estate is prima facie shown by proof that no administrator has been appointed thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 5.*]

3. DEATH (§ 36*)—ACTIONS FOR CAUSING DEATH—VENUE.

The venue of a cause of action against a railway company for a negligent homicide is in the county in which the fatal injury was inflicted, and not in the county where the injured person afterwards may have died. The cause of action adheres in the wrong as consummated by the injury, and not in the death itself.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 51; Dec. Dig. § 36.*]

4. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Under the employer's liability act of 1909, now found in Civil Code 1910, § 2782 et seq., where suit is brought for the death of an employe, the railway company has the burden of proving that its agents and employes have exercised all ordinary and reasonable care and diligence, and the plaintiff makes a prima facie case merely by showing that the decedent met his death while discharging the duties of his employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

5. COURTS (§ 217*)—SUPREME COURT—CERTIFICATION OF QUESTION—CONSTITUTIONALITY OF STATUTES.

The attempt of the plaintiff in error to make an attack upon the act of 1909, for unconstitutionality is ineffectual, because of the general and indefinite manner in which he presents the constitutional question. As to this point, the decision in *Davis v. City of Waycross*, supra, this day decided, and the cases therein cited, are controlling.

[Ed. Note.—For other cases, see Courts, Dec. Dig. 217.*]

6. STATUTES (§ 279*)—PLEADING—NECESSITY.

Where a statute of this state is applicable to the cause of action set forth in the petition, the plaintiff does not have to plead it, in order to get the benefit of it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. § 279.*]

7. DEATH (§ 95*)—ACTIONS—MEASURE OF DAMAGES—"FULL VALUE OF THE LIFE OF THE DECEASED."

The measure of damages for a negligent homicide falling within the purview of the act of 1909, now Civil Code 1910, § 2782, is the "full value of the life of the deceased," which by reference to Civil Code 1910, § 4423, is amplified to mean "the full value of the life of the deceased, without deducting for necessary or other personal expenses of the deceased had he lived."

[Ed. Note.—For other cases, see Death, Dec. Dig. § 95.*]

8. NEW TRIAL (§§ 104, 105*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

The evidence authorized the verdict. The grounds of the motion for a new trial based on the alleged newly discovered evidence, so far as formally complete, present matters merely cumulative or impeaching; and no reason appears for disturbing the recovery in the plaintiff's favor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-229; Dec. Dig. §§ 104, 105.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by Mary Hardaway against H. M. Atkinson, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

B. Whitfield and J. B. Moore, for plaintiff in error. Haygood & Cutts and Wade H. Watson, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 356)

PARK v. BUXTON et al. (No. 3,557.)
(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. BILLS AND NOTES (§ 537*)—ACTIONS—QUESTIONS OF LAW OR FACT—GOOD FAITH OF PURCHASER.

The law of this state (Civ. Code 1910, § 4291) declares that "any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." The character and sufficiency of the circumstances in a particular case which should place a prudent man on his guard are to be determined as questions of fact by the jury, and not by the judge as questions of law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. § 537.*]

2. BILLS AND NOTES (§ 537*)—ACTIONS—QUESTIONS OF LAW OR FACT—GOOD FAITH OF PURCHASER.

The promise to pay the interest on a negotiable note is as much a part of the contract as the promise to pay the principal. Principal and interest constitute one debt. When the note is sold to a third person before the principal is due, but when installments of interest are past due and remain unpaid, and the fact of nonpayment appears, either on the face of the note or by actual knowledge on the part of the purchaser, it would be for the jury to determine whether these facts were circumstances sufficient to put the purchaser, as a prudent man, on his guard, and to furnish to him warning that the maker of the note had some defense. Proof of the above facts indicated authorized the jury in finding that the purchaser bought the note with notice that it was then dishonored, and he would not be protected in his title against any defense that the maker could make, if the note was sued by the original payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. § 537.*]

3. SUFFICIENCY OF EVIDENCE—NO ERROR.

The other assignments of error are not material. There was evidence to support the plea of total failure of the consideration for which the note was given, and no reason appears for the grant of another trial.

Error from City Court of Waynesboro; H. A. Boykin, Judge.

Action by Howard C. Park against W. B. Buxton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

H. J. Fullbright and F. S. Burney, for plaintiff in error. W. H. Fleming and C. B. Garlick, for defendants in error.

HILL, C. J. Howard C. Park sued W. B. Buxton and others as makers of a promissory note, alleging that he was a bona fide holder for value, and that he had bought the note before it was due and without any notice of any defect of defense. The defense denied these allegations of the plaintiff, and on the issue thus formed and the evidence, under the charge of the court, the jury found a verdict in favor of the defendants, and plaintiff's motion for a new trial was overruled. The evidence, briefly stated, is as follows: The note was one of three notes made by the makers for \$1,000 each, and payable to McLaughlin Bros., or order. Each note was dated April 8, 1906; the first note falling due May 1, 1907, the second one falling due in 1908, the third one falling due in 1909. The consideration of the notes was a high-bred stallion, the purchase being made under express warranties as to the quality of the stallion, and the defense relied upon was a breach of these warranties. This defense was met by the contention of the plaintiff that, as he was a bona fide purchaser for value before maturity without notice of any defect or defense, this defense of failure of consideration could not be made to the note in his hands. There was a credit of \$200 on the principal of the note, leaving a balance of \$800 due. Plaintiff paid \$850 for the note to McLaughlin Bros., the original payees, and at the time of the purchase the principal of the note had not matured, but would have matured in 12 days. Two installments of annual interest, amounting to \$96 at the time of the purchase, were past due and unpaid. The face of the note did not show this fact, but the plaintiff admitted that he knew the fact when he purchased the note.

[1] The principal question of law presented is: Does the purchaser for value of a negotiable promissory note before the principal thereof is due, with knowledge that installments of interest thereon are past due and unpaid, stand in the position of a bona fide holder, and is he protected as such under section 4286, Civil Code 1910; or does the fact that installments of interest are past due, accompanied by his knowledge of the fact, constitute sufficient reason to dishonor the principal of the note and let in all defenses good against the original payee? Plaintiff in error insists that as a matter of law the simple fact that installments of interest are overdue and unpaid, disconnected

from other facts, is not of itself sufficient to affect the position of one taking the note before maturity of the principal for value as a bona fide purchaser, and that it was the duty of the trial judge so to instruct the jury. The trial judge refused so to instruct the jury as a matter of law, but submitted the question to them as one of fact, charging to the effect that it was for the jury to decide whether the nonpayment of the interest and the knowledge of that fact by the plaintiff at the time he purchased the note was a circumstance which would place a prudent man upon his guard in purchasing negotiable paper.

The question of law here presented has never been directly decided by the Supreme Court of this state, and the decisions in other jurisdictions are in conflict. Some of the courts holding that default in the payment of interest, with a knowledge of that fact by the purchaser, does not dishonor the note, and is not a sufficient circumstance of suspicion to put the purchaser upon further inquiry, are *Indiana & Ill. Ry. Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Thompson v. Perrine*, 103 U. S. 589, 1 Sup. Ct. 564, 568, 27 L. Ed. 298; *Nat. Bank v. Kirby*, 108 Mass. 497; *Kelly v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697. Some of those taking the opposite view are *Newell v. Gregg*, 51 Barb. (N. Y.) 263; *Citizens' Savings Bank v. Couse*, 68 Misc. Rep. 153, 124 N. Y. Supp. 79; *First Nat. Bank v. Forsyth*, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415. The United States Supreme Court, in the case of *Trask v. Jacksonville, Pensacola & Mobile R. Co.*, 124 U. S. 515, 8 Sup. Ct. 574, 31 L. Ed. 521, in seeming conflict with prior decisions on the same subject, holds, that, where interest coupons attached to bonds of the state had not been paid for 10 years, this fact furnished the strongest presumptive evidence of dishonor. The court in this latter case seemed to attach significance to the fact that so many of the interest coupons were unpaid, and the fact that the bonds were issued by the state, and the peculiar facts of the case seemed to have made the conflict between this decision and prior decisions more apparent than real. As illustrating the conflict in the decisions of the courts on this subject, it may be noted that those courts which hold that the mere fact of default in the payment of interest is not of itself sufficient to dishonor the note, and to put the purchaser on notice and destroy his character as a bona fide holder, repudiate the doctrine that as to negotiable paper mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser, and that this result would only follow where there has been bad faith on his part. See *Murray v. Lardner*,

2 Wall. 110, 17 L. Ed. 857, where the leading authorities on this subject are collated and considered.

The doctrine, however, that the purchaser of such paper, under circumstances of suspicion calculated to put a prudent man upon inquiry, does so at his risk, seems to be the rule in this state. Civil Code 1910, § 4291, provides that "any circumstances which would place a prudent man upon his guard in purchasing negotiable paper shall be sufficient to constitute notice to a purchaser of such paper before it is due." What would be sufficient to place a prudent man upon his guard in purchasing negotiable paper is necessarily a question of fact. It cannot in any case be a question of law. In this state the trial judge cannot instruct the jury what a prudent man should do, or would do, under certain circumstances; for, as Mr. Justice Bleckley says in the case of *R. & D. R. Co. v. Howard*, 79 Ga. 53, 3 S. E. 428, "in legal contemplation the jury know it better than the court." Looking at the question abstractly, it would seem that negotiable paper is dishonored by any breach of the engagement which it imports, and that any fact which would tend to show that the paper was disgraced would destroy its character of negotiability. In other words, if there is anything upon the face of the paper indicative of dishonor, the purchaser takes it at his peril.

[2] A promise to pay a negotiable promissory note applies to the interest as well as to the principal. There is but the one promise, and the interest is just as much a part of the debt represented by the note as the principal, and the obligation to pay the interest is as strong as the obligation to pay the principal, and a failure to pay the interest would indicate that the promisor had broken his promise, and had dishonored and destroyed the negotiable character of the obligation; or, as otherwise expressed, anything that dishonors any part of a note dishonors the whole note. The failure to pay one installment of interest would be a circumstance of suspicion, the suspicion growing stronger as defaults were made in the payment of successive installments. "Where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest annually is as much a part of the agreement as a promise to pay the principal. It is a portion of the debt, and if, when the note is sold to a third person by the payee, a year's interest is past due, the note is then dishonored. When the instrument furnishes evidence that the written promise to pay has been dishonored, a party taking the same takes it with the warning that the maker may have some defense, and no one can become a bona fide holder of a promissory note, so as to shut out a valid defense of the maker, if the holder takes it when money is past due upon

it." The above is the language of the Supreme Court of New York in the case of *Newell v. Gregg*, supra, and in our opinion expresses the sound rule on the subject.

Section 4291 of the Civil Code of 1910, immediately follows those sections of the Code which declare the rights of bona fide holders of negotiable paper, and was intended unquestionably as a qualification of these rights, and we therefore conclude that the trial judge in the present case properly instructed the jury that it was a question for them to determine, under the evidence, whether the failure to pay the interest on the note was a circumstance which would place a prudent man upon his guard in purchasing the note; and if they concluded that it was a sufficient circumstance, then the holder of the note would not be a bona fide purchaser, and the maker thereof would be let in to all of the defenses which he would have had to the note, if in the hands of the original payee. If the circumstance of default in the interest due for two years was in the present case sufficient to put the plaintiff, as a prudent man, on his guard in the purchase of this note, then it was also sufficient to put him on inquiry, and he is bound in law and in equity by any knowledge or information that he might have acquired in pursuance of reasonable inquiry on the subject. The jury were authorized to infer from the evidence that upon reasonable inquiry the purchaser of this note would have found out the defenses which the makers had to its payment, to wit, that the consideration of the note had totally failed. There was evidence to establish this defense.

[3] The other exceptions made to the charge of the court are immaterial. The foregoing question, which we have discussed, is controlling, and, in the view that we have taken of the law, we fail to find any error, and therefore affirm the judgment refusing a new trial.

Judgment affirmed.

(10 Ga. App. 254)

MCCORD v. HILL. (No. 3,278.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. REPLEVIN (§ 59*)—PROCEEDINGS—PETITION.

The petition in a bail trover suit described specifically each article of property sought to be recovered, but failed to give the value of each article, giving the aggregate value of all the articles described. *Held*, that the value of the articles was sufficiently stated, and a demurrer to the petition because the value of each separate article was not given was properly overruled.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 215-218; Dec. Dig. § 59.*]

2. REPLEVIN (§ 71*)—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

The property sought to be recovered in a bail trover suit was transferred to the plaintiff by the defendant as security for the payment of a promissory note under section 3306 of the Civil Code of 1910. On the trial the defendant offered to prove that before the note matured, and before any demand was made on him for the delivery of the property sued for (the property being several head of cattle), the cattle had died, which fact was known by the plaintiff when he brought the suit; and the trial judge refused to allow the proof. *Held* error. To maintain trover, the plaintiff must show title or the right of possession in himself, and possession or conversion by the defendant. The testimony offered was competent evidence to disprove both possession and conversion by the defendant. Civil Code 1910, § 4483.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 285-291; Dec. Dig. § 71.*]

3. REPLEVIN (§ 71*)—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

The above is true, although the defendant had agreed, in the written contract, to take all risks of injury to or death of the property transferred, and agreed that, if the note was not paid at maturity, the plaintiff could sue for recovery of the property "by bail trover or otherwise." The essentials of a trover suit are given by the statute, and cannot be enlarged by agreement.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 71.*]

4. REMEDY ON LOSS OF SECURITY.

The plaintiff's remedy was suit on the note.

Error from City Court of Washington; Wm. Wynne, Judge.

Action by J. L. Hill against Bill McCord. Judgment for plaintiff, and defendant brings error. Reversed.

F. H. Colley, for plaintiff in error. W. A. Slaton and F. W. Gilbert, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 283)

PATRICK v. HENDERSON. (No. 3,360.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

TRIAL (§ 169*)—DIRECTION OF VERDICT.

The evidence, with all reasonable deductions and inferences therefrom, did not absolutely demand the verdict for the defendant, and it was error to direct such a verdict.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 169.*]

Error from City Court of Monticello; A. S. Thurman, Judge.

Action by D. L. Patrick, Jr., against V. O. G. Henderson. Judgment for defendant, and plaintiff brings error. Reversed.

A. Y. Clement, for plaintiff in error. Greene F. Johnson, for defendant in error.

HILL, C. J. Patrick sued Henderson in trover to recover "one black horse mule 5

years old, medium size." After hearing the evidence, the trial judge directed a verdict for the defendant, and the plaintiff excepted.

The facts are as follows: On January 10, 1906, Lucian Benton sold the mule in question to William Harris, taking therefor a purchase-money note, reserving title. This instrument was duly recorded. This note is credited with a payment of \$104.71, dated October 28, 1907. On October 24, 1908, Benton transferred the note after maturity to Patrick with Benton's right and title to the mule. Some time in the spring of 1908 Harris, without the knowledge or consent of Benton, exchanged the mule for a horse to Jones, and gave a mortgage on the horse to Phillips. Harris having traded the mule for a horse, and having the latter in his possession, executed to Benton a note for \$104.02, with a reservation of title to the horse in Benton, and Benton transferred this note with reservation of title to Patrick. Jones, to whom Harris traded the mule for the horse, sold the mule to Henderson. Subsequently the horse was sold by Phillips under his mortgage, and bought by Patrick for \$69. Patrick, claiming title to the mule, brought the suit against Henderson. When the deputy sheriff went to serve bail process on Henderson, he did not find the mule in Henderson's possession; but Henderson told him that "he could get the mule all right," and would come to him the next day and settle the matter, whereupon the officer, with the consent of Patrick, did not execute the process. Henderson failed to produce the mule or to go to town and settle the case. The value of the mule was proved to be at least \$200, and the horse \$69.

It was contended by the defendant that as Benton had transferred the purchase-money note reserving title, after maturity, to Patrick, the transferee had no greater rights than the transferor, and that, as the evidence showed that Benton had taken the note for the horse in lieu of the note for the mule, the title to the mule was lost, and therefore Patrick could not recover the mule from Henderson. It was also contended that the evidence showed that Henderson did not have possession, custody, or control of the mule at the time of the filing of the suit and when the demand was made on him for the mule, and he had not converted the mule, and that for this reason, also, there could be no recovery. The judge took this view of the evidence and directed a verdict for defendant.

We do not think the evidence, with all reasonable deductions or inferences therefrom, was so clear and unequivocal on both points

as to demand the verdict for the defendant. Unquestionably Patrick had no greater title to the mule than Benton had; but, as Benton's contract reserving title to the mule was duly recorded, he had title until the note was paid or in some way settled. If Benton accepted the note for the horse with reservation of title from Harris in lieu of the note for the mule with reservation of title, which he subsequently transferred to Patrick, and it was so understood by both Benton and Patrick, the right to recover the mule was lost, for the horse was substituted for the mule. But if the jury could have reasonably inferred from the evidence that Benton was simply endeavoring to protect himself and his transferee as to the mule transaction, the mule being more valuable than the horse and having been sold by Harris, and that the horse note was collateral security for the mule note, then Patrick would still have title to the mule. In our opinion the evidence is not so clear and unequivocal on this point as to demand the finding that the horse note was taken, not as collateral, but as a substitution for the mule note, and this question should have been submitted to the jury. Civil Code 1910, § 5926; *Broughton v. Aiken*, 7 Ga. App. 318, 66 S. E. 809.

We think, also, that the question whether the defendant had possession, custody, or control of the mule was in some doubt under the evidence. Two or three days before the suit was brought, he was seen to have the mule in his possession, and on the night when the officer, in company with the plaintiff, went to serve bail process, he admitted that, while he did not have the mule in his possession at that time, "he could get it," and agreed that "if they would give him until to-morrow he would settle it." The jury might have inferred that, while he did not have the mule in his actual possession, it was where he could get it, or that he was playing for time to elude the mule, so as not to have it forthcoming. Even if he did not then have possession, custody, or control of the mule, but had previously gotten possession of it with legal knowledge of Benton's recorded title, and with this knowledge had disposed of the mule, this was a conversion so far as the superior right of Benton was concerned, if he had not lost his right to the mule in taking the note for the horse. *Miller v. Wilson*, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319; *Merchants' & Miners' Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802. The case should have been sent to the jury, and the direction of a verdict for the defendant was erroneous. Judgment reversed.

(113 Va. 746)

HARRIS et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Feb. 2, 1912.)

1. CONSPIRACY (§ 23*)—"CRIMINAL CONSPIRACY."

A criminal conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 30-39; Dec. Dig. § 23.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 3, p. 7613; vol. 2, pp. 1745-1746.]

2. MONOPOLIES (§ 12*)—COMBINATIONS PROHIBITED—COMMON-LAW RULE.

The common law did not prohibit the creation of a monopoly by individuals, but only the granting of a monopoly by the sovereign, and combinations in restraint of trade, in view of the laws against engrossing which were not technically monopolies at common law, were only unlawful when made among dealers in provisions or the necessities of life or of merchandise or manufacture in the market.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. MONOPOLIES (§ 18*)—COMBINATIONS BY INSURANCE COMPANIES—"INSURANCE"—"NECESSARIES."

Insurance is not an article of merchandise or manufacture, or one of the necessities of life, within the laws against engrossing, prohibiting combinations among dealers in merchandise or manufacture or necessities of life, since a policy of insurance is a simple contract of indemnity against loss.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 14; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677; vol. 5, pp. 4693-4703.]

4. CONSPIRACY (§ 23*)—COMBINATIONS BY INSURANCE COMPANY TO FIX RATES.

A combination of fire insurance companies to fix rates and control the business of insurance in a city, though an agreement in restraint of trade, is not an indictable conspiracy at common law.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 23.*]

5. CONSPIRACY (§ 43*)—CRIMINAL CONSPIRACY—INDICTMENT.

Where the object of a conspiracy is not criminal or illegal, and the illegality consists of the means by which the object is effected, the indictment must set forth the means which must be such as to constitute an offense at common law or by statute.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

6. CRIMINAL LAW (§ 1*)—OFFENSES—MOTIVE.

Acts which will subject one to a civil action without regard to the motive with which it is done may be indictable when done maliciously.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1; Dec. Dig. § 1.*]

7. CONSPIRACY (§ 23*)—ILLEGAL COMBINATIONS—WARRANT.

A warrant alleging that insurance companies and individuals doing business in a city which had levied a license tax on insurance companies doing business there maliciously conspired to arbitrarily raise insurance rates for the purpose of maintaining a monopoly of the

insurance business in the city, and to stifle competition and coerce the city authorities to repeal the license tax, does not charge a criminal conspiracy at common law, but shows that the companies had just cause for raising their rates in the city by considering the license taxes imposed, and the motive charged does not make the acts complained of a criminal offense.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 23.*]

Error to Corporation Court of Newport News.

A. H. Harris and others were charged with criminal conspiracy, and from a judgment overruling demurrers to the criminal warrant they bring error. Reversed and rendered.

O. D. Batchelor, R. Randolph Harrison, J. Winston Read, and Alex C. King, for plaintiffs in error. The Attorney General and C. C. Berkeley, for the Commonwealth.

BUCHANAN, J. This is a prosecution for criminal conspiracy. It was commenced before a justice, but upon appeal to the corporation court of the city of Newport News the warrant was by leave of the court amended.

The amended warrant is quite long. It charges, in substance, that on May 17, 1910, and previously for a number of years, a large number of insurance companies had been doing all the fire insurance business of the city, which insurance was a necessity to all persons owning property in the city; that prior to the said 17th of May the city authorities had passed an ordinance requiring a certain license tax to be paid by each fire insurance company doing business in the city for the license year beginning May 1, 1910; that the (6) plaintiffs in error and some 20 other persons, naming them, and others unknown, together with all the said fire insurance companies and associations, did on the 17th of the said May, with a wanton and malicious intent to damage and injure, oppress, and coerce the persons owning property in the city, and the council of the city and the members thereof acting in their official capacity, "maliciously, immorally, corruptly, wantonly, and fraudulently, unlawfully, and wickedly, conspire, combine, confederate, and agree together, with intent aforesaid" by coercion and intimidation to arbitrarily fix, establish, regulate, control, charge, and collect the premiums of insurance on all policies and contracts of insurance issued, and to be issued by the said insurance companies and all others who might attempt to do a fire insurance business in the city, and all their agents, on all property in the city, for the purpose of maintaining a wicked and exclusive monopoly of all the fire insurance business done in the city and state, and with like intent to stifle and destroy all competition in fire insurance in the city, and with like intent to arbitrarily

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

charge, coerce, extort, and collect the non-competitive rates and premiums so arbitrarily fixed, and to prevent persons owning property in the city from procuring fire insurance at any other than the said established noncompetitive rates, and thereby coerce and intimidate said council and its members to repeal the said license tax on said fire insurance companies—all of which was charged to be the great damage of the city and state, the council and its members, and against the peace and dignity of the commonwealth.

The warrant further charged that, pursuant to said conspiracy, the parties had done the said acts complained of.

There are numerous assignments of error; but, in the view we take of the case, it will be unnecessary to consider any of them except the demurrer to the warrant.

That demurrer is in substance that the warrant does not charge a criminal offense.

It is conceded that there is no statute of this state prohibiting such a combination as that charged in the amended warrant, but the contention of counsel for the commonwealth is that the combination charged is a crime at common law.

No case is cited by the counsel for the commonwealth which holds that a combination of fire insurance companies and associations to fix, regulate, and control fire insurance rates is a criminal conspiracy at common law; but the claim is that the common law "is an expansive, elastic, progressive system, and its old principles are as effective to-day to prevent unlawful conspiracies to oppress the people in the exercise of their rights to enjoy the benefits of modern insurance as it is to protect the people to-day in their rights to enjoy wholesome food at reasonable prices."

It is true that the principles of the common law are elastic, and that one of its peculiar merits is that it adapts itself to the rights of parties under changed circumstances (*Foster v. Commonwealth*, 96 Va. at pages 309, 310, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846), but the difficulty is in ascertaining what are the principles or rules of the common law as to criminal conspiracies. The cases and text-writers are not agreed on the subject.

[1] The definition or description which seems to be more generally adopted is that a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. See *Jones' Case*, 4 B. & A. 45; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; *Mogul Steamship Co. v. McGregor, etc.*, 23 Q. B. Div. p. 624; *Wright on Cr. Conspiracy* (Carson's Ed.) 48, 110-111, and authorities cited; 2 *Wharton's Cr. Law*, § 1337.

It is insisted that the object of the combination charged in the warrant was to create and maintain a monopoly in the fire insurance business in the city of Newport News, and that the creation of a monopoly in an article of necessity was a criminal offense at common law.

[2] It seems to be settled that there was no prohibition at common law against the creation of a monopoly by individuals. Chief Justice White in *Standard Oil Company v. United States*, 221 U. S. 1, 52, 55, 31 Sup. Ct. 502, 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, says it is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. "The frequent granting of monopolies [by the sovereign] and the struggle which led to a denial of the power to create them—that is to say, to the establishment that they were incompatible with the English constitution—is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But, as it was considered, at least so far as the necessities of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating, and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute (5 and 6 Edw. VI, c. 14), as follows:

"Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields,

or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed and taken an unlawful engrosser or engrossers.'"

After showing the difference between monopoly and engrossing, and how they afterwards became to be regarded as one and the same thing because of the similarity of some of the evils which resulted from them, he says: "Generalizing these considerations, the situation is this: (1) That by the common law monopolies were unlawful because of their restrictions upon individual freedom of contract and their injury to the public. (2) That as to necessities of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly; that is, an undue enhancement of price. (3) That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly because of its operation and effect to be brought within and spoken of generally as impeding the due course of or being in restraint of trade."

From these quotations and the authorities cited in that case and others that might be cited, it appears, we think, that combinations in restraint of trade and called monopolies, though not technical monopolies as known to the common law, were combinations, so far as pertinent to this case among dealers in provisions or the "necessaries of life," or "articles of prime necessity," or of "merchandise" or "manufacture in the market."

[3] Insurance is not an article of merchandise or manufacture, or one of the "necessaries of life," or of prime necessity, within the letter or spirit of the laws against engrossing.

It was said in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, that: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire entered into between the corporation and the assured for a consideration paid by the latter. The contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as having an existence and value independent of the parties to them." *Hooper v. California*, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. Ed. 297.

[4] The most that can be said as to the combination to fix, regulate, and control the business of fire insurance in the city of Newport News is that it was an agreement in restraint of trade. But agreements merely in restraint of trade are not illegal in the sense that they are either indictable or actionable.

In *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 619, Bowen, L. J., in commenting upon *Hilton v. Eckersley*, 6 El. & Bl. 47, said that "no action at common law will lie against any individual or individuals for entering into a contract merely because it is in restraint of trade," and in the same connection further said: "We are asked to hold the defendants' conference or association illegal as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts. It merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public."

In the same case, Fry, L. J., said: "It is said that such an agreement is in restraint of trade, and therefore illegal. Be it so. But in what sense is the word 'illegal' used in such a proposition? In my opinion it means that the agreement is one upon which no action can be sustained, and no relief obtained at law or in equity; but it does not mean that the entering into the agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. * * * The language of all the judges in the cases of *Hornby v. Close* and *Farrer v. Close* is consonant with that of Lord Campbell and Erle, J., in *Hilton v. Eckersley*, and *Crompton, J.*, is, I believe, the only judge who has ever hitherto held such contracts illegal as well as void."

In *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 279, 29 C. C. A. 148, 46 L. R. A. 122, Taft, J., said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co. v. McGregor*, *Gow & Co.* (1892) App. Cas. 25; *Hornby v. Close*, L. R. 2 Q. B. 153; Lord Campbell, C. J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; *Hannen, J.*, in *Farrer v. Close*, L. R. 4 Q. B. 602, 612."

In the case of *Queen Ins. Co. v. Texas*, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, in which that state attempted to dissolve a combination of insurance companies similar to that charged in the warrant in this case, one of the grounds urged by the Attorney General of the state was that "any article of general use and benefit to the public,

which affords to the public convenience, comfort, enjoyment, and profit, ought to be protected as a 'prime necessity.' Insurance affords all these in this latter day of business progress, and has become an important factor in every business of the country and in the use and enjoyment of property and possessions and belongings." But the court refused to adopt that view, and held that such a combination was not illegal at common law; and in doing so said: "Insurance is a mere contract of indemnity against contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restrictions will be found in any charter. Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable to most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground. Combinations among workmen to increase or maintain their wages by unlawful means are unlawful. But are such combinations unlawful when the only means resorted to to accomplish their objects is a refusal on the part of the parties to the agreement to accept employment at a lower rate of wages than that designated in the contract? This is the next question for determination, and it is not without difficulty.

That court, after reviewing the course of decision in this country and England, reached the conclusion that a combination of laborers agreeing not to work except upon named conditions, no unlawful means being employed, is not a criminal conspiracy, and that neither were such contracts illegal or void on the ground of public policy; thus reaching the same conclusion upon that subject as did this court in the case of *Everett Waddey Co. v. Richmond Typo. Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

In the latter case it was held that it was not unlawful for laborers to organize for their own protection and to further their own interests, and to persuade others to join them, provided they used no unlawful means in accomplishing those objects; citing a number of cases, among others the case of *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, from which is quoted with approval the following language: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work or deal with certain men or classes of men, or work under a certain price or without certain conditions. * * * Freedom is the policy of this country."

If it be lawful for laborers to combine to control the terms of their hiring and to induce others to unite with them for that purpose, it would seem to follow, in the absence of any statutory regulation upon the subject, that it is not unlawful for individuals or corporations engaged in the insurance business to agree upon the terms and conditions and rates upon which they are willing to insure, and to induce others engaged in the same business to unite with them in maintaining the terms and conditions and rates so fixed and agreed upon, provided they use no unlawful means in accomplishing their objects. See, also, generally, *Cont. Ins. Co. v. Fire Underwriters* (C. C.) 67 Fed. 310, and cases cited; *McCauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760; *Aetna Ins. Co. v. Com.*, 106 Ky. 864, 51 S. W. 624, 21 Ky. Law Rep. 503, 45 L. R. A. 360.

Having reached the conclusion that the agreement to fix, regulate, and control the rate of insurance in the city of Newport News was neither criminal nor unlawful, the next question is, Were the means by which that end was to be accomplished criminal or illegal?

[5] Where the object of an alleged conspiracy is not criminal or illegal and the illegality is in the means by which that object is to be effected, the means must be set forth, and must be such as to constitute an offense either at common law or by statute. 2 Whar. Cr. Law (9th Ed.) §§ 1358, 1367; *Pettibone v. United States*, 148 U. S. 197, 205, 13 Sup. Ct. 542, 37 L. Ed. 419; *Wright on Cr. Cons.* 197-199.

The warrant contains a great deal of

strong assertion and the frequent use of the words, "fraudulently," "unlawfully," "maliciously," "coercion," "intimidation," and the like, but the facts averred do not show any element of fraud, coercion, or intimidation in the legal sense of those terms. 2 Whar. Cr. Law, §§ 1367, 1368.

[8, 7] It is no doubt true that some acts which would subject a party to a civil action without regard to the motive with which they are done are indictable when done maliciously, and it may also be true that a combination of persons instigated and moved by mere malice towards others as a means of doing them injury and for no benefit to the parties to the combination would be a criminal offense. But that is not this case. The warrant does not so charge, and it affirmatively appears from its allegations that the city of Newport News had levied a license tax upon insurance companies doing business in the city, and that such companies had subsequently raised their insurance rates. The facts charged in the warrant show that the insurance companies had just cause for raising their rates of insurance in the city, for they had the same right in fixing their rates of insurance to take into consideration the license taxes they were required to pay as any other item of expense attending their business. The question involved here is whether or not, where the combination is neither in end or means criminal or unlawful, except in the sense that courts will not enforce the agreement, the motives with which the parties to the agreement are moved, as charged in the warrant, will make it a criminal offense.

The general rule, as stated in Cooley on Torts (3d Ed.) p. 1505, citing numerous cases, is that "malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because done with a bad intent. Where one exercises a legal right only, the motive which actuates him is immaterial." Numerous cases are cited which sustain the text.

In *Hunt v. Simonds*, 19 Mo. 583, it was held that an action does not lie for a conspiracy to do a lawful act. Thus an action will not lie against the officers of insurance companies for combining to refuse to take insurance on a boat, however malicious their motive. In discussing the question involved in that case, the court said: "The damage to the plaintiff is alleged to have been produced by the refusal of the defendants to make contracts in the ordinary line of their business. It is obviously the right of every citizen to deal or to refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and con-

tract with others. * * * But such is not the obligation of underwriters. The business of insuring is but a game of hazard, and there are a great many elements entering into the calculations upon which it can be safely pursued."

Again it is said: "He had no right in law to demand insurance upon his boat from one or all of the defendants, nor that they should insure cargo on his boat, and consequently their refusal to insure from any motive, however improper, could give him no right to sue them."

In *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 253, 68 Am. Dec. 770, it was held that a conspiracy by insurance companies that they would not insure any boat on which a certain person was employed, whereby such person was deprived of employment, did not furnish a ground of civil action, however malicious the motives of the insurance companies may have been. See *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 234, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Bowen v. Mathe-son*, 14 Allen (Mass.) 499.

Litigation would be endless if the motives of those who are simply doing what they have a legal right to do were made the subject of inquiry.

In *Phelps v. Nowlen*, 72 N. Y. 39, 45, 28 Am. Rep. 93, in which it was held that, where a man has a legal right, courts will not inquire into the motive by which he is actuated in enforcing the same, the court said: "A different rule would lead to the encouragement of litigation, and prevent in many instances complete and full enjoyment of the right of property which inheres to the owner of the soil. An idle threat to do what is perfectly lawful or declarations which assert the intentions of the owner might often be construed as evincing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights."

And the evil consequences of such a practice would be much worse in cases of conspiracy where all are responsible within certain limitations for the acts and declarations of one of their number as to the motives which actuate him, when none of his associates may be moved by it or any other improper motive.

Dr. Wharton in his *Criminal Law* (9th Ed.), after stating in section 1337 that it is conceded on all sides that combinations of two or more persons may become indictable when directed to the accomplishment either of an illegal object or an indifferent object by illegal means, says the conflict in the cases begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offense, but from the idea that the policy of the law forbids

the reaching of the attempted object by a confederacy; and in section 1333 adds: "But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert, involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offenses are indictable, and, if we do not, the knowledge is readily obtained. Such offenses, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. * * * No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitution of an indictable offense * * * that it should be prohibited either by statute or by common law; but conspiracies to commit by nonindictable means nonindictable offenses, if we resolve them into their elements, are neither prohibited by common law nor by statute. * * * An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which, in one phase of judicial sentiment, would be regarded as meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been, treated as an indictable offense."

In reaching the conclusion that the amended warrant does not charge an indictable offense and that the demurrer to it should have been sustained, we do not wish to be understood as holding that the combination charged in this case may not be prejudicial to the public, and that a sound public policy may not require limiting or suppressing such combinations. But, as was said by the Court of Appeals of Texas in *Queen Ins. Co. v. Texas*, supra, in holding that a like combination was not a criminal offense at common law: "There are certain contracts and perhaps combinations which the law regards as being against public policy. The courts cannot extend the rule merely by reason of their opinion as to what the law ought to be. What other combinations or contracts should be held illegal on the ground of public policy is a political question—that is to say, one which it is the province of the legislative department of the government to determine. The Legislature has the power to weigh the public interest, even 'in golden scales,' and, if such combinations be found detrimental,

they can denounce the evil and provide the remedy."

The judgment complained of will be reversed, and this court will enter such judgment as the trial court ought to have entered.

Reversed.

(113 Va. 687)

LANFORD v. VIRGINIA AIRLINE RY. CO.
(Supreme Court of Appeals of Virginia. Jan. 25, 1912.)

1. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS—RULING ON ADMISSION OF EVIDENCE—WAIVER.

Where no bill of exceptions is taken to the admission of evidence over objection, the objection is considered as having been waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

2. RAILROADS (§ 102*)—ACTION TO REQUIRE CONSTRUCTION OF CROSSING—EVIDENCE—TESTIMONY OF COMMISSIONERS.

In an action under Code 1904, § 1294b, cl. 2, by an owner across whose land a railroad ran, to require the construction of an underway crossing from one part of the land to another, evidence by the commissioners, appointed to assess the owner's damages at the time the road was constructed, as to whether they had considered the fact that the owner would be deprived of a surface crossing by reason of a fill, was admissible to explain the report.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 306-314; Dec. Dig. § 102.*]

3. RAILROADS (§ 102*)—ACTION TO REQUIRE CONSTRUCTION OF CROSSING—CONSTRUCTION OF STATUTORY PROVISION.

Code 1904, § 1294b, cl. 2, which requires every railroad passing through the lands of any person to provide a suitable "wagonway across" its road, to be constructed on the written request of the owner to an officer or agent of the company, at a point designated by the owner, and that, if the company refuse to construct such way, the owner may appeal to the circuit court for the appointment of commissioners to determine whether the wagonway should be constructed, their report to be confirmed, "unless good cause is shown against it by the company," considered with section 1294b, cl. 3, which in dealing with the crossing of one railroad by another uses only the word "crossing," and section 1294d, cl. 38, which, as to crossings of other railroads and of county roads, declares it the policy of the state to abolish grade crossings, does not give the owner the arbitrary right to an underway wagon road, but must be given a reasonable construction with reference to the convenience of both parties, and the cost to be incurred by the railroad in constructing the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 306-314; Dec. Dig. § 102.*]

4. RAILROADS (§ 102*)—CONSTRUCTION OF PRIVATE CROSSINGS—APPOINTMENT OF COMMISSIONERS—EFFECT OF REPORT—BURDEN OF PROOF.

Under Code 1904, § 1294b, cl. 2, making it the duty of every railroad passing through land of any person to provide a suitable wagonway across its road from one part of the land to another, and providing for the appointment of commissioners on the owner's application to determine whether the wagonway asked for should be constructed, the report of such com-

missioners locating a crossing and prescribing its character makes a prima facie case against the railroad, and imposes upon it the burden of showing good cause against the construction of such crossing, but the report is in no manner conclusive; the whole question being up for decision by the court.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 306-314; Dec. Dig. § 102.*]

5. APPEAL AND ERROR (§ 1032*) — PRESUMPTIONS—BURDEN OF SHOWING ERROR.

A landowner who makes application under Code 1904, § 1294b, cl. 2, to have a railroad running through his farm construct an under-way wagon crossing, as to which the lower court has held that good cause was not shown by the report of the commissioners determining that a way was necessary and dismissed the application, the burden is upon him on appeal to satisfy the Supreme Court of Appeals that there was prejudicial error in the decree dismissing the application.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

Error to Circuit Court, Fluvanna County.

Application by J. W. Lanford against the Virginia Airline Railway Company to compel the defendant to construct a crossing under its road. Application dismissed, and plaintiff brings error. Affirmed.

Pembroke Pettit and J. O. Shepherd, for plaintiff in error. C. W. Allen, L. O. Haden, and Harmon & Walsh, for defendant in error.

CARDWELL, J. J. W. Lanford, with the view of availing himself of the benefits of section 1294b, cl. 2, of the Code of 1904, filed his petition with the circuit court of Fluvanna county, demanding of the Virginia Airline Railway Company the construction of an underway crossing for a wagon road from the uplands to the lowlands of his farm at a designated point on the defendant's railroad line where it passes through plaintiff's farm, and where the railroad bed is constructed with a very high fill.

Pursuant to the statute, the circuit court appointed three commissioners who returned a report, signed by only two of them (although the three considered the matter together), favorable to the plaintiff, and to the report the defendant company filed exceptions, which were sustained, whereupon the two commissioners were, over the objection of the defendant, allowed to amend their report. At a later term of the court, the cause came on for final hearing upon the amended report of the commissioners, the evidence introduced by the plaintiff as well as that introduced by the defendant, and the argument of counsel for both parties; thereupon the court adjudged that good cause had been shown why neither of the reports made by the two commissioners in favor of the plaintiff should be confirmed, and that the plaintiff's application be dismissed, with costs to the defendant. This judgment we are asked to review and reverse.

The statute, supra, so far as relevant to the issue, is as follows:

"It shall be the duty of every railroad * * * corporation, whose road * * * passes through the lands of any person in this state, to provide proper and suitable wagon ways across said road * * * from one part of said land to the other, and to keep such ways in good repair. Such ways shall be constructed on the request of the landowner, in writing, made to any section master, agent, or employé of such company, having charge and supervision of the railroad * * * at that point, and shall designate the points at which the wagon ways are desired. * * * If the company fail or refuse for ten days after such request to construct wagon ways of a convenient and proper character at the places designated, then the owner, having given ten days' notice in writing, as aforesaid, may apply to the circuit court of the county * * * wherein the said land is located for the appointment of three disinterested persons whose lands do not abut on the said railroad * * * who shall constitute a board of commissioners, whose duty it shall be to go upon the land and determine whether the wagon ways asked for should be constructed. Their decision shall be in writing, and, if favorable to the landowner, it shall set forth the points at which the wagon ways should be constructed, giving also a description of what should be done by the company to make a suitable and convenient way. The decision of the commissioners shall be returned to and filed in the clerk's office of such court, and when called up at the next or any succeeding term of said court, it shall be affirmed, unless good cause is shown against it by the company, either party to have the right of appeal to the Supreme Court of Appeals from the judgment of the said court."

The report of the commissioners in this case recommended that the defendant railway be required to construct, at the point designated by the plaintiff, an underway "wagonway twelve feet wide and not less than twelve feet high from subgrade, and it shall preserve intact the original grade of the said wagonway or road." The earth fill through which this underway crossing was to be constructed is about 18 feet high and about 82 feet wide, and the wagonway was to be an open trestle or an arch subway in the discretion of the railway company.

Plaintiff in error's farm is situated on the Rivanna river, in Fluvanna county, and contains approximately 200 acres, of which about 30 acres is fertile and productive bottom land, and upon the residue of the farm—the highland—his dwelling, barn, and other buildings are located. On the upper or western side of the farm a high and precipitous bluff projects from the table land sheer to the

water's edge of the river at low water, circling back from the water's edge and southward upstream or towards the west, almost perpendicular and following the winding of the stream, but not receding very far from the banks. Downstream, or eastward, however, the bluff breaks more abruptly southward, and, circling somewhat eastward, leaves the above-mentioned piece of low-grounds or bottom land about one-third as wide as it is long, extending all the way to the entire distance of plaintiff in error's farm to the eastern boundary line between him and one C. E. Jones; and this bluffy formation, extending all the way to his eastern boundary, divides his low grounds from his highland, the bluff standing most of the way at an angle of about 45 degrees. There are, however, three depressions in the bluff, the first being not far from where the bluff projects into the river, called "depression No. 1"; the second about midway plaintiff in error's low grounds, called "depression No. 2"; and the other over on Jones' land not far from the division line, called "depression No. 3." That plaintiff in error may have defendant in error to construct and maintain a wagonway through the fill in depression No. 2, so that he can have the use of the road leading from his highland to the low grounds which he in the main formerly used, is the subject-matter of this controversy.

It appears that, when it went about the acquisition of a right of way through plaintiff in error's farm, defendant in error complied with the statute—section 1105f (4), c. 46b, Code—with respect to the filing in the clerk's office of Fluvanna county of maps and profiles showing the cuts and fills, etc., in the proposed construction of its roadbed through the farm of the plaintiff in error, and which showed that the right of way desired was along the entire length of the bluff separating the highland from the low grounds, and that the roadbed was to be constructed by fills and cuts, and not by trestling. Moreover, when the five commissioners appointed in the condemnation proceedings to assess and report the damages to be paid by defendant in error for the right of way through plaintiff in error's farm were upon the farm viewing the route of the proposed roadbed, etc., plaintiff in error had his attention called to the fact, both by the commissioners and defendant in error's engineer in charge of the construction of its roadbed through plaintiff in error's farm, that the roadbed was to cross depression No. 2 over a fill, and not over a trestle or arch, which of necessity would put an end to the use of this depression for a wagonway.

Clauses 6-8, § 1105f, of the Code, supra, provide that the commissioners condemning land "shall ascertain what will be a just compensation for said property and land • • • and assess the damages, if any, to

the adjacent or other property of such tenant or owner * * * beyond the peculiar benefits which will accrue to such properties respectively from the construction and operation of the company's works."

It is quite clear that the commissioners for condemnation are required by the sections of the Code just referred to, to take into consideration all damages incident to the construction of a railroad as designed, according to the maps and profiles filed in the clerk's office as required by statute, and in this case there is no ground for the contention of plaintiff in error that the commissioners disregarded the requirement of the statute when assessing his damages in the condemnation proceedings; on the contrary, four of the commissioners have testified in this case to the effect that they did regard the requirements of the statute, that they knew that the profile called for a fill across depression No. 2, that the damages assessed to plaintiff in error (\$600) would not have been as great but for the closing up of the road formerly used by plaintiff in error through depression No. 2, that the increase of the damages beyond what they would have allowed was because they knew that the road through depression No. 2 would be stopped up, that, while they considered that the railroad was bound to give plaintiff in error another road, he could not get another such road as the one to be stopped by the fill. "He would have to go right much farther to get a road, farther to haul, and that he could have got about as short a road to haul over, but more grade."

One of these commissioners (Dr. Boston), when asked to state the nature of any conversation had between the commissioners and Lanford (plaintiff in error) before they brought in their final report, said: "I had been talking with Mr. Lanford a good deal about the matter, and I suggested to him that, as the question of that road was involved in that decision, I thought we ought to make report setting forth that, if the road was stopped, the commissioners awarded so much damages, or, if it was not interfered with, that we would allow him so much damages. Before we concluded our report, I sent for Mr. Lanford, and asked him and he said he would consult his lawyer. He went out and came back and said something about just go on, and I took it for granted that we had given him big damages because of the stopping up of the road. I think that was the view of all the commissioners."

The other commissioner, H. P. Kent, refused to sign the report assessing damages to plaintiff in error at \$600, and, testifying for him in this case, in effect corroborates the other commissioners in the statement that in considering the damages to be allowed for the railroad's right of way it was understood that the roadbed was to be constructed across depression No. 2 by a fill, thereby discontinuing the road that plaintiff in er-

ror had been using as a farm road mainly; but while he gave his reasons for not signing the report returned by the commissioners, and says that without reference to the crossing he was in favor of fixing the amount of damages at \$1,000, he does not undertake to explain why the amount he favored was greater than the amount favored by any of the other commissioners; and, when asked if there was any other practicable way than this depression (No. 2) for a road to the low grounds, he answered: "I don't think there is any point on his place that he could build a road that would compare with that." Here the witness corroborates the statement made by the other commissioners to the effect that the discontinuance of the farm road in question and the consequent inconveniences, etc., to which plaintiff in error would be put were matters taken into consideration by the commissioners in fixing the amount of damages allowed him.

The report of the commissioners was returned to court, confirmed without objection, and plaintiff in error was paid the amount of damages (\$800) assessed to him.

[1, 2] Objection was made by plaintiff in error to the admission in this proceeding of the testimony of the four commissioners adverted to above, but no bill of exceptions has been taken to the ruling of the court admitting it, and therefore the objection has to be considered as waived. *N. & W. Ry. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Same v. Ampey*, 93 Va. 108, 25 S. E. 226. If such were not the case, this evidence was admitted for the purpose only of explaining and making clear the report of the commissioners, and for that ruling authority is abundant.

[3] It is manifest that in the beginning and throughout this whole controversy he has proceeded upon the erroneous theory that the statute gives him the arbitrary right to demand and have of the defendant in error, not only an underway wagon road crossing from one part of his farm to the other, but at the point he designates, and without regard to the costs thereby imposed upon the defendant in error, or whether the inconvenience and expense to him in having to take and use a grade crossing of the railroad's right of way at another point on his farm would be much or little.

The statute admits of no such construction, even if it were clear that it contemplates that a railway company can be required to construct an underway crossing to give access from one part of a farm to another where a farm is divided by the roadbed constructed through it. It is very clear that the statute contemplates that the way is to be constructed readily and quickly. It does not, as plaintiff in error contends, merely provide that the railway company, when the landowner requests a farm crossing, shall within 10 days agree to construct it, but provides: "If the company fail or re-

fuse for ten days after such request, to construct wagonways of a convenient and proper character, at the places designated then the owner may" institute legal proceedings to require the company to construct such ways as he has designated. The statute does not impose upon a railway company the duty to "provide a crossing," but to provide proper and suitable "wagonways across" the railroad right of way, and the words "wagonways across" appear significant, especially so when the statute is read along with clause 3 of section 1294b, ch. 54a, of the Code, which latter section deals with the crossing of one railroad by another, and uses the word "crossing" only, and that section has been construed by this court to require no more than a surface crossing. *N. & W. Ry. Co. v. Tidewater Ry. Co.*, 105 Va. 129, 52 S. E. 852. When in the same act (section 1294d, cl. 38) the Legislature declared the policy of the state to be that crossings shall be either over or under existing structures, no mention is made of private crossings, nor any language used to indicate that they were to be considered as subject to this policy.

That section is: "It is hereby declared to be the policy of this state that all crossings of one railroad by another, or of a county road or highway by a railroad, or of a railroad by a county road or highway, shall, whenever reasonably practicable pass above or below the existing structure."

Construing section 1294b, cl. 3, supra, in the light of the declared policy of the state just quoted, this court held that the statute did not necessarily require an overhead viaduct by one railroad in crossing another, where the expense would be excessive.

In this case the report of the two commissioners, which the circuit court refused to confirm, required that defendant in error excavate an opening through its roadbed, build two walls 18 feet high, 20 feet wide at the top, and 82 feet wide at the bottom, then fill back behind the walls and bridge across the opening, or else construct concrete or granite walls, arched over, through this opening, of 12 feet wide and of height sufficient to give a clearance of at least 12 feet, which reconstruction of the defendant in error's roadbed at that point, a work of months, would, according to evidence in the record practically uncontradicted, impose upon defendant in error an expense of from \$3,800 to \$4,000, to say nothing of the possible increase of danger or inconvenience resulting from the reconstruction of its road bed or the change of its character at that point.

W. H. Talley, a civil engineer, testifying for plaintiff in error, does say that he made an estimate of the cost of the construction of the under-crossing required by the commissioners' report, and ascertained that it would be less than the witnesses for defend-

ant in error estimated it; but, besides admitting that he was inexperienced in the work of constructing a railroad, he produced no figures showing how he arrived at his estimate of the cost, and refused to do so.

It is earnestly argued for plaintiff in error that, with his road through depression No. 2 stopped up, he is practically denied access to and from his low grounds, but we are unable to take that view of the evidence in the record. The witnesses for defendant in error testify with unanimity that a surface crossing of the railway is practicable at another point on plaintiff in error's farm, and where he has had a road which he had from time to time used. His own witness, Talley, while saying that the route up the middle depression (No. 2) is the most practicable and convenient route, etc., admits that it is not the only practicable route, and that, while a certain other route would be longer, the grade of the road would be not greater than many of the county roads of Fluvanna, and less than some of them. In fact, only in the argument of counsel and the statements of plaintiff in error himself is it asserted that it is not practicable for him to have a crossing of the railway over which to reach his low grounds, except by the route through depression No. 2. True, to have to use another route than that usually used by him before the railway through his farm was constructed would be attended with inconvenience and some expense in constructing partly another road, and perhaps a bridge across a usually dry ditch, but this inconvenience and expense would not amount to a burden comparable to that he demands shall be borne by defendant in error in order that he may avoid such inconvenience and expense. It is also true that plaintiff in error, when told that the plans for the construction of the railroad bed through his farm called for a fill in depression No. 2, said, and thereafter repeated, "I want my crossing," gave notice to the defendant in error to that effect, and gave notice to it that he would apply for an injunction to prevent the stopping up of his road, but although defendant in error agreed to and did suspend its work at depression No. 2 for a reasonable time, and waited ten days for the injunction bill to be filed, none was filed, whereupon the work of filling across depression No. 2 was resumed, and plaintiff in error admits that he made no further objection to the work going on, having decided "to take other proceedings."

Having received, without objection to the confirmation of the report in the condemnation proceedings, the \$600 the report allowed him, and declining to contest the legal right of defendant in error to proceed with the construction of its roadbed and works on his farm, according to the maps and profiles by which the commissioners were guided in assessing the damages resulting there-

from to him, plaintiff in error assumes the attitude of demanding of defendant in error that it reconstruct its roadbed across depression No. 2 so as to provide for him an underway crossing of a wagon road, and at a cost to defendant in error amounting to three times the admitted assessed valuation of his whole farm for taxation, including buildings, etc., thereon, and to two-thirds of the value thereof put upon it by himself when offering the property for sale before the railroad was constructed.

While the statute imposes upon a railroad company whose line of road passes through the lands of any person in this state the duty to provide proper and suitable wagonways across its roadbed from one part of said land to the other, and to keep such ways in good repair, the statute has to receive a reasonable construction, so as to make the remedy commensurate with the right of the landowner and the mischief intended to be redressed. *Adams v. Tidewater R. Co.*, 107 Va. 798, 60 S. E. 129.

According to the evidence in this case, there is an established grade crossing but a short distance southeast of the crossing plaintiff in error is now contending for, which crossing he can reach by a reasonably convenient route which he has sometimes heretofore used, yet he has selected a point for his farm crossing where the cost to defendant in error in its construction would approximate \$4,000, while the land to be reached, at his own estimate, is not worth more than \$2,500, and his whole farm, buildings included, is valued for taxation at the sum of \$1,341.

It further appears that if defendant in error were required to reconstruct its roadbed across depression No. 2, so as to give plaintiff in error a wagonway up that depression, it would not be a saving to him of more than four or five days of extra work in harvesting his crop on the bottom lands, as that land is only cultivated in corn, and, before the construction of the railway through his farm, the wagonway up depression No. 2 was not used more than from seven to ten days during the year.

Clearly a reasonable construction of the statute imposes upon the party having the right to select his crossing of a railroad right of way the duty to be reasonable, and regard must be had to the convenience of both parties and the cost to be incurred by the party required to construct the crossing.

In *N. & W. Ry. Co. v. Tidewater R. Co.*, 105 Va. 129, 52 S. E. 852, the appellant sought to compel the appellee, in the construction of its line of railroad across appellant's line at a given point, to cross overhead or underground and not at grade, and the opinion by Buchanan, J., says: "It was earnestly insisted by counsel for appellant * * * that the corporation commission, in allowing a grade crossing to be made, had not given due consideration to the declared policy of the

state in favor of overhead or underground crossings. Clause 38, § 1294d, Code of 1904. The change of the policy of the state from grade to overhead or underground crossings both as to highways and railroads is an eminently wise one, and should be given full effect 'wherever,' in the language of the statute, 'it is reasonably practicable and does not involve an unreasonable expense, all the circumstances of the case considered.' But to require the establishment of an overhead or underground crossing where it is not reasonably practicable and would involve an unreasonable expense, all the circumstances of the case considered, would be as much against the policy of the state as to permit a grade crossing where those difficulties are not shown to exist. In reaching our conclusion in this case, we have not been unmindful of the provisions of that statute."

[4] The learned counsel for plaintiff in error in this case argue that while the court has a certain kind of review of the action of the commissioners, it may hear evidence, but it does not hear evidence for the purpose of substituting its judgment for theirs, as the statutes have practically said that "the judgment of the commissioners is better than the judgment of the court in such a matter."

We do not so construe the statute under which this proceeding is had. In none of the cases relied on as supporting the contention has the court in effect said more than that the report of the commissioners makes a prima facie case, and, if nothing irregular appears on its face, great weight should be given to the judgment of the commissioners; so that while the report of the commissioners in this case, locating the crossing and prescribing its character, made a prima facie case, and imposed upon the defendant in error the burden of showing good cause against it, as is not denied, the statute by express terms makes the trial court the final arbiter of the propriety of directing the crossing to be constructed. *Adams v. Tidewater R. Co.*, supra. It would have been a vain thing for the Legislature to have made by its enactment the trial court the final arbiter in such a case, and so worded the statute that it would have been susceptible of the construction that the court is limited to the power only of determining matters which do not go to the question whether or not good cause has been shown against the confirmation of the commissioners' report.

[8] In this case the trial court heard the witnesses testify, examined the maps and profiles of the defendant in error exhibited at the hearing and which were relevant to the issue to be determined, and its order complained of sets forth, in the language of the statute, that good cause had been shown why the reports of the commissioners should not be confirmed.

"The burden is upon the appellant to satis-

fy this court that there was error to his prejudice in the decree or judgment, and, failing in this, the decree or judgment will be affirmed." *Johnson v. Michaux*, 110 Va. 595, 66 S. E. 823.

We are of opinion that the judgment complained of here is without error, and therefore it is affirmed.

Affirmed.

(113 Va. 199)

CITY OF RADFORD v. CLARK

(Supreme Court of Appeals of Virginia. Jan. 25, 1912.)

1. MUNICIPAL CORPORATIONS (§ 745½*)—EXERCISE OF CORPORATE POWERS—TORTS—GROUNDS OF LIABILITY.

To render a municipal corporation liable for the torts of its agents and employes, the injury must have resulted from an act done in the exercise of some power conferred on the municipality by its charter, or other positive enactment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

2. MUNICIPAL CORPORATIONS (§ 733*)—STREETS—CONSTRUCTION AND REPAIR—OPERATION OF QUARRY.

A municipal corporation, unless expressly authorized by charter or general law, or unless such power is to be fairly implied as incidental to powers expressly granted, has no authority to operate a quarry either within or without its corporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

3. MUNICIPAL CORPORATIONS (§ 733*)—STREETS—LIABILITY FOR INJURIES FROM USE—AUTHORITY TO OPERATE QUARRY.

The right to operate a quarry inside the city limits is neither necessary, fairly implied in, nor incidental to the duty of a city to keep its streets in a reasonably safe condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

4. MUNICIPAL CORPORATIONS (§ 733*)—TORTS—LIABILITY—UNAUTHORIZED MAINTENANCE OF QUARRY.

A municipal corporation is not liable to one whose horse, while driven on a street, was frightened by a quarry blast and ran away and threw him out, where the city's operation of the quarry causing the fright was unauthorized.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

5. MUNICIPAL CORPORATIONS (§ 786*)—STREETS—DEFECT—NOISES.

Noises outside of the limits of a street, amounting to a public nuisance, do not constitute a defect in the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1638-1640; Dec. Dig. § 786.*]

6. MUNICIPAL CORPORATIONS (§ 786*)—TORTS—PUBLIC NUISANCE—LIABILITY.

A municipal corporation is not liable for injuries caused to persons or property by failing to suppress a public nuisance within its limits, when such nuisance is not created nor maintained by the express authority of the city, and is not the result of any act done or

neglected in the performance of a duty imposed upon the municipality by law, such as the repair of streets, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1552; Dec. Dig. § 736.*]

7. MUNICIPAL CORPORATIONS (§ 733*)—GOVERNMENTAL DUTY—FAILURE TO PREVENT NUISANCE—LIABILITY.

The operation or control of a rock quarry in which blasting is carried on within 65 feet or more from the street upon which a traveler is injured by the fright of a horse from the blasting was not a positive or ministerial duty, but a governmental duty, for which the city is not liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

8. MUNICIPAL CORPORATIONS (§ 736*)—TORTS—PUBLIC NUISANCE—LIABILITY.

Where a city, without authority, operates a quarry 65 feet or more from the public street, so as to make it a nuisance, it is not liable for not preventing the nuisance; it not being connected in any way with the construction or use of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1552; Dec. Dig. § 736.*]

9. APPEAL AND ERROR (§ 1175*)—REVERSAL—RENDERING FINAL JUDGMENT.

Where the Supreme Court of Appeals is of the opinion, in a personal injury case, that the demurrer to the declaration should have been sustained, it will, in view of the presumption that the plaintiff made the strongest presentation of his case which the facts permitted, and that it could not be strengthened by amendment, enter such judgment as the court below should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Whittle, J., dissenting.

Error to Circuit Court, Montgomery County.

Action by Mrs. Mollie P. Clark against the City of Radford. Judgment for plaintiff, and defendant brings error. Reversed.

Harless & Colhoun and H. C. Tyler, for plaintiff in error. Longley & Jordan, for defendant in error.

CARDWELL, J. The declaration in this action, brought by Mrs. Mollie P. Clark against the city of Radford, consists of five counts, which, after setting out that the defendant is a municipal corporation chartered by the Legislature of Virginia, and charged with the duty of keeping its streets in a reasonably safe condition for use of the public, alleges that said defendant city was on the ——— day of September, 1909, through its servants and agents, blasting with powder and other explosive material in, and getting out rock for use on its streets from, a rock quarry, at a distance of 65 feet from a street of the city known as Grove avenue, and that, while the city was so engaged in blasting on the date named, the plaintiff was driving along said street and within 75 feet of the point of the blasting, and without

knowledge thereof on her part, when a succession of blasts were set off, frightening her horse, causing it to become unmanageable and suddenly to wheel around in the street, throwing plaintiff violently upon the ground, whereby she was seriously injured, and her buggy and harness destroyed.

The neglect of the city to perform its duty of keeping its streets, and particularly Grove avenue, in reasonably safe condition for the use of travelers thereon, is alleged in the five counts in plaintiff's declaration as follows: The first count charges a failure to give warning of its intention to put off the blasts; the second charges a failure on the part of the city to cover its blasts; the third charges the employment by the city of unskillful, careless, and negligent servants; the fourth merely alleges damages to the buggy and harness; and the fifth combines the negligence alleged in the first, second, and third counts, and practically charges negligence on the part of the city in maintaining or failing to prevent a nuisance, resulting in injury to the plaintiff.

The defendant city demurred in writing to the declaration and each count thereof, which demurrer was by the court overruled, whereupon the plea of not guilty was entered and issue joined; and at a subsequent term of the court a trial by jury was had, resulting in a verdict and judgment against the city for \$500 damages in favor of the plaintiff with interest and costs, to which judgment this writ of error was awarded.

Of the eight assignments of error, we find it necessary to consider only the first, which is to the ruling of the court upon the demurrer to the declaration.

[1] "In order to render a municipal corporation liable in damages for the torts of its agents and employes, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment." *Duncan v. City of Lynchburg*, 34 S. E. 964, 48 L. R. A. 331; *Donable's Adm'r v. Town of Harrisonburg*, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. Rep. 1056, and authorities cited in those cases.

In the first of the cases just cited the opinion by Buchanan, J., defines what powers, under the settled law, a municipal corporation can exercise and none other, and it was there held that the city of Lynchburg, either under its charter provisions or the general law relating to such corporations, had no power or authority to create and maintain a nuisance resulting from the operation of a rock quarry outside of the city's limits, although the rock quarried was for use in the construction and maintenance of roads which the city was authorized to con-

struct and maintain, the nuisance complained of having been created and continued by the agents or employes of the city while engaged in a work which was without its corporate powers.

In *Donable v. Harrisonburg*, supra, the injury sued for resulted from the operation of a rock quarry outside of the corporate limits of the town, the stone gotten out to be for use upon the streets of the town, but it was there also held that there could be no recovery for the injury, because the operation of the rock quarry was ultra vires, for the reasons (1) that neither the charter nor the general law gave the town authority to operate a rock quarry; and (2) because the operation of the quarry was carried on outside of the corporate limits.

[2] It has been repeated in the authorities that it might be convenient and even profitable for a municipal corporation, in order to perform certain duties imposed upon it as such corporation to own and operate a rock quarry or other like undertakings, yet it has no power to do so unless in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted.

[3, 4] In this case, as in *Duncan v. Lynchburg*, and *Donable v. Harrisonburg*, supra, to operate a rock quarry was neither necessary to, fairly implied in, nor incident to, the duty of the city of keeping its streets in a reasonably safe condition, nor essential to the declared objects and purposes of the corporation. We fail to see how a different rule of law is to be applied where the injury sued for resulted from an unauthorized act of a municipality, done within its corporate limits, from that applied by this and other courts, as well as sanctioned by the ablest law writers, to cases in which the tort was committed outside of the corporate limits, for the tort committed either in the one or the other case flows from an ultra vires act.

Neither the charter of plaintiff in error, city of Radford, nor the general laws of the state, authorize the operation, either within or without its corporate limits, of a rock quarry.

It is contended for defendant in error that, although there is no allegation or complaint made in her declaration that the street on which she received her injuries was unsafe by any defect therein, she is nevertheless entitled to recover for her injuries because the street was made unsafe by the operation of the rock quarry located 65 feet therefrom.

[5] The authorities very generally hold that noises outside of the limits of the highway, amounting to a public nuisance, are not a defect in the highway.

The allegation was made in the case of *Lincoln v. City of Boston*, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601, that on the day of the accident to the plaintiff cannon were fired in Boston Com-

mon, near Charles street, which rendered said street on which plaintiff was driving unsafe, and was a public nuisance, that the Common was owned and controlled by the city, upon which, by the mayor acting as its agent, the firing of the cannon was licensed; but the opinion of the court sustaining the demurrer to the declaration said: "Annoying and even dangerous as such firing may be, an adjoining householder could not maintain an action against the city, and the plaintiff stands no better than an adjoining owner would."

To the same effect is the opinion of the Supreme Court of Wisconsin in *Hubbell v. City of Viroqua*, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 868, where the action was to recover damages for an injury received while passing along one of the streets of the city, caused by a ball of a gun fired from within a shooting gallery adjoining the sidewalk, but not within the boundaries of the street or sidewalk; the declaration charging that the operating of the shooting gallery, which was licensed by the city, was an obstruction to the free and safe travel of the public on and along a street. In the opinion of the court holding the city not liable, it is said: "The shooting gallery was neither in the street, nor within the boundaries of the sidewalk, but outside of the same, upon private property, and no more obstructed the sidewalk than any other building adjoining such walk."

[6] In the case just cited, as in the case before us, the contention was made that the city was liable because it knowingly permitted a public nuisance to exist in the city adjacent to a public street, which endangered persons traveling upon the street; but with respect to this contention the court's opinion says: "An action will not lie against a municipal corporation for not suppressing a public nuisance within the municipality when such nuisance is not created nor maintained by the expressed authority of the municipality, and when such public nuisance is not the result of some act done, or neglected to be done, in the performance of a duty imposed upon the municipality by law, such as repair of streets, constructing sewers, water, or other public works, the municipal corporation is not liable for injuries caused to persons or property of the citizen by the criminal acts of individuals, unless made liable by statute."

[7] The further contention of the learned counsel in this case that plaintiff in error is liable "for maintaining and not preventing a nuisance," resulting in injury to plaintiff, is equally without merit. Leaving out of view the fact that there is no allegation in the declaration, or in any count thereof, that plaintiff in error had knowledge, actual or constructive, of the unsafe condition of its streets, the operation or control of a rock quarry and blasting therein situated 65 feet

or more from the street upon which defendant in error received her injuries was not a positive or ministerial duty, but a governmental, legislative, and discretionary duty for which the city (plaintiff in error) cannot be held liable. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294, and authorities cited.

[8] Conceding that the operation of the rock quarry complained of in this case was a nuisance, plaintiff in error created it without power or authority conferred upon it by its charter or other positive enactment, and it follows that it could not be held liable for not preventing the nuisance, since the alleged nuisance (the rock quarry) was 65 feet or more from the street, and not connected in any way with the physical construction of the street.

An examination of the cases cited for defendant in error discloses that they all practically deal with the question of a nuisance per se, such as the obstruction of the street itself by the erection of objects therein, as in *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; and in like cases, or the carrying on of a dangerous business that no amount of care, reasonable foresight, or prudence could have safeguarded against, as were the facts appearing in *Wilson v. Phoenix Power Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. Neither those cases nor the line of cases to which they respectively belong apply to the facts alleged in the declaration in this case.

The authorities cited above hold (1) that a city is not liable for its failure to pass ordinances prohibiting bicycle riding upon sidewalks, or coasting upon its streets (*Jones v. Williamsburg*, supra), or (2) the firing of cannon near a street, or (3) the firing of a gun in a shooting gallery licensed by the city to operate adjacent to and outside of a street, resulting in injury to a traveler upon the street; and it follows, necessarily, that a city cannot be held liable for its failure to pass an ordinance to prevent or safeguard the firing of blasts in a rock quarry 65 feet or more from its streets and upon private property. See, also, *Farrell v. Inhabitants*, etc., 69 Me. 72, and cases cited.

[9] For these reasons, we are of opinion that the demurrer to the declaration and each count thereof should have been sustained, and in view of the fact that it is to be presumed that defendant in error has made the strongest presentation of her case which the facts permit, and that it could not be bettered if leave were given to amend, this court, entering such judgment as the circuit court ought to have rendered, will sustain the demurrer and enter a final judgment for plaintiff in error.

Reversed.

WHITTLE, J. (dissenting). The following material facts are set out in the declaration: While the defendant in error, Mrs.

Mollie P. Clark, was driving in her buggy along one of the streets of Radford, the employees of the city, without notice or warning of any kind, set off three uncovered blasts in a rock quarry operated by the city for the purpose of obtaining material with which to repair the streets. The quarry was situated inside the corporate limits and within 65 feet of the street, and was 75 feet from the point of accident. The noise from the explosions, together with the falling rocks in the street and upon the vehicle, frightened the horse and caused it suddenly to turn and run away, overturning the buggy and inflicting upon the plaintiff the injuries of which she complains.

These allegations were proved at the trial, and thereupon the jury awarded the plaintiff \$500 damages.

Upon the theory that the act of the city in thus operating the rock quarry was an ultra vires act, for which the municipality could not be held liable in damages, this court reversed the judgment of the trial court, and sustained the demurrer to the declaration.

In the two Virginia cases (*Duncan v. City of Lynchburg*, 34 S. E. 964, 48 L. R. A. 331, and *Donable v. Harrisonburg*, 104 Va. 533, 52 S. E. 174, 2 L. R. A. [N. S.] 910, 113 Am. St. Rep. 1056) relied on, in part, to sustain this ruling, the rock quarries in question were both located outside the city limits, which fact seems to have exercised considerable influence with the court.

The charter of Radford and the general law impose upon the city the imperative duty of keeping its streets in reasonable repair; and I should be loath to hold that such grant of power and imposition of responsibility does not carry with it as a necessary and fairly to be implied incident the power to take rock and other needful material from its contiguous property to enable the city to discharge that duty. It is matter of common knowledge that cities and towns throughout the country resort to such sources of supply in opening, grading, and repairing streets, and to deny them that privilege would in many instances occasion intolerable inconvenience and expense.

But I think the action is maintainable on another ground. The conceded duty which rests upon all municipalities to keep their streets in reasonably safe condition would be but half discharged were they permitted to suffer dangerous operations to be so negligently conducted in the immediate vicinity of such streets as to jeopardize the safety of the traveling public along the same. Such works as imperil human life and safety are classified as public nuisances. And in *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345, it was held: "If a city, without legislative authority, authorizes the erection of a nuisance in one of its streets, it is liable in damages for the injuries resulting therefrom. The city cannot escape liability merely be-

cause it exceeded its powers in authorizing the nuisance."

Blasting, it is true, is not per se a nuisance; but blasting near a highway or street becomes a nuisance when it is conducted in such a manner as to endanger the safety of travelers along such highway or street. *City of Paris v. Com'th (Ky.)* 93 S. W. 907.

In 28 Cyc. 1292, note 38, the reason for the rule is stated thus: "Nuisances in or near public street.—In general.—The doctrine of the liability of a municipality for failure to abate a nuisance in or near a public street arises out of the rule enforced in those jurisdictions that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that failure to perform this duty constitutes a breach of ministerial duty, and the liability does not rest upon a failure to perform a judicial duty of abating a nuisance. *Dalton v. Wilson*, 118 Ga. 100 [44 S. E. 830, 98 Am. St. Rep. 101]. And upon this principle it is held that, if the nuisance is in or near a public street so as to endanger the safety of travelers thereon, a municipality will be liable for any special damage suffered by reason of the existence of the nuisance and the failure to abate the same. *Dalton v. Wilson*, supra; *Parker v. Macon*, 39 Ga. 725 [99 Am. Dec. 486]; *Moore v. Townsend*, 76 Minn. 64 [78 N. W. 880]."

As the owner of property a municipality is amenable for its proper use. "The corporation of the city of New York has no more right to erect and maintain a nuisance on its lands than a private person possesses." *Brower v. New York*, 3 Barb. (N. Y.) 254, 258.

In this aspect of the case, sustaining the demurrer involves the incongruity that, if a city suffers a third party to operate a rock quarry in a negligent manner so near to one of its streets as to inflict injury upon a traveler thereon, it is liable in damages; yet, if it does the same act by its own servants, it is not liable. A course of reasoning which leads to such result can hardly be sound.

If the act were ultra vires, the underlying principle upon which the city would be liable is that, being charged with the duty to keep its streets in reasonably safe condition, it is estopped to set up the defense that the street was rendered unsafe by a nuisance of its own creation which it had no authority to maintain.

I am of opinion that the judgment ought to be affirmed.

(137 Ga. 337)

SCOTT v. STATE.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 617*)—PREPARATION OF CASE—INSUFFICIENT TIME—WAIVER OF OBJECTION.

Where counsel appointed to defend one accused of crime are in consultation with their client, and are requested by the court to proceed with the case, and such counsel proceed with the trial of the case without requesting further time for the preparation of their client's case, it is too late to complain, after the trial, that sufficient time was not allowed for preparation for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1375; Dec. Dig. § 617.*]

2. INSTRUCTION REQUIRED.

The facts of the case do not authorize a charge on the law of voluntary manslaughter.

3. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—CHARACTER OF ACCUSED.

While the good character of an accused person is a substantive fact, and evidence of such character should be weighed and considered by the jury in connection with all the other evidence in the case, still such good character of the accused is not a distinct substantive defense. A proper instruction should be given in every case where the accused puts his character in issue; but, in the absence of a timely request, an omission to give a specific charge on the subject will not require a new trial. It is only in exceptional cases where, on the court's failure to charge relative to the good character of the accused, a new trial should be granted. *Seymour v. State*, 102 Ga. 803, 30 S. E. 263. This case falls within the general rule, and not within the exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

4. CRIMINAL LAW (§ 922*)—INSTRUCTIONS—DEFINITION OF "FELONY."

The failure of the court to give in charge the legal definition of the term "felony," appearing in Penal Code 1910, § 70, which section was given in charge, was not such error as requires a new trial. *Pickens v. State*, 132 Ga. 46, 63 S. E. 783.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 922.*]

5. JUSTIFIABLE HOMICIDE—INSTRUCTION.

There was no error in the charge on the law of justifiable homicide. The evidence warranted the verdict, and no error appears requiring the grant of a new trial.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Carrie Scott was convicted of a crime, and brings error. Affirmed.

L. D. McGregor and M. E. Evans, for plaintiff in error. Thos. J. Brown, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

(137 Ga. 483)

CHIPSTEAD v. OLIVER et al.
(Supreme Court of Georgia. Jan. 22, 1912.)

(Syllabus by the Court.)

**1. SCHOOLS AND SCHOOL DISTRICTS (§ 74*)—
PREPARATION OF SCHOOL SITE—INJUNCTION.**

Under the charter of the city of Blakely (Acts 1900, p. 225, § 19), the board of education of that municipality is empowered to select a site for the erection of school buildings and to contract for their erection. Where the mayor and council and the board of education cooperate through a committee chosen from the respective bodies for the removal of the old buildings on the site selected, a contract by the committee with a contractor for such removal, duly ratified by the board of education, is not so irregular that the payment of the contract price will be enjoined.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 74.*]

**2. MUNICIPAL CORPORATIONS (§ 63*)—DIS-
CRETION OF MUNICIPAL BOARD—CONTROL BY
COURTS.**

Where a municipal board is authorized to do a particular act in its discretion, the courts will not control this discretion, unless manifestly abused, nor inquire into the propriety, economy, and general wisdom of the undertaking, or into the details of the manner adopted to carry the matter into execution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

Error from Superior Court, Early County;
W. C. Worrill, Judge.

Suit by M. T. Chipstead against G. D. Oliver and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Glessner & Park, for plaintiff in error.
Hawes, Pottle & Wright, for defendants in error.

EVANS, P. J. The city of Blakely issued \$27,000 of bonds for the erection of school buildings, and in the selection of the site for the proposed schoolhouse for the white children there arose a dispute among the citizens of the city, the mayor and council, and the board of education. The mayor and council, with the consent and approval of the board of education, appointed a building committee of five (three of whom were selected from the council and two from the board of education), with power to select a site and let the contract for the new school buildings, subject to the approval of council. Having determined that it was to the best interest of the city to erect the new school building upon the site occupied by the present school buildings, the building committee made a contract with R. J. Self for the removal of the old buildings, so as to provide space for the new buildings. Certain citizens filed their petition against the mayor and council, protesting against their action, and seeking to enjoin them from paying out any money on this contract, on the ground that the mayor and council had

no jurisdiction in the matter of selecting a site or exercising authority in connection with the removal of the old buildings and the erection of any new school building; their contention being that the board of education was vested with exclusive authority over the matter. A temporary restraining order was granted, and, pending it, the board of education intervened and prayed that all the parties to that suit be enjoined from interfering with the board of education in the construction of the contemplated school building, or in the control and management of the school affairs of the city. A restraining order was granted as prayed in the intervention. In this condition of affairs the board of education contracted with R. J. Self to finish the removal of the old buildings. On the interlocutory hearing for injunction, after considering the evidence submitted and the argument of counsel, the court revoked the restraining order and refused an injunction. The petitioners in the main suit sued out a bill of exceptions, complaining of the refusal of the court to grant an injunction as prayed.

[1] 1. The charter of the city of Blakely (Acts 1900, p. 225, § 19) provides for a system of public schools under the control of a board of five members, known as the "city board of education." The board was given the same authority, jurisdiction, and powers in respect to schools and educational matters of every nature within the school limits as county boards of education had in their respective jurisdictions. It was further provided that "the city council of Blakely shall deed to said board of education the property on which the Blakely Institute is located, and they shall hold it for said city for the purposes of the white school." It was further provided that "the city council may appropriate money toward maintaining, furnishing or repairing school buildings and property held by said board." In view of these provisions, and especially that which conferred on the city board the same powers possessed by the county boards, which includes the "power to purchase, lease, or rent school sites, build, repair or rent schoolhouses, * * * and make all arrangements necessary to the efficient operation of the schools" (Civil Code, § 1484), the board of education was clothed with authority to select the site and construct the new buildings. The mayor and council were expressly authorized to appropriate money toward maintaining and repairing the school buildings. And even if the contract made by the building committee, under the approval of the mayor and council and the board of education, for the removal of the old buildings, was irregular, because of the participation of the mayor and council, it was none the less binding on the board of education, which was authorized to make the contract.

Nor. was the second contract between the board of education and the contractor illegal, because they recognized a small damage to the contractor by reason of the suspension of work because of the injunction and agreed to pay the same.

[2] 2. The main battle before the judge at the interlocutory hearing concerned the propriety of the selection by the board of education of the present site for the erection of the new school buildings, and the plaintiffs in error assign error on the refusal of the court to enjoin the board of education from proceeding further with their plan of erecting a new schoolhouse on the present school site. The complaining citizens contended that the present site was unsuitable. This contention was denied by the board of education and the city council. The evidence to support the several contentions was conflicting. The board of education was clearly acting within the scope of its powers. No evidence was adduced to show that they acted fraudulently or corruptly in the selection of the school site. They are a branch of the municipal government, invested with discretion in choosing a location for the school buildings. The judgment of the court implies that they neither acted arbitrarily nor abused their discretion in selecting the site, and the evidence supports this finding. Under such circumstances the rule is that, where a municipal board is authorized to do a particular act in its discretion, the courts will not control this discretion, unless manifestly abused, nor inquire into the propriety, economy, and general wisdom of the undertaking, or into the details of the manner adopted to carry the matter into execution. *Danielly v. Cabaniss*, 52 Ga. 212; *Wells v. Atlanta*, 43 Ga. 67; *City of Atlanta v. Stein*, 111 Ga. 791, 36 S. E. 932, 51 L. R. A. 335; *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509; *Dyer v. Martin*, 132 Ga. 445, 64 S. E. 475.

Judgment affirmed. All the Justices concur.

(187 Ga. 465)

SMITH et al. v. DONALSON.

(Supreme Court of Georgia. Jan. 18, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 66*)—OPERATION AND EFFECT—"CONSTRUCTIVE POSSESSION"—INSTRUCTION.

The court did not err in charging the jury as follows: "'Constructive possession' of lands is where a person having paper title to a tract of land is in actual possession of a part thereof. In such a case the law construes that possession to extend to the boundaries of the tract." It was applicable to the issues in the case and was authorized by the evidence.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1474, 1475.]

2. ADVERSE POSSESSION (§ 116*)—ELEMENTS—FRAUD—INSTRUCTION.

In view of the entire charge of the court upon the subject of fraud which would vitiate a prescriptive title, the plaintiffs in error have no valid complaint against the following charge of the court: "If you believe that John E. Donalson, the defendant in this case, who claims title by prescription, entered upon this land under a fair claim of right, believing that he had an honest title, whether he was mistaken in law or not, if he honestly believed his title was good, the best title that he could get, and he entered in that way, then you would not consider that he was guilty of that character of fraud that the law contemplates in the law just given you."

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 66; Dec. Dig. § 116.*]

3. ADVERSE POSSESSION (§ 25*)—POSSESSION BY TENANT—SUFFICIENCY.

The court did not err in charging the jury as follows: "I charge you that the possession of the tenant is in the right of the person under whom he holds, and though such enters under only an oral lease, his possession inures to the benefit of the person under whom he holds, and if such possession of a tenant should continue for seven years, and should have the necessary qualities which the law gives it, the person who put the tenant in possession would, if he had good color of title, acquire title by prescription." It was not inapplicable to the issues in the case, nor was it without evidence to authorize it.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 116-120; Dec. Dig. § 25.*]

4. EVIDENCE (§ 273*) — DECLARATIONS OF FORMER OWNER.

The court did not err in excluding the alleged sayings of one from whom the defendant in the case claimed to derive title, made while the latter was in possession of the land as a tenant under the former, which sayings were not in disparagement of the former's title, but related to the right of the party in possession to perform certain acts which were being performed by him as a tenant of the speaker; it appearing that the defendant was not present at the time the remarks were made.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 273.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by J. C. Smith and others against J. E. Donalson. Judgment for defendant, and plaintiffs bring error. Affirmed.

Russell & Custer and T. S. Hawes, for plaintiffs in error. E. M. Donalson and J. R. Pottle, for defendant in error.

BECK, J. This was an action of ejectment. The jury returned a verdict in favor of the defendant, who pleaded a prescriptive title acquired by adverse possession under a color of title for more than seven years. The plaintiffs contested both the continuity and the bona fides of the defendant's possession. The plaintiffs made a motion for a new trial, which was overruled, and they accepted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant relied upon a prescriptive title. The plaintiffs contended that the prescriptive title was not founded in good faith; that there was fraud in the title, and the defendant knew it at the time he entered into possession; that the prescription was not an unbroken prescription, and did not measure up to the rule of law defining prescriptive title. The defendant contended that he went into possession in good faith, without grounds to suspect that his title had originated in fraud, and that he and his predecessors in title had been in possession continuously for the time prescribed by law, and that his title fully measured up to the requirements of the law in order to make a good title by prescription. Such, in substance, was the statement of the court in his instructions to the jury upon this controlling issue in the case, and this statement of the contention of the parties was authorized by the evidence.

[1] 1. The court then, after defining title by prescription and stating the essential elements thereof, and after defining what would constitute actual possession of land and what was evidence of actual possession, charged the jury as follows: "Constructive possession of lands is where a person having paper title to a tract of land is in actual possession of a part thereof. In such a case the law construes that possession to extend to the boundaries of the tract"—and added that the title or color of title under which a party claims prescriptive title by possession must be recorded, in order to extend to the boundaries of the tract. An inspection of the record shows that the charge quoted was authorized by the evidence, and the judge did not err, as against the plaintiffs, in instructing the jury in the language quoted.

[2] 2. The following charge of the court is complained of on the ground that it is contrary to law: "If you believe that John E. Donalson, the defendant in this case, who claims title by prescription, entered upon this land under a fair claim of right, believing that he had an honest title, whether he was mistaken in law or not, if he honestly believed his title was good, the best title that he could get, and he entered in that way, then you would not consider that he was guilty of that character of fraud that the law contemplates in the law just given you." In other portions of the charge the court used the following language: "The plaintiff claims that the prescriptive title under which the defendant claims originated in fraud. I charge you that that kind of fraud must be moral fraud, and not legal fraud. I charge you that fraud may not be presumed; but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. Upon the question as to whether or not the prescriptive title

under which the defendant claims originated in fraud, you are to determine from all the circumstances as shown by the evidence in this case." And charged further: "If, on the other hand, the circumstances shown to you convince your minds, under the rule of law given to you, that at the time he entered into possession that he had notice that the title under which he entered was absolutely void, was no title in law, then you could apply that principle of law. I charge you that, if a purchaser has actual notice that he is purchasing a bad title when he takes possession, his purchase is bad, and he goes into possession in fraud of the rights of the true owner. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of everything which it is afterwards found such inquiry might have revealed, which was unknown for want of investigation; that is, where a person has sufficient information to lead him to a fact, he shall be deemed cognizant of it." The part of the charge excepted to in the ground of the motion now under consideration finds place between the two excerpts last quoted. Considering the entire charge upon the subject with which the court was dealing in this portion of his charge, manifestly the plaintiffs in error had no valid ground of complaint against the particular part of the charge which they criticised. It was but an elaboration of the recognized principle that actual fraud on the part of one claiming under prescriptive title is necessary to vitiate that title. Upon the issue as to whether or not the defendant was guilty of such fraud as would render invalid his claim of a good prescriptive title, the court charged fully; and if his charge on that issue is subject to criticism at all, it would be criticism on the part of the defendant in error, and not the plaintiff in error.

[3, 4] 3, 4. The rulings made in headnotes 3 and 4 do not require any further discussion.

[5] 5. The evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 336)

GLASCO v. STATE.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 921*)—NEW TRIAL—GROUNDS—OBJECTIONS TO EVIDENCE.

A ground of a motion for new trial, complaining of the admission of evidence, which fails to disclose that the objection taken there-to was urged before the trial court at the time of the ruling complained of, is not sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206-2209; Dec. Dig. § 921.*]

2. WITNESSES (§ 268*)—CROSS-EXAMINATION—CONVERSATION.

Generally, when part of a conversation has been introduced in evidence, the rest of it, so far as relevant, may be brought out by the opposite party on cross-examination of the witness. *Cox v. State*, 64 Ga. 375 (8), 37 Am. Rep. 76; *Betts v. State*, 66 Ga. 503.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 933; Dec. Dig. § 268.*]

3. CRIMINAL LAW (§ 921*)—PRESENTATION OF EVIDENCE—DISCRETION OF COURT.

Where, after the state had closed its case, the judge permitted an additional witness to be sworn in behalf of the state, before argument had begun, and where it does not appear that the accused was deprived of the right to meet the testimony of such witness, such action upon the part of the judge was not sufficient to require the grant of a new trial merely because such testimony was not in rebuttal of any evidence submitted in behalf of the accused. The reopening of the case is in the sound discretion of the trial judge, and it will not be interfered with, unless abused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2206-2209; Dec. Dig. § 921.*]

4. HOMICIDE (§ 340*)—INSTRUCTIONS—HARMLESS ERROR.

Where a person was on trial under an indictment for murder, a correct charge on the law of manslaughter, even if not authorized by the evidence, is not cause for the grant of a new trial, where the accused was convicted of the higher offense. *Rucker v. State*, 135 Ga. 391, 69 S. E. 541, and cases cited.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

5. ASSIGNMENTS OF ERROR.

One of the grounds of the amended motion for new trial, assigning error upon an instruction of the court, was expressly abandoned in the brief of counsel for plaintiff in error, and the only remaining one not disposed of by the preceding notes was not approved by the judge.

6. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Gus Glasco was convicted of crime and brings error. Affirmed.

R. Earl Camp, for plaintiff in error. E. D. Graham, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(137 Ga. 450)

DAVIS v. GASKINS et al.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 158*)—INFANTS (§ 98*)—BEST AND SECONDARY EVIDENCE—CONVEYANCES—ACTION TO SET ASIDE.

In an action by one seeking to set aside her deed and recover the land conveyed thereby because of her minority at the time it was executed, it was not error to permit her to testify on cross-examination that her husband had paid for a certain town lot and built a

house thereon, and she did not know whether she or her husband had sold it, what she received therefor, and whether the proceeds were paid to her husband or to herself, over objection of her counsel that the deed to the house and lot was the highest evidence; the purpose of the testimony being to support the defendant's plea that the plaintiff, after she became of age, ratified her sale of the land sued for, and there being evidence tending to trace the proceeds of the sale into a house and lot which she sold after becoming of age, and authorizing the jury to infer that the plaintiff had knowledge of this fact.

(a) Nor was it error to admit in evidence the deed from the plaintiff, conveying to a purchaser the house and lot referred to in the preceding note, offered for the purpose of maintaining the plea of ratification. Especially is this true where the plaintiff made no offer to restore the money received from the sale of the land sued for.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 158; *Infants*, Dec. Dig. § 98.*]

2. TRIAL (§ 93*)—RECEPTION OF EVIDENCE—MOTIONS TO EXCLUDE.

A motion made in the trial court, which was overruled, to "exclude all of the testimony" of certain witnesses "tending to show that at any time after the making of this deed that any property came into her hands which may have been purchased or acquired by the operation of this money or any of this money," is not a complete ground of a motion for a new trial, and cannot be considered here. The motion should set out specifically the testimony sought to be ruled out.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 246; Dec. Dig. § 93.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—REVIEW—ADMISSION OF EVIDENCE.

The age of the plaintiff being an issue in the case, and a witness having testified that one of her children was born on a named date and the plaintiff was born previously thereto, even if for any reason assigned it was error to allow put in evidence a Bible, belonging to the witness, containing an entry showing the birth of her child to have been as she orally testified, such error was harmless; the oral testimony of the mother fixing the date of her child's age being nowhere contradicted.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.*]

4. INFANTS (§ 98*)—CONVEYANCES—CANCELLATION—EVIDENCE.

It was not error to exclude testimony of the purchaser from the plaintiff of the land sued for to the effect that he had placed a mortgage on it for \$1,000 and still owed the amount; such testimony being immaterial and irrelevant.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 98.*]

5. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

The following charge of the court was not accurate as applied to this case: "The court instructs you that the pleadings in the case are not to be considered as evidence. You are at liberty to look to the pleadings, which you will have out with you, for the purpose of seeing the issues between the parties; but I charge you that in determining those issues you must look to the evidence and the law, and not to the pleadings." But, while the charge complained of did not accurately state the rule that admissions in the pleadings by the defendant were evidence for the plaintiff, yet, as the material admissions complained of were other-

wise proven and not controverted, the error complained of will not require a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

6. NO ERROR—EVIDENCE SUFFICIENT.

No error appears in the other grounds of the motion for a new trial, and the evidence was ample to support the verdict.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by Rhoda Davis against H. B. Gaskins and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. Alexander & Gary, J. P. Knight, and W. H. Griffin, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 324)

CLARK v. DODSON PRINTERS' SUPPLY CO.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. SALES (§ 472*)—EVIDENCE (§ 460*)—CONDITIONAL SALES—DESCRIPTION OF PROPERTY—PAROL EVIDENCE.

A written contract of conditional sale contained the following among other clauses: "Received of Dodson Printers' Supply Company (incorporated), of Atlanta, Georgia, under terms below stated, the following described machinery and personal property, to wit: Three hand carbonators and fixtures, * * * four delivery wagons, two mules, stock of extracts, stoppers, and all other merchandise used in or connected with the bottling business now carried on by me at 248 Marietta St., in the city of Atlanta, Georgia." Then followed clauses showing that the maker of the instrument purchased the property from the corporation above named, and the terms of the purchase, and stating that promissory notes were given for the deferred payments. "The personal property above described, and the title thereto, notwithstanding delivery, shall belong to and be vested in the Dodson Printers' Supply Company until all the aforesaid notes, or any renewal thereof, shall be first fully paid. * * *

I hereby covenant and agree that in case default shall be made in the payment at maturity of any of the notes aforesaid, or any part thereof, or in case the purchaser shall sell, assign, or remove said property, * * * it shall be lawful for the said Dodson Printers' Supply Company * * * to take immediate possession of said property. * * * The said property to be kept at 248 Marietta street, in the town of Atlanta, Ga., and to be there held and kept, and not removed therefrom without the written consent of the said Dodson Printers' Supply Company first had and obtained." This instrument was duly attested and recorded. *Held*, that under the decision in *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333, the specification of the property covered by such contract of conditional sale was not so indefinite as to render the instrument void as against third parties, and it was competent to show by parol that the delivery

wagon, which was levied on and sold under an execution against the purchaser, was one of those which were used in connection with the business of the vendor, sold by it, and located at the specified place, and thus identifying it as being one of those included in the instrument.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 472; * Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

2. NO ERROR.

There was no error in any of the rulings of the court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Dodson Printers' Supply Company against I. O. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

Moore & Branch, for plaintiff in error. C. L. Pettigrew, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 353)

BROWN v. PANOLA LIGHT & POWER CO.
(Supreme Court of Georgia. Jan. 10, 1912.)

(Syllabus by the Court.)

ELECTRICITY (§ 16*)—ELECTRIC LIGHT COMPANY—DEATH OF CHILD.

A power company constructed over the land of another, with his consent, its transmission line. The wires were three in number, strung to poles at a height of 22 feet from the ground. The wires passed over a sweet gum tree, the top of which had been cut out to prevent contact of the wires with the tree. The wires were not insulated, and carried an electrical current of high voltage. The tree had sometimes been visited by children for the purpose of procuring the gum, which exuded from cuts or abrasures on the tree; but the power company's officials had no knowledge of this. A 13 year old boy, unusually well grown for his age, though warned by his father some months previously of the dangerous character of the wires, climbed the tree in search of gum, came in contact with the wires, and was killed. *Held* that, in a suit for damages for the alleged wrongful death of the boy, the power company is not liable.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

Error from Superior Court, De Kalb County; E. J. Reagan, Judge.

Action by M. F. Brown against the Panola Light & Power Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith and R. W. Crenshaw, for plaintiff in error. L. B. Norton and J. D. Kilpatrick, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

(127 Ga. 330)

WATKINS v. HENDRICKS.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 78*)—CONSTRUCTION OF CONTRACT—TIME AS ESSENCE OF CONTRACT.

In a contract for the sale and purchase of land, signed by both parties, the purchaser agreed to pay for it in installments, payable at specified times, and to clear, improve, and put in cultivation 12 acres of the land each year. In the event he failed to pay the purchase money as provided, the contract stated that it was to be null and void, and that his right to the possession of the land should cease. If the purchaser made the improvements specified, but failed to pay the purchase money, the improvements were to be taken in settlement of the rent of the land. In the event he failed to perform any of the stipulations and agreements, either as to improvements or payment of the purchase money, or any part or installment of it, the agreement provided that his right to the possession of the property should cease, and that he would at once, without process of law, upon notice, deliver possession to the vendor. *Held*, that time was of the essence of the contract as to the agreements of the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121-125; Dec. Dig. § 78.*]

2. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—PETITION.

Where an equitable petition filed by a purchaser for specific performance of a contract of sale of land showed on its face that time was of the essence of the contract, and that he had not complied with his agreements, and set forth no reason excusing nonperformance on his part, the petition was demurrable.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

3. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—PETITION.

The addition of a prayer that, if for any reason specific performance could not be decreed, damages in lieu thereof should be awarded, was not sufficient to save such a petition from being dismissed on demurrer.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

4. APPEAL AND ERROR (§ 518*)—RECORD—SCOPE AND CONTENTS—AMENDMENT TO PLEADINGS.

Where an amendment to pleadings is tendered and rejected by the court, the paper so offered does not become a part of the record, so as to be brought up as such, when error is assigned upon its rejection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by J. J. Watkins against Nancy Hendricks. Judgment for defendant, and plaintiff brings error. Affirmed.

Way & Burkhalter, for plaintiff in error. Jno. P. Moore and Hines & Jordan, for defendant in error.

LUMPKIN, J. [1] 1. While time is not ordinarily of the essence of the contract, it

may become so by express agreement or by reasonable construction. Civil Code 1910, § 4268 (8). In this case the purchaser of land in 1902 agreed to pay for it in five installments, payable on January 1st of each year, and to clear, improve, and put in cultivation 12 acres of the land a year. The contract provided that in the event the purchaser failed to make the clearings or improvements as agreed, or failed to pay the purchase money "as above mentioned, then this contract or agreement is to be null and void, and rights of said J. J. Watkins [the purchaser] to the possession of said land shall cease." If the purchaser made the improvements, but failed to make the payments of the purchase money "aforesaid," the improvements were to be accepted as settlement of rent for the land. In another clause the purchaser agreed, "in the event he failed to do and perform any of the above and foregoing stipulations and agreements, either in the improvement of said place or payment of purchase money, or any part or installment of the same, that his right to the possession of said property ceases, and he will at once, without process of law, upon notice given her [him] by the said Nancy Hendricks [the vendor], her agent, or attorney, or other representative, deliver quiet and peaceable possession of the same." This was signed by both parties. Under the terms of this agreement, time was of the essence of the contract. *McDaniel v. Gray & Co.*, 69 Ga. 433; *Dukes v. Baugh*, 91 Ga. 33, 16 S. E. 219; *Ellis v. Bryant*, 120 Ga. 890, 893, 48 S. E. 352.

[2] 2. The petition does not allege that the purchaser made or tendered the payments at the time agreed on, or state any sufficient reason for the failure, except as to the first installment, the time for the payment of which was alleged to have been extended. The plaintiff alleged in general terms the tendering of "the whole amount due on said contract" to the transferee of the vendor in July, 1905, and to the vendor in the spring of 1907. The installments due in January, 1904 and 1905, were not paid. Nor was that due in 1906 and 1907 tendered till the spring of the latter year, after the other party had retaken possession in 1906. The equitable petition, which was filed in 1908, alleged that about 50 acres had been improved and put in cultivation. The plaintiff thus comes into a court of equity, praying specific performance of a contract where time was of the essence, though showing that he himself has not performed his own contract, and offering no reason therefor. The original petition was accordingly demurrable.

[3] 3. The prayer for damages in the event that the plaintiff cannot have specific performance adds nothing to the case. Under the allegations of the petition, he was entitled neither to specific performance nor to

damages for breach of contract in lieu thereof. *Prater v. Sears*, 77 Ga. 28 (2).

[4] 4. It appears that the plaintiff in error tendered an amendment to his petition, but the court refused to allow it. Error was assigned on this ruling. It has been settled by numerous decisions that, in such a case, the rejected amendment cannot be brought to this court as a part of the record. The presiding judge having refused to allow it to be made a part of the record, counsel could not, by filing it in spite of such ruling, make record of it, and bring it to this court as such. *Moore v. Guyton*, 110 Ga. 330, 35 S. E. 339; *Hays v. Clay*, 124 Ga. 908, 53 S. E. 899, and citations. The assignment of error based on this ground cannot be considered; but the case must be determined on the original petition and demurrer thereto.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 191)

DOBBS et al. v. HARDIN, Tax Collector,
et al.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
TAXATION—SUBMISSION OF QUESTION TO
POPULAR VOTE—STATUTORY PROVISION.

The time prescribed by Civil Code 1910, § 1535, within which the ordinary must order an election to be held in a school district on the question of local taxation for educational purposes, is "not earlier than 20 days, nor longer than 60 days, after the petition for such election is received" by him. The time for holding such election is not within any given time from the granting of the order calling the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
TAXATION—VALIDITY OF LEVY.

When such an election has been held, and the result declared in favor of local taxation, the tax is not illegal because it "was levied by the board of trustees and the county commissioner, instead of the secretary of the board of trustees and the county school commissioner." Civil Code 1910, § 1537, provides that the district trustees "shall determine the amount necessary to be raised by local tax on all the property of the district," and prescribes a method for ascertaining the value of all the property in the district subject to taxation for county purposes, and that the secretary of the board, who must be a member thereof, with the aid of the county school commissioner, "shall levy such rate on the property thus found as will raise the total amount to be collected." In levying the rate the secretary and the county school commissioner perform merely the ministerial act of ascertaining, by mathematical calculation, what rate of taxation is required to be levied on the value of the property in the district in order to raise the amount fixed by the trustees. The mere fact that the other members of the board of trustees take part in ascertaining or levying such rate will not render the tax illegal.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 240; Dec. Dig. § 103.*]

3. APPEAL AND ERROR (§ 1051*)—REVIEW—
HARMLESS ERROR—ADMISSION OF EVIDENCE.

The petition alleges that an election was held in the Cumming district on the question of local taxation, which resulted in favor of taxation. Therefore it was not error hurtful to the plaintiff to admit, on a hearing for an interlocutory injunction, an affidavit of the ordinary to the effect that the managers of such election regularly made returns to him, which were filed in his office, and that he wrote a final order declaring the result of the election to be in favor of local taxation for school purposes, especially as the plaintiffs contended that the facts to which the ordinary deposed did not appear from the records in his office.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 107*)—
REMEDIES OF TAXPAYERS—INJUNCTION.

A number of persons, alleging themselves to be citizens and taxpayers of the Cumming school district in Forsyth county, brought an action in behalf of themselves alone, against the tax collector of such county and the school trustees of the Cumming district, to enjoin the collection of tax executions issued against the plaintiffs, respectively, for the proportion claimed to be due by each of them of a tax levied for educational purposes in the district for the scholastic year of 1910. Plaintiffs alleged that the tax was illegal on the grounds dealt with in the preceding headnotes 1 and 2, and on the further grounds that the county board of education had never laid off Forsyth county into school districts, as there was territory in the county not included in any school district, that no map of the school districts was ever made and filed with the ordinary, and that the boundary of the Cumming school district was changed by the county board of education within less than two years after it was laid off. Upon the hearing before the judge for an interlocutory injunction there was evidence tending to show the following facts: During November and December, 1905, the board of education of Forsyth county undertook, in accordance with the act of the General Assembly approved August 23, 1905 (Acts 1905, p. 425), to lay off that county into school districts, and in so doing exercised the discretion vested in them under the act as to the area of each district. The boundaries of the districts were, however, not finally fixed, as the board desired that the people of the county should have an opportunity to be heard before final action should be taken in the matter. Public schools were conducted in the several districts so laid off in the year 1906. On January 12, 1907, the board of education again tentatively laid off and defined the lines of the Cumming school district, and on February 9, 1907, after giving the people of the county notice of the board's intention to do so, and after hearing such suggestions as those interested desired to make as to changes in the various districts as previously laid off, the board passed an order finally designating the lines and boundaries of the respective districts in the county, in good faith endeavoring to embrace all the inhabitable territory of the county in some district. The order so defining the boundaries of the various school districts was entered upon the minutes of the board, and a large number of pamphlets containing the description and boundaries of each district were printed by the direction of the board and distributed throughout the county, after supplying all the teachers and trustees of the various districts with copies of the same. No map of the county showing the lines and boundaries of

the various school districts was filed with the ordinary. On February 13, 1907, an election was duly held in the Cumming district to decide whether local taxation for educational purposes should be levied in the district, which election resulted in favor of taxation. On November 18, 1908, the county board of education changed the boundaries of the Cumming district by adding thereto territory in which a number of citizens owning taxable property therein resided. The Cumming district as laid off did not contain 16 square miles, but there was no evidence that the board of education abused its discretion in fixing the area of the district. Only three of the citizens of the territory added to the Cumming district by the change made November 18, 1908, were parties plaintiff, and each of them patronized the school in the Cumming district during the scholastic year of 1910, and each of them paid his school tax for that year, and no execution was proceeding against any of them. It did not appear that any additional burden was placed upon the taxpayers of the district as originally laid off by the change made November 18, 1908, which took into the district more territory; but, from the amount of the territory so taken in, there is a strong inference that they were benefited by the change. A public school has been maintained by local taxation in the Cumming district since the election for the years 1907, 1908, 1909, and 1910, without effort on the part of any one, so far as the evidence discloses, to interfere with the maintenance of the school, until the bringing of the plaintiff's petition. The scholastic year of 1910 commenced on September 5th of that year and continued for nine months. Contracts were entered into by the trustees with teachers for the term of 1910, relying upon the fund to be derived from the taxes levied for school purposes for that year to meet the obligation under such contracts, as well as to defray the contingent expenses of the school for that term. The plaintiffs knew of the levy of such tax at the time it was levied, or very soon thereafter, as well as the purposes to which the fund to be derived therefrom was to be devoted; yet they delayed filing their petition to enjoin the collection of their respective portions of such tax until January 9, 1911. *Held*, that while the board of education of each county should lay it off into school districts, make a map thereof, showing the lines and boundaries as laid off, and file the map with the ordinary, as the statute requires, yet we cannot hold that under the facts above stated, and the long delay on the part of the plaintiffs in applying for an injunction to restrain the collection of the tax, the judge was not warranted in denying an interlocutory injunction for the collection of the tax for the year 1910. *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 107.*]

Error from Superior Court, Forsyth County; Geo. L. Bell, Judge.

Action by W. C. Dobbs and others against Charles P. Hardin, Tax Collector, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. P. Brooke, for plaintiffs in error. C. L. Harris and H. L. Patterson, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 366)

BURKHART et al. v. CITY OF FITZGERALD et al.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 723*)—ASSIGNMENTS OF ERROR—ADMISSION OF EVIDENCE.

An assignment of error in a bill of exceptions to a judgment refusing an ad interim injunction, based upon the admission of evidence, must set out the evidence admitted, at least in substance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3010-3012; Dec. Dig. § 723.*]

2. TRIAL (§ 85*)—EXCEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE ADMISSIBLE IN PART.

An assignment of error upon the admission of a given portion of the affidavit of a witness is not well taken, where it appears that the excerpt was objected to as a whole, and some part of it, if not all, was admissible. *Fricker v. Americus Mfg. & Improvement Co.*, 124 Ga. 165 (8), 52 S. E. 65.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

3. STATUTES (§ 76*)—LOCAL LAWS—APPLICABILITY OF GENERAL STATUTES.

The act of the General Assembly approved August 22, 1907 (Acts 1907, p. 609), as amended by the act approved August 17, 1908 (Acts 1908, p. 666), chartering the city of Fitzgerald, and establishing the territory embraced within the corporate limits as an independent school district, and authorizing the municipal officers to establish and maintain a public school system in such city, is not unconstitutional, on the ground that the act of 1905 (Acts 1905, p. 425), as amended by the act of 1906 (Acts 1906, p. 61), commonly known as the "McMichael school law," made provision by general law for the laying out of counties into school districts, and the levying of school taxes in such districts after an election therefor, while the act of 1907, as amended by the act of 1908, above referred to, was a local act providing for a school system in a municipality. *Farmer v. Mayor and Council of Thomson*, 133 Ga. 94(1), 65 S. E. 180.

(a) The act of 1905, amended by the act of 1906, referred to above, was not intended to "prevent the Legislature from incorporating new towns or cities, or conferring upon them powers touching municipal schools not in conflict with the Constitution." 133 Ga. 98, 65 S. E. 182.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

4. CONSTITUTIONAL LAW (§ 31*)—SCHOOLS AND SCHOOL DISTRICTS (§ 90*)—CONSTRUCTION OF CONSTITUTION—SELF-EXECUTING PROVISIONS—SCHOOL TAXES.

Const. art. 8, § 4, par. 1, as amended by the proposal of 1903 (Acts 1903, p. 23), which empowers the General Assembly to give authority to municipal corporations, upon recommendation of the corporate authority, to establish and maintain public schools by local taxation, to become operative only after the law shall have been submitted to a vote of the qualified voters, and approved by a two-thirds vote of the persons qualified to vote at such election, is not self-executing. A general power contained in the charter of the city of Fitzgerald (Acts 1907, p. 609), amended by the act of 1908 (Acts 1908, p. 666), to establish and maintain a public school system by taxation,

and without any provision in the charter for a submission of the question to a vote of the qualified voters of the town before it should become effective, was not a compliance with the Constitution; and did not authorize the levy and collection of a special tax for school purposes, although an election was held and two-thirds of the persons voting thereat voted for such special tax (*Brooks v. Town of Loganville*, 134 Ga. 358, 87 S. E. 940); such election having been held prior to the passage of the act approved August 18, 1910 (Acts 1910, p. 26), authorizing a certain class of municipalities to hold an election to determine the question of local taxation for the support and maintenance of public schools, to prescribe the qualification of electors for such election, and for other purposes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 31.* Schools and School Districts, Dec. Dig. § 99.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§§ 99, 107*)—SCHOOL TAXES—REMEDIES OF TAXPAYERS—INJUNCTION—ESTOPPEL.

Without authority of law to hold such election, the municipal authorities of the city of Fitzgerald caused an election to be held for the purpose of determining whether a special school tax should be levied for the support of the public schools. The requisite number of votes was cast in favor of the tax. An ordinance levying the tax was adopted by council in June, 1910. Four resident taxpayers, consisting of the Fitzgerald Trust Company, a corporation, M. E. Pearson, a woman, and H. A. Burkhart and J. B. Seanor, filed suit March 11, 1911, after expense had been incurred in organizing and conducting the school almost to the end of the term, for the purpose of enjoining, among other taxes, the collection of the school tax so levied. *Held*:

(a) As there was no authority of law to hold the election, it was void and of no effect.

(b) As there was no valid election, the levy of the school tax was void.

(c) Injunction will lie at the instance of any taxpayer, who has not estopped himself, to enjoin the sale of his property for collection of such an unauthorized tax.

(d) Such an estoppel will not arise against a person who has done nothing to encourage the levy of the tax or the incurrence of the expense. *Sellers v. Cox*, 127 Ga. 246, 56 S. E. 284.

(e) As to one of the plaintiffs, J. B. Seanor, who was an alderman and voted for the ordinance levying the tax, the evidence was of such character as to authorize the judge to find that he was estopped from resisting collection of the tax; but as to the other three the evidence was different, and of such character as that the judge should have granted a temporary injunction.

(f) The case is controlled by the principle of *Sellers v. Cox*, 127 Ga. 246, 56 S. E. 284, and for reasons therein pointed out is distinguishable from *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120, and *Dobbs v. Hardin* (decided in December) 73 S. E. 582.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 248-252; Dec. Dig. §§ 99, 107.*]

6. TAXATION (§ 44*)—VALIDITY—INEQUALITIES.

The mere fact that certain lands within the city limits of Fitzgerald, owned by certain other persons, had been taxed, not ad valorem, but upon a valuation which was the difference between their value for agricultural purposes and their value as town lots, furnished no reason why the plaintiffs should not pay

a tax on their property greater than the percentage of the values placed upon such agricultural lands for taxation. Even if it did, there was evidence tending to show that all agricultural lands within the incorporate limits were valued and taxed as other property therein. *Georgia Midland & Gulf R. Co. v. State*, 89 Ga. 597(2), 15 S. E. 801.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 44.*]

7. MUNICIPAL CORPORATIONS (§ 983*)—APPEAL AND ERROR (§ 170*)—TAXES—PENALTIES—PRESENTATION OF QUESTIONS IN TRIAL COURT.

Section 53 of the charter of the city of Fitzgerald (Acts 1907, p. 632), provides: "Be it further enacted by the authority aforesaid, that the first half of all city taxes called for the city tax digest shall be payable during June, and the second half payable during November of each year. Any taxes payable according to this section not paid as above stated shall be increased ten per cent. as penalty for non-payment within the time prescribed." Therefore there was authority of law to collect a penalty for failure to pay lawful taxes.

(a) It was suggested in counsel's brief that this portion of the charter is void, because it refers only to such property as is mentioned in the tax digest; and as property of railroads is not mentioned in such digest, the statute does not operate uniformly. This is in effect a criticism upon the constitutionality of the act, but no such question was raised in the pleadings or rulings on the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 983; Appeal and Error, Cent. Dig. § 1037; Dec. Dig. § 170.*]

8. MUNICIPAL CORPORATIONS (§§ 978, 979*)—REMEDIES OF TAXPAYERS—INJUNCTION—INTEREST.

Executions issued for taxes due a municipal corporation do not bear interest, where the municipal corporation, under charter authority, imposes a penalty for failure to pay the taxes. A municipality cannot collect both a penalty for failure to pay taxes and interest on tax executions. Civil Code 1910, § 1144. The charter of the city of Fitzgerald, as indicated by the excerpt quoted in the preceding note, contained a provision for the collection of a penalty, and hence no interest could be collected.

(a) All the executions sought to be enjoined were issued for a bulk sum, covering taxes levied for the purpose of raising revenue for the payment of the ordinary current expenses of the city for educational purposes for the year 1910, and for a sinking fund for the payment of bonds and interest thereon, and for penalty for the nonpayment of such taxes, and for interest from the date the executions were issued. While some of the items going to make up such bulk were legal and collectible, they are so compounded with the illegal that this court will not undertake to separate the legal from the illegal, and therefore the several executions as a whole against the plaintiffs, other than Seanor, should be enjoined. The execution against him should be enjoined only as to interest.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 978, 979.*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by H. A. Burkhart and others against the City of Fitzgerald and others. From the judgment, both parties bring error.

Judgment on each bill of exceptions reversed in part and affirmed in part.

L. Kennedy, for plaintiffs in error. JOA. B. Wall, for defendants in error.

ATKINSON, J. Judgment on each bill of exceptions reversed in part and affirmed in part. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 350)

BALL et al. v. WALSH

(Supreme Court of Georgia. Jan. 10, 1912.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 136*)—NEGLIGENCE (§ 136*)—DEFECTS IN LEASED PREMISES—LIABILITY FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—NONSUIT.

If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. Civil Code, § 4426.

(a) This doctrine has been frequently applied in actions brought by tenants against landlords for damages sustained by tenants by reason of landlord's failure to keep the rented premises in repair, as they are bound to do under the statute in this state. Some of the cases in point are *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46; *Id.*, 95 Ga. 288 (2), 22 S. E. 532; *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615; *Aikin v. Perry*, 119 Ga. 263 (2), 46 S. E. 93; *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. 579; *Henley v. Brockman*, 124 Ga. 1050, 53 S. E. 672.

(b) The question of negligence is, of course, usually one for the jury. Where, however, the allegations of a petition clearly disclose that the plaintiff, by the use of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, the petition is subject to general demurrer; and where such fact does not clearly appear from the petition, but is manifest from the evidence submitted on the trial by the plaintiff, a nonsuit is proper.

(c) In an action brought by a tenant and his wife against a landlord for damages from personal injuries sustained by the wife by reason of the failure of the defendant to keep the rented premises in repair, the following facts appear from the petition: There was a rear porch to the rented dwelling, about nine feet from the ground, and on this porch a railing. The "railing had been erected for a great length of time, and was old and rotten, and many of the balusters had fallen out, leaving the rail at the top of said balusters attached at each end to posts; said rail being attached by old and rusty nails, and the railing itself was old and rotten." Prior to the occasion when the injuries alleged were sustained, the plaintiffs had repeatedly notified the defendant "of the defective condition of said * * * railing, and had received from [defendant's agent] repeated assurances that the same would be repaired, but that no repairs had ever been made thereon prior to the time the tenant's wife was injured. She "is a very fleshy woman," and "while passing along said back porch * * * leaned slightly against said railing; that upon her doing so the said rail gave way, on account of its defective condition, and on account of the fact that it was old and the nails attaching same to the posts were rusty"; and she thereby "was precipitated from said porch to the ground below, falling upon her back," sustaining described

and severe injuries, which caused her great pain at the time. Her injuries are permanent, and she will continue to suffer pain therefrom, and, furthermore, she will permanently be rendered incapacitated to perform her household duties. The petition further alleged that she "was without negligence in leaning against said rail." Held that, notwithstanding the allegation last quoted, to the effect that the tenant's wife was not negligent in leaning against the railing, the petition was clearly subject to general demurrer, and the court did not err in dismissing the same, for the reason that the wife of the tenant by ordinary care could have avoided the consequences to herself caused by the landlord's alleged negligence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 642, 643; Dec. Dig. § 168; * *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by O. H. Ball and others against Mrs. S. R. S. Walsh. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. O. Wilson, for plaintiffs in error, Smith, Hastings & Ransom, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 454)

RICE v. CITY OF MOULTRIE (No 3,878.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1181*)—CERTIORARI—DISMISSAL.

The petition for certiorari alleging that bond and security were given as required by law, and having been duly sanctioned, and it not affirmatively appearing from the answer of the mayor, or otherwise from the record, that this allegation was untrue, the court erred in dismissing the certiorari, upon the ground that bond and security had not been given by the applicant as required by law.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1131.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

W. H. Rice was convicted of violating an ordinance of the City of Moultrie. From an order dismissing petition for certiorari, defendant brings error. Reversed.

L. L. Moore, for plaintiff in error. A. B. Buxton and J. D. McKenzie, for defendant in error.

RUSSELL, J. 1. So far as appears from the record, the certiorari bond required by law had been filed with the clerk of the municipal court as provided by law. The clerk of the municipal court had so certified, and this certificate was attached to the petition. The answer of the mayor, while not affirming, did not deny, the allegation of the petition for certiorari, nor the certificate of

the clerk of the mayor's court; consequently it was error to dismiss the certiorari upon the ground that the clerk of the mayor's court had not approved the bond filed in the case. The petition, for certiorari alleged, and the certificate of the clerk of the mayor's court confirmed the statement, that the very bond required by law had been given, and nothing appears in the record to dispute this statement.

The ruling would be different if it appeared from the record that the judge of the superior court, as he can do (*Stallworth v. Mayor and Council of Macon*, 125 Ga. 250, 54 S. E. 142), had made an investigation into the facts in relation to the bond, and upon such investigation had discovered (either because of failure to recite the proper conditions, as in *Roach v. Atlanta*, 7 Ga. App. 172, 66 S. E. 484, or because it was approved by the mayor, instead of the clerk, or for any other reason) that the bond had not been given as required. In the present case we learn this fact from the brief of the counsel for the defendant in error; but the fact does not appear from the record, nor is it certified in the bill of exceptions that such is the fact, so that this court may know that such is the truth of the case, and that for that reason the judge of the superior court dismissed the certiorari.

Judgment reversed.

(137 Ga. 325)

WIMPEY v. SMART et al.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. EASEMENTS (§ 24*) — CREATION — EXPRESS GRANT—TRANSFER.

When one owning land sells a part of it, reserving in the deed an alleyway for the common use of the part conveyed and the part reserved, and subsequently conveys the remainder, giving the alleyway as a boundary, the right of common of easement in the way passes under the second deed as appurtenant to the land conveyed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. § 24.*]

2. EASEMENTS (§ 32*) — TERMINATION — PRESCRIPTION.

Where the grantee in the first deed erects a permanent structure, which encroaches upon a portion of the alley, which is continuously maintained for more than 20 years without objection, the common of easement on that portion of the alley encroached upon is lost to the grantee in the second deed and his privies in estate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 84; Dec. Dig. § 32.*]

3. COVENANTS (§ 17*) — IMPLICATION — DESCRIPTION.

A conveyance by the executors of the grantee in the second deed to a purchaser, after they had lost the common of easement over that part of the alley covered by the structure, wherein the land is described as "commencing on the east side of Peachtree street, at the north line of T. L. Langston's lot, and extending thence north along the east side of Peachtree

street forty-nine (49) feet to a ten (10) foot joint alley, thence east along said alley two hundred (200) feet to the R. C. Mitchell lot, thence south forty-nine (49) feet to T. L. Langston's lot, thence west along said Langston's line two hundred (200) feet to the beginning point," will not operate so as to imply a covenant of easement in that part of the alley covered by the encroachment.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 14-16; Dec. Dig. § 17.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Harriet E. Smart and another, executors of A. G. Smart, against W. E. Wimpey. Judgment for plaintiffs, and defendant brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendants in error.

EVANS, P. J. The defendants in error, Harriet E. Smart and Arthur T. Smart, executors of A. G. Smart, on April 1, 1908, sold a city lot to W. E. Wimpey for \$20,000. The vendee paid \$4,000 cash, and gave his notes for the remainder; and the vendors executed to him a bond for title, obligating themselves to make a good and sufficient title to the premises to the vendee upon his payment of the balance of the purchase money. In the bond for title the premises were described as "all that tract or parcel of land lying and being in the city of Atlanta, in the Fourteenth district of said county, and being a portion of land lot No. fifty-one (51), and described as follows: Commencing on the east side of Peachtree street, at the north line of T. L. Langston's lot, and extending thence north along the east side of Peachtree street forty-nine (49) feet to a ten (10) foot joint alley, thence east along said alley two hundred (200) feet to the R. C. Mitchell lot, thence south forty-nine (49) feet to T. L. Langston's lot, and thence west along said Langston's line two hundred (200) feet, to the beginning point, and having thereon a two-story frame dwelling and known as No. 263 Peachtree street, between Harris and Baker streets, and being the land conveyed by deed from Mrs. Fowler to the said A. G. Smart, by a deed recorded in Deed Book F—4, page 18, on February 10, 1892." The vendee failed to pay the purchase-money notes at maturity, and the vendors brought suit thereon. The defendant pleaded partial failure of consideration, in that an abutting landowner had made a permanent encroachment on the alley, which encroachment had existed for more than 20 years, and reduced the width of the alley at the place of encroachment to 5½ feet. After the evidence was closed, a verdict was directed for the executors for the full amount of the notes sued on. Wimpey excepted.

[1] It appeared on the trial that Mrs. Flora Fowler owned a lot of land in the city of Atlanta, abutting on Peachtree street and

embracing the premises sold by the executors of Smart to Wimpey. On November 24, 1874, Mrs. Fowler conveyed to W. L. Goldsmith a part of the lot, described as fronting 50 feet, more or less, on the east side of Peachtree street, adjoining the land of Mrs. Fowler and Dougherty, extending back 200 feet to Mr. Mitchell's lot, with a 10-foot alley between the parties to the deed, extending back 200 feet, for the mutual benefit of both parties to the deed, unless a 10-foot alley be opened in the rear of the lot extending from Harris to Baker street; then said 10-foot alley shall be for the exclusive use of Goldsmith. Through mesne conveyances the title to this lot, with the same alley privileges, passed to the present owner. In the year 1876 or 1877 Goldsmith, the then owner of the lot, built a house on it, which encroached about $4\frac{1}{2}$ feet on the alley between Mrs. Fowler and himself, and the house is still standing as originally constructed. On February 10, 1892, Mrs. Flora Fowler conveyed to A. G. Smart the other part of her lot, describing the land conveyed as "commencing on the east side of Peachtree street, at the north line of T. L. Langston's lot, and extending thence north along the east side of Peachtree street 49 feet to a 10-foot joint alley, thence east along said alley 200 feet to R. C. Mitchell's lot, thence south 49 feet to T. L. Langston's lot, and thence along said Langston's line 200 feet to the beginning point." When the executors of A. G. Smart sold to Wimpey, the owner of the land on the opposite side of the alley had encroached upon the alley by maintaining a permanent structure thereon for more than 20 years. The encroachment began about 30 feet on the alley from Peachtree street, projecting in the alley at the furthest point $4\frac{1}{2}$ feet, and extending down the alley about 35 feet; and neither party controverted that the abuttal owner had prescription to the encroachment. Thus it will be seen that at the time of the sale to Wimpey, the owner of the lot on the other side of the alley had a prescriptive title to the encroachment. Under these circumstances the main and controlling question presented is whether the description of the land as contained in the bond for title from the executors of Smart to Wimpey is sufficient to imply a covenant of easement over the entire alley, so as to entitle Wimpey to an apportionment in the purchase price because of the encroachment on it. When Mrs. Flora Fowler sold a part of her lot to Goldsmith, reserving a 10-foot alley for their joint use, and subsequently sold to Smart the remainder of her lot, the right of common of easement in the alley passed to Smart as appurtenant to the land conveyed. *Taylor v. Dyches*, 69 Ga. 455. And Smart was entitled to the free and unobstructed use and enjoyment of the alley. *Murphy v. Harker*, 115 Ga. 84, 41 S. E. 585. When Smart purchased, the encroachment made by Goldsmith, the abuttal owner, had existed 15 or 16 years;

and when his executor sold to Wimpey, the encroachment had continued for about 30 years. At the time of Wimpey's purchase, his vendors had lost their right of easement over that portion of the alleyway actually covered by the house, and the owner of the house had a prescriptive title to the land upon which it rested.

[2] Where a conveyance of land calls for a street or alley as a boundary, if the grantor has the fee of the land thus referred to, he is estopped to deny that it is a street, and a right of way passes to the grantee by implication of law. *Schrek v. Blun*, 131 Ga. 489, 62 S. E. 705. As has been well said by the Supreme Court of Oregon: "This doctrine rests upon the fact that the grantor, by describing the land as bounded by a way, when he is the owner of the soil under the way, intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way, and whether it be deemed to operate as an implied grant, covenant, warranty, or estoppel binding on the grantor, his heirs or assigns, is immaterial." *Lankin v. Terwilliger*, 22 Or. 100, 29 Pac. 269. The necessity that the grantor own the land represented as a street before a covenant of easement over it can be implied is apparent. In the absence of an express grant, a grantor will not be presumed as intending to pass, as an appurtenance to the land conveyed, an easement over the land of another. If he gives a street or way as a boundary, he will be estopped by his deed from denying the existence of the street or way. This estoppel results from the effect to be given to his deed; for every grant should be so construed as to give the grantee the benefits intended to be conferred by the grant, and the grantor will not be permitted to close up the way or do anything that will defeat or essentially impair this grant. *Parker v. Framingham*, 8 Metc. (Mass.) 268. When a way is given as a boundary, the implication of a grant of an easement is dependent upon the grantor's ownership of the servient fee; nevertheless he is estopped by his deed from contesting with his grantee the latter's right to use the way, whether the ownership of the servient fee be in him or in another. This distinction has not always been clearly observed in the cases bearing on the question, but where the express point was made the distinction was noted and the case decided accordingly. In *Howe v. Alger*, 4 Allen (Mass.) 206, the grantor described the premises conveyed as bounded on the north and south by certain streets, and the grantee sought to charge the grantor in damages for a breach of an implied covenant as to the existence of these streets. The breach assigned was that there were no such streets legally laid out, or any right of way, on the north and south sides of the lot. The grantor did not own the adjacent land described as streets. It was held that in the absence

of an express covenant that there were such streets, which should always be kept open for travel or the use of the grantee, a mere recital in the boundary of a street as one of the abutments would not operate further than an estoppel, as to the grantor and those claiming under him, to deny the existence of such street or way, and to prevent him from interfering with the grantee in the use and enjoyment of the same; and judgment was given for the defendant. In *Fulmer v. Bates*, 118 Tenn. 731, 102 S. W. 900, 10 L. R. A. (N. S.) 964, 121 Am. St. Rep. 1059, the grantor described the land as bounded on the rear by a 20-foot alley. There was no such alley, nor did the grantor own the adjacent land. The grantee sued to recover damages for an alleged breach of an implied covenant; and the court held that where land in a deed is bounded by a way, if the grantor does not own the land, no covenant will be implied from the reference. And this doctrine is recognized in 1 *Tiedeman on Real Property*, § 801; 3 *Washburn on Real Property*, 485.

[3] In the instant case the easement over that part of the alley encroached upon had been lost on account of 20 years' adverse possession, and the abuttal owner had a prescriptive title to it. Therefore, at the time of the execution of the bond for title by Smart's executors to Wimpey, the title to the soil under the encroachment was not in the vendors, and no covenant of easement will be implied from the reference to the 10-foot alley as a boundary. We do not think that the word "joint," in describing the alley, gives to the transaction a legal effect different to that if the word had been omitted. The word "joint" denotes restriction rather than enlargement in the use of the easement. The vendee set up in his plea the vendors' assurance that the northern boundary was an alley 10 feet wide throughout and extended that width the full depth of the lot, and, having complete confidence in the statements and representations made by the vendors, and the description of the alley as laid in the bond for title, he accepted the bond for title and closed the trade. We construe the plea and the evidence in support of it to mean that the vendors sold a lot abutting on a 10-foot alley, an easement in which was implied as appurtenant to the land, and that the appurtenance was less extensive in scope than the description in the deed, and that for this reason there was a breach of the implied covenant of easement. As we have attempted to demonstrate, there has been no breach of the implied easement. The evidence falls far short of showing any deceitful representations, or that the vendee was prevented by the vendors from knowing of the encroachment, even if he did not actually know the condition of the alley at the time of his purchase. The rulings upon evidence were in harmony with the rule of law which

we have applied in reaching our decision in the case. The evidence demanded the verdict.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 347)

GARLAND v. RUMBLE. (No. 3,511.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

A client sued his attorney to recover an amount of money had and received by the attorney for the client's benefit. The client placed in the hands of the attorney a note for collection. The latter collected the note, and retained half of the amount as a fee for his services. The client contended that he had made no contract for fees, and the attorney was entitled only to a quantum meruit for his services. The attorney claimed that he had a verbal contract which entitled him to retain one-half of the amount collected. This was the sole issue in the case, and the jury found in favor of the client, and no error of law is complained of. As repeatedly ruled, the verdict settled the issue of fact, and this court cannot interfere.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by S. Rumble against J. J. Garland. Judgment for plaintiff, and defendant brings error. Affirmed.

E. C. Armistead and J. J. Garland, for plaintiff in error. J. M. Smith, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 273)

SEABOARD AIR LINE RY. CO. et al. v.

HUNT. (No. 3,344.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. **SUFFICIENCY OF EVIDENCE.**

The evidence authorizes the verdict.

2. **MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.**

Under Civil Code 1910, § 2782 et seq., an employé (or one in his right), suing for injuries inflicted upon him by the alleged negligent acts of fellow servants in railway employments, is not barred from his recovery by contributory negligence, unless it amounts to a failure to exercise ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. **MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE.**

Contributory negligence on the employé's part may consist in a violation of a valid rule promulgated by his employer. However, when an employer offers in evidence a rule for the

purpose of showing that the employé has been guilty of negligence by violating it, the employé may avoid the effect of it by showing that the master made it, not in good faith and with the intention that it should be obeyed, but merely for the purpose of shielding himself behind it in the event that an employé, expected to violate it, is injured, or may show that the employer has waived or abrogated the rule by knowingly allowing continuous and customary violations of it by his employés generally.

(a) Where a railway company promulgates rules for the guidance of its employés, they will be most strongly construed against the company; and, if it be doubtful whether they cover the act in question, they will not be sufficient to render that act, if committed by the servant, negligence per se.

(b) If it be at all doubtful as to whether the rule was intended to apply to a particular kind of service, and it is shown that both before and after its promulgation that service had been, with the master's knowledge, constantly performed by the employés in violation of the terms of the rule, the evidence of the practice of the employés in this respect is relevant, not only where a waiver of the rule is relied on to prove the waiver, but also to aid in the construction of the rule itself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

4. DEPOSITIONS (§ 90*)—USE AS EVIDENCE—PRESENCE OF WITNESSES.

Depositions of a witness taken under provisions of the Civil Code for use in a pending case may, in the discretion of the court, be read in evidence, notwithstanding the presence of the witness at the trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-260; Dec. Dig. § 90.*]

5. TRIAL (§ 193*)—INSTRUCTIONS—EXPRESSION OF OPINION.

For the court to state to the jury the allegations of the petitioner and the insistences of counsel is not violative of the Code section against the judge's expressing or intimating an opinion upon the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

6. NO ERROR—NEW TRIAL REFUSED.

The trial was free from error, and no reason appears for granting a new trial.

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by Mrs. C. E. Hunt against the Seaboard Air Line Railway Company and others. Judgment for plaintiff, and certain defendants bring error. Affirmed.

Hunt was a yardmaster in the service of the defendant company at Cordele. On July 10, 1910, which was Sunday, he received instructions to switch certain cars containing perishable freight, in order that their forwarding might be expedited. In order to place these cars, what is known as a "flying switch" was made. Hunt was on the foot-board of the engine for the purpose of unloosing the freight cars from the engine, in order that they might take one track while the engine took the other. A switchman was placed at the switch stand in order to turn the switch between the time of the passage of the engine and the time of the passage of the cars. As the engine was passing over

the switch, it became derailed and threw Hunt from it, and he fell so that in his efforts to extricate himself he got into such a position that the moving freight cars struck him, ran over him, and killed him. Hunt's widow sued the company, its section foreman, the engineer in charge of the locomotive, and the switchman who handled the switch. The grounds of negligence alleged were: (1) That the section foreman had allowed the switch points to become so worn that the switch "split" when the engine ran over it; (2) that the switchman moved the switch while the engine was upon it, so that the forward wheels took one track, while the other wheels took the other; (3) that the engineer was running at an excessive speed, so that when the switch was "split," by reason of its worn condition, or by reason of its being moved by the switchman, the injury occurred. The company was also charged with negligence on account of each and all of the acts of these separate employés. At the trial the plaintiff abandoned its charge of negligence as to the worn condition of the switch, and dismissed the section foreman from the case. The jury found a verdict against the company and the switchman, exonerating the engineer. This verdict, in the light of the charge of the court and of the evidence, is necessarily to be construed as a finding that the only act of negligence established was that the switchman moved the switch while the engine was in passage over it and that the engineer was not guilty of operating the train at an excessive speed. This fact renders it unnecessary for us to discuss or decide some of the points made in the record relating solely to the other features of the case, which were eliminated by the jury's finding in favor of the company as to all grounds of negligence except the act of the switchman. The defendants who were found liable, having made a motion for a new trial, which was overruled, bring error.

W. H. McKenzie and E. A. Hawkins, for plaintiffs in error. F. G. Boatright and J. T. Hill, for defendant in error.

POWELL, J. (after stating the facts as above). [1] Without going into details, it is sufficient to say that the evidence was in conflict as to whether the switchman moved or could have moved the switch while the engine was in passage. On this point the verdict of the jury is conclusive. The only other question raised by the general grounds is whether the plaintiff himself was guilty of such contributory negligence as to bar a recovery on his part. Without enlarging upon the discussion of this question at present, we will simply say that the evidence was such as to justify the verdict and that the verdict is not without evidence to support it. The case was determinable, not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

under the old law, which required an employé, or one suing on his behalf, to show that he was free from fault, or he could not recover for an injury inflicted by the act of a fellow servant, but was governed by the new rule, now embodied in Civil Code 1910, §§ 2782-2787, inclusive.

[2] 2. The plaintiffs in error contend that there was no issue as to the plaintiff's contributory negligence; that concededly he was guilty of such contributory negligence, amounting to a failure to exercise ordinary care, as to bar a recovery under Civil Code 1910, § 2783. Under that section, contributory negligence amounting to a failure to exercise ordinary care will absolutely bar recovery, while contributory negligence of a less degree will diminish the recovery.

[3] 3. The instance of counsel is that inasmuch as the petition alleges that the plaintiff was engaged in making a "flying switch" at the time he met his death, and inasmuch as it was shown on the trial that the company had a rule, known to him and agreed to by him, prohibiting the making of a "flying switch," his engagement in that act was necessarily contributory negligence, and was as a matter of law the proximate cause of his injury. The defendant in error resists this contention with the counter contention that the making of the "flying" switch was a remote, and not the proximate, cause of the injury; that the proximate cause was the switchman's negligent act in turning the switch under the engine; also that the rule of the company upon the subject did not apply to switch engines handling cars in the yards, but only to trains, in the sense that that term is defined in the rules of the company; and, further, that if any such rule was ever applicable to the plaintiff, it had been abrogated by reason of the company's allowing its continuous and constant violation by its employes. We are of the opinion that it was probably a question for the jury as to whether the making of a "flying" switch was or was not so connected with the act of the switchman as to make it at least a part of the proximate cause. But, be this as it may, there was certainly enough evidence in the record to justify the jury in finding that this practice of making "flying" switches had gone on for such a length of time and with such knowledge on the company's part as to indicate that the rule was not made for the purpose of having it obeyed, and that, if it ever had validity, it had been waived. No proposition is better settled by this court and by the Supreme Court than that if a railroad company makes rules, not for the purpose of having them obeyed, but merely for the purpose of shielding themselves behind them in the event that an employé is injured in violating them, the rules will be disregarded by the court, and, further, that an abrogation or waiver of the rule may be established by proof that it was

constantly and continuously violated with the knowledge of those officers whose duty it was to enforce it and with their apparent acquiescence. In this case the particular rule was promulgated in 1908, but a similar rule had been in effect previously, and continuous violations of it were shown, both before and after the year 1909.

Specific objection is made to the evidence tending to show a violation before 1908, and also to such of the evidence as tended to show a violation after the death of the employé in this case. But we think that this evidence was admissible. It is doubtless true that where a railway company, having promulgated a rule and having allowed it to become abrogated by allowing its violation, but being desirous of stopping the practice forbidden by it, may repromulgate the rule, notifying the employes thereafter that obedience will be insisted on, and may thus give validity from that time forward, so as to make a further violation of it negligence on the employé's part, provided that the company does thereafter in good faith insist on obedience. But where, under the rule as originally promulgated, customary violations took place with the company's knowledge, and thereafter the same rule is again promulgated, and no change of practice is insisted on, and the same practice of violation continues, the inference becomes almost irresistible that the second promulgation was intended to have no greater effect than the first promulgation had; that the company did not intend in good faith to enforce it. The past attitude of the company becomes strongly illustrative of its attitude under the rule as reissued.

Besides, it is not at all clear in this case that this rule ever had applicability to a yard engine. Of course, the general doctrine is that the rules are to be construed most strongly against the company promulgating them. In the rule book of the company this particular rule forbidding running switches was known as rule No. 104 (e), and appeared under the head of "Movement of Trains." These same rules give a set of definitions by which the particular rules are to be construed, and the following definitions are to be found: "Train: An engine, or more than one engine, coupled, with or without cars, displaying markers." "Yard engine: An engine assigned to yard service and working within yard limits." And rule No. 18 provides that "yard engines will not display markers," thus evincing an intention that a yard engine is not to be regarded as a train, while working within yard limits (as the engine in the present case was working). And if rule No. 104 (e), relating to "flying" switches, refers only to the movement of trains, as it seems to do by being placed under that head, it was not the intention of the rules to forbid such engines, working within yard limits, from making "flying" switches. It is true that this same rule appeared in the time-table furnished to

employés; but this time-table itself made reference to the general rules of the company and purported to quote largely from them, and it seems only fair to construe the rules as found in the time-table in connection with the rule as found in the rule book.

The jury were, therefore, authorized to find that the company did not intend for this rule to apply to its yard engines; this inference being supported both by the ambiguous form in which the rule was promulgated and by the practice of the employés of making "flying" switches in the yards with the knowledge of the company's officers. This being so, it cannot be said that the making of the "flying" switch was the proximate negligent cause of the injury. The jury might have found that in the absence of a rule on the subject the making of a "flying" switch was negligence; but this question was fairly submitted to them, and they found to the contrary. And, as we have said before, the jury found that the immediate cause of the injury was the switchman's negligent act in turning the switch under the engine as it was passing. In this view, the making of the "flying" switch was a mere condition of the injury, and the negligent turning of the switch the juridic cause. This disposes, not only of one phase of the question presented by the general grounds, but also controls a number of the special grounds of the motion for a new trial.

[4] 4. The testimony of one of the witnesses for the plaintiff had been taken by deposition. The defendant objected to this deposition being read, because the witness was present in court; the insistence being that he should have been put upon the stand, that he might subject him to cross-examination. The point is directly ruled against the plaintiff in error by the Supreme Court in the case of *W. & A. R. Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207. The party taking the depositions has the right to read them, notwithstanding the presence of the witness at the trial, and, if the opposite party desires to cross-examine the witness, it is his privilege to call him to the stand for that purpose.

[5] 5. Error is assigned upon the court's stating to the jury the contentions of the plaintiff as made in her petition and as insisted on by her counsel at the trial; the insistence being that this is violative of the statute which prohibits the judge from expressing any opinion upon the facts of the case. It has been repeatedly held that this form of instruction is not violative of the statute.

[6] 6. There are several assignments of error relating to the refusal of certain written requests to charge. We have examined these carefully in connection with the gen-

eral charge, and we find that, so far as they were pertinent and legal, they were fully covered. Indeed, the charge of the court is one of the most magnificent presentations of the law governing cases of this character that it has ever been our privilege to review. It was full, fair, lucid, and errorless. In fine, the case was fairly tried throughout, and while the verdict (for \$15,000) is rather large, it is not excessive or beyond what the evidence authorizes. We see no ground for setting it aside.

Judgment affirmed.

(10 Ga. App. 647)

J. I. CASE THRESHING MACH. CO. v. EZZELL. (No. 3,369.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

OVERRULING DEMURRER.

The allegations of the petition, if proved, in the absence of a defense, would authorize a recovery of the damages claimed, and there was no error in overruling the demurrer.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. C. Ezzell against the J. I. Case Threshing Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne, Little & Jones, for plaintiff in error. Stiles Hopkins and I. F. Mundy, for defendant in error.

HILL, C. J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 649)

PETERSON v. STALVEY. (No. 3,445.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

LANDLORD AND TENANT (§ 167*)—LIABILITY OF LANDLORD—DANGEROUS PREMISES.

The petition of the plaintiff in the court below alleged that one Joe Teaser was the tenant of the defendant. If this statement had been proved by any evidence, the verdict would have been supported as to this point, because the duty devolved upon the landlord to keep his premises in such condition as would protect the safety of his tenants, and of live stock being used by them as well. However the evidence in this case, both for plaintiff and defendant, established, without contradiction, that Joe Teaser was not the tenant of the defendant in the court below, but a trespasser, attempting to occupy the premises of the landlord without his permission or knowledge, and, under the facts appearing in the record, no duty, with reference to the safety of Joe Teaser or of the horses he was driving, devolved upon the landlord, other than that of not willfully and wantonly injuring them. Moreover the fright of the horses appears to have been the proximate cause of the injury, and this is not traceable to the presence of the open well. For these reasons the verdict was unsupported by the evidence, and a new trial should have been granted. The

facts of the present case distinguish it from *Bailey v. Dunaway*, 8 Ga. App. 713, 70 S. E. 141.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 668-679; Dec. Dig. § 167.*]

Error from City Court of Douglas; J. C. McDonald, Judge.

Action by Jas. Stalvey against B. Peterson. Judgment for plaintiff, and defendant brings error. Reversed.

F. Willis Dart, for plaintiff in error. O'Steen & Wallace, for defendant in error.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 417)

CUTTS v. WATT-HARLEY-HOLMES CO.
(No. 3,204.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1006*)—REVIEW—SUGGESTIVE VERDICTS.

The evidence, though conflicting, supported the verdict rendered, and none of the assignments of error are of sufficient materiality to have required the grant of a new trial. This verdict being the second verdict in behalf of the plaintiff, and being approved by the trial judge, it will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by the Watt-Harley-Holmes Company against Eldridge Cutts. Judgment for plaintiff, and defendant brings error. Affirmed.

M. B. Cannon and Max E. Land, for plaintiff in error. Hal Lawson, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 248)

KAUFMAN v. SEABOARD AIR LINE RY.
et al. (No. 3,260.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. CARRIERS (§ 76*) — TRANSPORTATION OF GOODS—CONVERSION BY CARRIER.

The owner of certain goods delivered them, through his agents, to a common carrier for transportation, and the agents took bill of lading therefor in their own names. When the goods arrived at destination, the agents through whom the shipment had been made refused to deliver the bill of lading to the owner of the goods; but he demanded, nevertheless, that the carrier make delivery to him. The carrier refused to deliver to him unless he would produce the bill of lading. *Held*, that the carrier's refusal to deliver, under the circumstances stated,

did not constitute a conversion, and that the owner of the goods could not maintain bill trover against the carrier for them.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 76.*]

2. REPLEVIN (§ 124*) — PROCEEDINGS — BAIL TROVER—LIABILITIES ON BOND.

If the plaintiff in bail trover replevies the property in controversy, on the defendant's failure to do so, and at the trial of the case suffers nonsuit, the defendant may enter up judgment against the plaintiff and the sureties on his bond for the value of the property; and if the defendant is content with the value stated in the plaintiff's affidavit to obtain bail, no further proof or assessment of value is necessary.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 124.*]

3. REPLEVIN (§ 119*) — PROCEEDINGS — BAIL TROVER—LIABILITIES ON BOND.

The principle stated in the immediately preceding headnote is applicable, notwithstanding the defendant may not claim any title to the property, and only holds possession for some special purpose or under some limited right or title. The money recovered by the defendant through judgment is held for the benefit of all persons having lawful claims to or upon the property, accordingly as their respective interests may appear.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 119.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. H. Kaufman against the Seaboard Air Line Railway and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Kaufman, being about to move from Norfolk, Va., to Atlanta, Ga., engaged Jones & Co. to crate and pack his furniture and to ship it to him at Atlanta. Jones & Co. shipped the goods by the Seaboard Air Line Railway, taking the bill of lading in their own names. They attached this bill of lading to a draft for the amount which they claimed Kaufman owed them for their services in packing and crating the goods and for freight charges paid by them on the shipment. When the goods arrived in Atlanta, Kaufman demanded them of the railway company; but delivery was refused on the ground that he did not produce the bill of lading. He claimed that the goods had not been properly packed, and that by reason of the negligence of Jones & Co. in this respect the shipment had suffered damage in excess of the amount of their charges. He therefore declined to pay the draft drawn on him by Jones & Co., and hence did not get possession of the bill of lading, so that he could produce it in response to the railway company's demands. Thereupon he brought bill trover against the railway company and its local agent; and, upon the company's refusal to replevy, the plaintiff gave bond in terms of the statute and took the goods. At the trial, the facts appearing substantially as has been stated, the court awarded nonsuit, and allowed the defendant to take judgment against the plaintiff on his bond.

for \$800, the amount stated in the plaintiff's petition and affidavit for bail as the value of the goods. To this the plaintiff has excepted. There are certain other assignments of error, as to rulings on evidence; but our opinion on the main question is of such a nature as to render any decision on these minor questions unnecessary.

Jos. W. & Jno. D. Humphries and Wm. F. Phillips, for plaintiff in error. King, Spalding & Underwood, for defendants in error.

POWELL, J. (after stating the facts as above). [1] 1. "The gist of the action of trover is the conversion of the plaintiff's property by the defendant; that is to say, that the defendant wrongfully deprived the plaintiff of possession." *Bell v. Ober*, 111 Ga. 668, 672, 36 S. E. 904, 905. That in the present case the railway company acquired the possession of the goods lawfully is conceded. The goods were delivered to it in regular course by the plaintiff's own agents. However, a conversion may consist in retaining possession lawfully acquired after the right to retain it has ended; and this is what the plaintiff contends happened in this case. So the plaintiff's right to recover depends upon whether the defendant company, as a common carrier, was justified in retaining the goods and in enforcing its demand for a production of the bill of lading as a condition precedent to delivery, against his demand that the goods be delivered to him on his claim that he was the true owner, notwithstanding the bill of lading was outstanding in the name of another. This point is settled adversely to the plaintiff in the case of *Sellers v. Savannah, Florida & Western Ry. Co.*, 123 Ga. 386, 51 S. E. 398, where it is held that, "Inasmuch as the law imposes liability upon a common carrier when a delivery of freight is made by mistake to a person not entitled to receive the same, it is the right of the carrier to call upon an unknown person claiming a shipment to identify himself and establish his claim thereto; and where a bill of lading covering the shipment has been issued, the carrier may demand its production as a condition precedent to making delivery."

[2] 2. In bail trover, where the defendant fails or refuses to replevy and keep the possession of the goods, the plaintiff has the option of doing so. Civ. Code 1910, § 5152. However, if the plaintiff thus causes the possession of the property to be transferred from the defendant to him, he stands chargeable as for a conversion of it, unless he recovers in the suit. If the case proceeds to verdict, and the defendant prevails, he is entitled to take his choice of one of three forms of verdict, namely: (1) For the specific property; or (2) for the market value of the property at the date of the conversion, with the addition of hire or interest; or (3) for the highest proved value of the

property between the date of the conversion and the date of the trial without hire or interest. And if he chooses a money verdict, he may take judgment against the plaintiff and the sureties on the replevy bond for the amount so assessed by the jury in his favor. *Bank of Blakely v. Cobb*, 5 Ga. App. 289, 63 S. E. 24. The defendant has a similar option if the plaintiff's action is dismissed (*Marshall v. Livingston*, 77 Ga. 21), or if it terminates in nonsuit (*Lauchheimer v. Jacobs*, 126 Ga. 261, 55 S. E. 55). The defendant in any of these events may ask for the question of value to be submitted to the jury for assessment; but, if he is content with the value sworn to by the plaintiff in his affidavit for bail, verdict is unnecessary, and he may, upon the sworn admission of the plaintiff as contained in this affidavit, take judgment against the plaintiff and his sureties for the sum stated in the affidavit, with interest thereon. See, in addition to the cases cited above, *Mallory v. Moon*, 180 Ga. 591, 61 S. E. 401; *Block v. Tinsley*, 95 Ga. 436, 22 S. E. 672; *Thomas v. Price*, 88 Ga. 533, 15 S. E. 11; *Hayes v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Jaques v. Stewart*, 81 Ga. 82, 6 S. E. 815.

[3] 3. It is contended, however, that, though the general rule may be as has been stated, it does not apply where the defendant whose possession has been violated does not claim to own the property absolutely, but holds the possession under some special right or title; that in this case the judgment of the court below would result in grave injustice if allowed to stand, because the defendant claimed no title to the goods, but claimed only the right to hold them, in its capacity as a common carrier, until the question as to who had the right to receive them could be determined; that, as the goods were the plaintiff's, he ought not to be required to pay the defendant for them. The rule does apply, and no injustice is done. The plaintiff took the goods from the defendant's possession without having the right to do so. When his lack of right was judicially established, it was obligatory on him, under his replevy bond, to put the property or its value in money back into the defendant's hands. When, under the restitution, the defendant company takes money, instead of the property, it will hold the money on like terms as it held the property. The defendant will hold the money, not for its own ultimate benefit, but for its protection. The plaintiff by presenting the bill of lading and by identifying himself as the owner of the goods, will be entitled to receive the money from the defendant on the same terms as he would have been entitled to receive the goods. If he cannot get possession of the bill of lading because of illegal claims asserted by Jones & Co., he may take such steps in law or in equity as shall be necessary to extinguish these claims, to identify

himself as the sole owner of the goods, and to give adequate protection to the defendant. These things could not be accomplished in the present action, for lack of necessary parties, if for no other reason. The only real ultimate hardship, if any, on the plaintiff, is that he will have to pay the costs; and this hardship he imposed on himself by mistaking his remedy.

Judgment affirmed.

(10 Ga. App. 311)

ATLANTIC COAST LINE R. CO. v. W. W. GORDON & CO. (No. 3,450.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. SALES (§ 202*)—TRANSFER OF TITLE—"CASH SALE."

Under Civil Code 1910, § 4126, the title to cotton and certain other agricultural products sold under cash sale does not pass by delivery until the cash is in fact paid. A sale is no less a "cash sale," within the purview of this section, when so intended by the parties, because the money is not paid concurrently with the delivery, and the actual paying over of the cash is temporarily deferred to meet the convenience of the parties in making a settlement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

For other definitions, see Words and Phrases, vol. 1, pp. 997, 998.]

2. PRINCIPAL AND AGENT (§ 145*)—RIGHTS AS TO THIRD PARTIES—UNDISCLOSED AGENCY.

While it is true that, if a concealed principal sues upon a contract made by his agent in the latter's name, the defendant may set off any counterclaim he has against the agent with whom he contracted as if he were the principal, whether the counterclaim grows out of the contract in question or not, still this doctrine does not apply where the person who was contracted with by the agent became the moving party and attempts to hold the concealed principal, and it appears that he who is thus moving did nothing and gave up nothing on faith of the agent's apparent principalship.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 145.*]

3. TROVER AND CONVERSION (§ 69*)—PROCEEDINGS—MEASURE OF RECOVERY.

One who has the right of possession to personal property which is converted by a stranger, or a mere wrongdoer, may sue in trover and recover the full value of the property, though his right of possession be held under a qualified title, and only for some special purpose, such as security for a debt; still the plaintiff's recovery in such a case is held for the benefit of himself and for all others in community of title or possession with him, accordingly as their respective interests may appear. Whenever a plaintiff who, though having a right of possession, has it only for the special purpose of securing a debt, brings trover against the person for whose benefit he would, if he recovered the full value of the property, hold the overplus beyond his debt, the court, on the trial of the trover case, will adjust the matter by limiting the amount of his recovery to the amount of the debt.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 308-313; Dec. Dig. § 69.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by W. W. Gordon & Co. against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

P. W. Meldrin and Shelby Myrick, for plaintiff in error. W. W. Gordon, Jr., and E. S. Elliott, for defendants in error.

POWELL, J. This case has been before this court previously. See 7 Ga. App. 354, 66 S. E. 988. The only point there involved (as to whether nonsuit was proper, because the plaintiff had not shown the value of the property in dispute) cuts no figure in the present record. The case is in trover. The plaintiffs, Gordon & Co., are cotton factors at Savannah. Giddens was a customer of theirs at Kirkland, Ga. On January 18, 1908, they had certain cotton of Giddens, on which they had made advances to an amount probably exceeding the value of the cotton. On that date, Giddens himself being absent from his place of business, a brother of his was in charge. A man named Stone brought in a bale of cotton, which the brother bought from him for Giddens, telling Stone that Giddens would hand him the money for it on his return to the store on the next day. This brother caused the cotton to be placed in custody of the defendant, the Atlantic Coast Line Railroad Company, and obtained a bill of lading for it in the name of Gordon & Co. as consignees. When Giddens returned to the store and Stone requested his money Giddens refused to pay the price his brother had named, and he and Stone rescinded the trade and notified the agent of the railroad company, who at their instance issued another bill of lading, in favor of Stone as consignor, and Butler, Stevens & Co., of Savannah, as consignees. In due time the railroad company delivered the cotton, on this last bill of lading, to Butler, Stevens & Co. On January 18th Giddens (or his brother, writing in his name) sent to Gordon & Co. the bill of lading first issued for the cotton, writing them: "Please handle to best advantage. Please pay draft made to James Summerlin for \$55.05." Gordon & Co. refused, however, to pay the draft mentioned, because Giddens' account was already overdrawn. There was also a contention by the plaintiff that Stone had authorized Giddens to ship the cotton to Gordon & Co. for him; he (Stone) being a concealed principal. Whether there is any legal evidence to support this contention we need not decide, in the light of what we shall decide as to the point. The value of the cotton, as found by the jury, was \$47.19. The total amount due Gordon & Co. by Giddens, and upon which they based their right to have the cotton, was about \$35. The plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiffs' case was based on the theory that they had the right to the possession of the cotton by reason of the issuance of the bill of lading, and that the railroad company's action in shipping it and delivering it to Butler, Stevens & Co. was a conversion. Under an instruction from the court that, if the jury found the issues in favor of the plaintiffs, they should find for them the full value of the cotton as damages, the jury rendered a verdict in favor of the plaintiffs for \$47.19. We shall not discuss the points in the order in which they are presented in the record, but will discuss the questions topically, and in such a way as to guide the court in the future trial of the case, if any be had.

[1] 1. If Stone was the true owner of the cotton, and made a cash sale of it to Giddens, or his brother, and the cash was not paid him, no title passed out of him to Giddens, and none from Giddens to the plaintiffs; and in that event the plaintiffs could not recover. In this state the title to cotton and certain other agricultural products sold on cash sale does not pass by delivery until the cash is in fact paid. Civil Code 1910, § 4126. The fact that Stone agreed to await the return of Giddens on the next day after he delivered the cotton to Giddens' brother before receiving the cash in hand did not make it a credit sale, if a cash sale was intended. *McCall v. Hunter*, 8 Ga. App. 612, 70 S. E. 59; *Flannery v. Harley*, 117 Ga. 483, 43 S. E. 785.

[2] 2. The plaintiff in error claims that there was evidence that Giddens, in shipping the cotton to Gordon & Co., was acting for Stone as concealed principal, and relies upon the doctrine that, if the concealed principal sues on a contract made by his agent, the defendant may set off any counterclaim he has against the agent with whom he contracted as principal, whether the counterclaim grew out of the contract in question or not (as to which, see *Durant L. Co. v. Sinclair L. Co.*, 2 Ga. App. 209 [4], 58 S. E. 485, and citations). This principle would plainly have been applicable if Giddens were acting as agent for Stone as concealed principal and Gordon had honored the draft sent with the cotton, or if Stone, or any one holding under him, were attempting to hold Gordon in any wise liable for the price of the cotton; but we do not think that it is applicable here, where Gordon & Co. did nothing and gave up nothing on the faith of Giddens' ownership of the cotton. The reason of the rule does not extend to such cases, and the rule should not. Be that as it may, the only proof, so far as we see, of the existence of any such relationship between Stone and Giddens is found by implication from a declaration contained in one of Giddens' subsequent letters to Gordon & Co. As between the parties to this suit the admissions and declarations of Giddens as to

such matters were mere hearsay and of no probative value.

[3] 3. But, after all, there is one absolute and controlling reason why the verdict cannot stand. Take the claims of Gordon & Co. at their highest, their only right to this cotton is to hold it for the protection of their factor's lien, for some \$35. If we could concede their lien and their right to the possession of the cotton as security therefor, still it must be remembered that they are not suing a stranger to the title. The railroad company, in committing the alleged conversion, was acting on behalf of the person holding the general title to the property, and, for the purposes of this suit, stands (to speak metaphorically) in that person's shoes. It is undoubtedly true that one having a right of possession may sue a stranger or mere wrongdoer in trover, and recover the full value of the property, though his right of possession rests on only a qualified title. Such a plaintiff holds the money recovered for the benefit of himself and all others in community of possession or title with him, as their respective interests may appear. Compare *Kaufman v. Seaboard Air Line Ry.*, 73 S. E. 592, this day decided. If the defendant in the trover suit had an interest in the property, so that in the event of a recovery the plaintiff would, under the rule just mentioned, hold any money recovered wholly or partly for his (the defendant's) benefit, the rights of the respective parties may be adjusted in the trover suit, where the plaintiff elects to take a money verdict; and if the plaintiff, though having a right of possession, is entitled to hold that possession only as security for a debt, and the defendant is the one to whom the property would go after the debt is paid, the plaintiff in the trover suit can in no event recover a money judgment for more than the amount of his debt. In such cases, if the rule were otherwise, a multiplicity of suits would arise. For instance, we will say that A. has pledged an article worth \$40 to B. in pawn for a debt of \$10, and illegally takes it out of B.'s possession. B. sues him in trover. If he were to recover \$40, the full value of the article, he would at once hold \$30 for A.'s use and benefit, as to which A. might, upon demand, maintain an action for money had and received. Therefore the rule is that in all such cases the plaintiff's money verdict will be so limited as to represent his ultimate rights.

A fair application of this rule is found in those cases where property is sold on conditional sale and upon default on the purchaser's part the seller brings trover. In those cases it has been uniformly held that the plaintiff's recovery can never exceed the amount of his debt. See *Elder v. Woodruff Hardware Co.*, 71 S. E. 806, and citations. Whenever, in a trover case, the proof shows that the interest of the plaintiff is less than absolute ownership, and the defendant is the

owner of the general property, the measure of damages will be the value of the plaintiff's interest therein, whatever that may be. *Holmes v. Langston*, 110 Ga. 861, 867, 36 S. E. 251 (a case between pledgor and pledgee). "A creditor's recovery from his debtor in an action of trover for converting collaterals cannot exceed the amount of the debt, with legal interest." *Bell v. Ober*, 96 Ga. 214, 23 S. E. 7. See, generally, on the subject, *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373. In the case at bar, if the railroad company committed any conversion as against the plaintiffs, it did so under instructions from both Giddens and Stone, and, thus having become their agents in the matter, is entitled to justify and defend under whatever rights they would have been entitled to set up if the plaintiffs' action were proceeding against them or either of them, instead of proceeding, as it does, against the carrier. Therefore in no event should the plaintiffs' recovery exceed amount of their debt.

Judgment reversed.

(10 Ga. App. 319)

HICKMAN v. BELL (No. 3,465.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 145*)—INSTRUCTIONS—ISSUES.

The defendant, being sued on a note, filed two pleas: (1) Non est factum; (2) what was called a plea of estoppel by conduct, misleading the defendant into a belief that the debt had been paid. The evidence established no legal defense under the second plea. *Held*, that the court did not err in restricting the jury to a consideration of the defense made by the other plea, as to which there was a conflict in the evidence. *Kelly v. Strouse*, 116 Ga. 872 (2a), 43 S. E. 280; *Crew v. Hutcheson*, 115 Ga. 511 (2), 42 S. E. 16.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 328; Dec. Dig. § 145*]

2. APPEAL AND ERROR (§ 216*)—REVIEW—INSTRUCTIONS.

In the absence of written request, it is not reversible error for the court to omit to instruct the jury as to the burden of proof in a civil case. *Central Ry. Co. v. Manchester Mfg. Co.*, 6 Ga. App. 254 (2), 257, 64 S. E. 1128.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216*; Trial, Cent. Dig. §§ 627, 628.]

3. TRIAL (§ 84*)—INSTRUCTIONS—OBJECTIONS—SUFFICIENCY.

Where an issue of forgery is before the jury for trial, and papers containing the signature of the alleged signer of the instrument in question are offered in evidence, a general objection of irrelevancy does not present the specific points that the genuineness of the signatures on the papers offered for comparison had not been shown.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84*]

Error from City Court of Waynesboro; W. H. Davis, Judge.

Action by Simeon Bell against J. R. Hickman. Judgment for plaintiff, and defendant brings error. Affirmed.

H. J. Fullbright, for plaintiff in error. E. L. Brinson and A. P. Bell, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 287)

MARTIN v. DUNBAR (No. 3,382.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 598*)—WEIGHT AND SUFFICIENCY—NUMBER OF WITNESSES.

The right of a jury to determine the truth of an issue in case of conflict in the testimony is not dependent upon or affected by the number of witnesses testifying on the one side or the other. The verdict is supported by evidence which fully authorized the finding of the jury, and is approved by the trial judge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598*]

2. TRIAL (§ 233*)—INSTRUCTIONS—CONTENTIONS OF PARTIES.

The assignment that the court erred in misstating the contentions of the parties is not supported by the record. It appears in the record that counsel for both parties agreed in open court that the only real issues involved were as they were afterwards stated to the jury in his charge; and therefore it was not error for the court, in his instructions to the jury, to state the contentions of each party, as each admitted it to be, although the oral admission differed from the pleadings in the case, especially for the reason that, while the statement of the court varied the amount contended for by each party in his pleadings, it did not affect the nature of the suit, nor the defense, and therefore could not confuse the jury. Nor could the jury have been confused by the court's incorrectly stating the amount claimed by the plaintiff in his petition, because the court, in the same connection, referred the jury to the pleadings.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 233*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

The error of the court in stating that they should determine a certain point "from the testimony of witnesses on the stand" (without referring at that time to the consideration of the jury certain testimony which had been submitted by interrogatories) was harmless, in view of the fact that the court, later on in the charge, called specific attention to the interrogatories, and told the jury it was their duty to consider that evidence along with other testimony in the case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296*]

4. APPEAL AND ERROR (§ 499*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

This court cannot review the ruling of the lower court upon the admissibility of testimony, when it is not made to appear what objections were urged in the lower court to the admissibility of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2299; Dec. Dig. § 499*]

5. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Assignments of error, not referred to in the brief of counsel, will be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4258-4261; Dec. Dig. § 1078.*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action between D. L. Martin and F. H. Dunbar. From the judgment, Martin brings error. Affirmed.

A. J. McDonald and Griffin & Griffin, for plaintiff in error. Haygood & Cutts, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 320)

BANK OF SOUTHWESTERN GEORGIA v. EMPIRE LIFE INS. CO. (No. 3,466.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

EXECUTION (§ 198*)—CLAIMS OF THIRD PERSONS—EVIDENCE.

The proper practice in a claim case, where the claimant fails to put in an appearance, is either to dismiss the claim, or have the plaintiff to make out his case and take a verdict finding the property subject to the execution; and where the entry of levy on the execution recites that at the time of the levy the property levied upon was in the possession of the defendant in execution, this would make out a prima facie case in behalf of the plaintiff in *fi. fa.*, and would cast the burden upon the claimant, and in the absence of the claimant would entitle the plaintiff in *fi. fa.* to a verdict finding the property levied upon subject.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 198.*]

Error from City Court of Leesburg; H. C. Beasley, Judge pro hac.

Claim case between the Empire Life Insurance Company and the Bank of Southwestern Georgia. From a verdict finding the property levied on subject, the bank brings error. Affirmed.

W. A. Dodson, for plaintiff in error. Tipton & Passmore, for defendant in error.

HILL, C. J. This was a claim case, and the only issue raised for the decision of this court is whether the trial judge erred in allowing the plaintiff in *fi. fa.* to join issue and take a verdict finding the property levied upon subject, where there was no appearance for the claimant. The plaintiff in error insists that the claim should have been dismissed. In *National Furniture Co. v. Edwards*, 105 Ga. 240, 31 S. E. 161, it is held that "the proper practice in a claim case, where the claimant fails to put in an appearance, would be either to dismiss the claim, or for the plaintiff to make out his case, before he would be entitled to a verdict

or judgment subjecting the property." Under this decision, when the case was called for trial, and the claimant was absent and unrepresented, the trial judge could either have granted a motion to dismiss the claim, or have allowed the plaintiff to make out his case and take a verdict finding the property subject; and, at the instance of the plaintiff in the court below, the latter course was adopted.

Did the plaintiff make out his case? It does not appear that he introduced any evidence. The recital in the bill of exceptions is that he tendered issue, impaneled a jury, and proceeded to take a verdict finding the property subject. The execution, with the entry of the levy, was a part of the papers before the court, even if not formally introduced in evidence, and the entry of the levy made by the sheriff on the execution recited that at the time of the levy the property levied upon was in the possession of the defendant in execution. This was sufficient to make out a prima facie case, and to cast the burden upon the claimant. Where the claimant was not present to carry this burden, it seems that the plaintiff was entitled to a verdict finding the property subject to the execution. Section 5170, Civil Code 1910. There was no error.

Judgment affirmed.

(10 Ga. App. 444)

TOLES v. STATE. (No. 3,462.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

1. INTOXICATING LIQUORS (§ 139*)—KEEPING LIQUOR AT PLACE OF BUSINESS.

It is a violation of the law for a person to keep on hand intoxicating liquors at his place of business when it is closed, as well as when it is open to the public for the purposes of business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.*]

2. INTOXICATING LIQUORS (§ 169*)—KEEPING LIQUOR ON HAND AT PLACE OF BUSINESS—AGENTS.

As all engaged in the commission of a misdemeanor are principals, one may be guilty of keeping intoxicating liquor at his place of business, or of keeping such liquor on hand at the place of business, although it is disclosed by the evidence that he was not the owner of the liquor, but merely kept it on hand as an employé or agent of the owner, at the place of business where he worked, provided that it was a public place of business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

3. INTOXICATING LIQUORS (§ 139*)—"PLACE OF BUSINESS."

In contemplation of the general prohibition law, even a menial employed by another may have a "place of business." His business may consist only of discharging the duties devolving upon him under the terms of his employment, and the place of business of his employer will

be his place of business if it be the place where the performance of his duties is required.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 139.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5390-5392.]

4. INTOXICATING LIQUORS (§ 236*)—LIQUORS AT PLACE OF BUSINESS—EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 800-822; Dec. Dig. § 236.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Shep Toles was convicted of unlawfully keeping intoxicating liquor at a place of business, and brings error. Affirmed.

E. R. Bradfield, E. A. Jones, and M. U. Moity, for plaintiff in error. Henry Reeves, Sol., for the State.

RUSSELL, J. The plaintiff in error was convicted under an accusation charging that he was guilty of unlawfully keeping on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors. Exception is taken to the overruling of the motion for new trial, which contains the customary grounds, and also two assignments of error predicated upon the charge of the court. If the complaints urged against the judge's instructions to the jury are well founded, a new trial would result, even though the evidence authorized the conviction of the defendant, and for this reason we shall first consider the merits of the exceptions to the charge of the court, presented by the amended motion.

[1] Error is assigned because the court charged the jury as follows: "I charge you, gentlemen, that it is a violation of the law for a person to keep on hand intoxicating liquors at his place of business at any time. It is a violation of the law to keep it on hand when it is open to the public for business; and it is a violation to keep it on hand when it is closed. The decision cited by counsel only applies when the place of business is used as a residence and also as a place of business." We find no error in this charge. It is a violation of the law for a person to keep on hand intoxicating liquors at his place of business when it is closed, as well as when it is open to the public for the purposes of business, and it is not error for the court so to instruct the jury. The evidence in this case showed that at least a portion of the whisky which was found in the place of business where the defendant worked was placed there in his absence, and after the place had been closed for the night, and this place of business had not been opened the next morning when the officers entered it through the window; so there was no direct evidence that the intoxicants which the officers found had been kept on hand during the hours when the

place of business was open. The purpose of the provision of the general prohibition law now under consideration was to prohibit the carrying of intoxicating liquors into a place of business and keeping it on hand during those hours when it was closed, as well as during the hours when it was open. The presence of the intoxicants either by night or day might afford a pretext by which other violations of the statute would be excused. The ruling in the Land Case, 5 Ga. App. 98, 62 S. E. 685, is not applicable to this case. The ruling in that case dealt with the peculiar facts disclosed by the record, but the dissimilarity between the Land Case and the case at bar is apparent, in that it appeared in the Land Case that there was a portion of the day when Land's place of business was devoted to no other but private use, being a room used as his sleeping apartment. In the present case there is no suggestion that the poolroom where the whisky was found was at night closed for all purposes other than private use.

[2] 2. As all engaged in the commission of a misdemeanor are principals, one may be guilty of keeping intoxicating liquors at his place of business, or of keeping liquor on hand at the place of business, although it is disclosed by the evidence that the accused was not the owner of the liquor, but merely kept the intoxicating liquor on hand as an employé or agent of the owner at the place of business where he worked, provided that it was a public place of business. According to the evidence, Shep Toles, the defendant, was perhaps only an employé of one Yarbrough, and employed by him to run the poolroom and other accessories of the business. It is uncontradicted that none of the whisky that was found was directed or marked in his name, though all of it was so marked as to indicate clearly an ownership by others. So it is not perfectly plain that the defendant had an interest in the ownership of the whisky. But, granting that he had none, there was evidence to the effect that he kept the place of business for Yarbrough; and it is very plain, from the quantity of empty whisky barrels, similar to those found to be full, that Toles not only knew that whisky was being kept at the place of business, but aided as an employé in keeping it on hand.

The point is made that the evidence shows that the poolroom, if a place of business at all, belonged to Yarbrough, and that, being Yarbrough's place of business, it would not be an offense, under the terms of the general prohibition law, for another person (Toles, for instance), who merely worked or was employed there, to keep intoxicating liquors on hand at such place of business, for the reason that the statute only forbids that one shall keep intoxicating liquors on hand

at his own place of business, and, if this place of business belonged to Yarbrough, then Toles would violate no law by keeping intoxicating liquor on hand there. Upon this subject we approve the charge of the court, which was as follows: "In order for you to find the defendant guilty, it would not be necessary to show that the defendant was the owner of the liquor which was found, if any was found. If the jury should find from the evidence that it was Yarbrough's business, that he was owner of the liquor which was found, if any was found, and if they further found that defendant, as an employé or agent of Yarbrough, being hired by Yarbrough to run the business, kept intoxicating liquor on hand at this place of business where he worked, and the same was a public place of business, in Troup county, on or about the date alleged in the accusation, he would be guilty of a violation of the law." The instructions of the judge follow our ruling in *Hendrix v. State*, 5 Ga. App. 819, 63 S. E. 939, in which we held that, "where the evidence showed that the intoxicating liquors sold or furnished at the place of business in question was in entire charge of the accused, it is not error for the judge to instruct the jury that if the defendant assented to the furnishing of the intoxicating liquor he might be found guilty." The two cases are so similar that the ruling in the *Hendrix* Case is controlling in this.

[3] 8. Furthermore, in contemplation of the general prohibition law, even a menial employed by another may have a place of business. His business may consist only of discharging the duties devolving upon him under the terms of his employment, and the place of business of his employer may be his own place of business, if this be the place where his duties are performed.

[4] 4. There being no merit in the assignments of error upon the charges of the court, it is very plain that the jury were authorized, under the evidence adduced, to convict the defendant. While it is true that apparently the 16 barrels of whisky found in the poolroom run by him had been shipped to others than himself, and were found marked in their name, and granting that the poolroom where the whisky was found was owned by Yarbrough, still there was evidence that Toles was employed to manage and run the poolroom, and that he did so. The evidence does not disclose whether Toles was jointly interested in the ownership of the whisky, or of the poolroom, or was only an employé; but there are a number of circumstances in the evidence which would have authorized the jury to infer that Toles assented to the keeping of the whisky on hand in his place of business in which he was interested, and certainly that he aided in keeping and furnishing intoxicating liquor at a public place, if being in charge of this

poolroom, as testified, he permitted it to be kept there. The evidence authorized the verdict.

Judgment affirmed.

(10 Ga. App. 423)

CENTRAL OF GEORGIA RY. CO. v. BIRD.
(No. 3,335.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 113*)—FIRES—LOSS OF FREIGHT
—LIABILITY OF CARRIER.

Where a railroad company, in pursuance of an agreement with a warehouse company, places one of its cars on a side track in front of the warehouse for the purpose of having the car loaded, for immediate shipment, with cotton stored in the warehouse, the railroad company to pay for the work of loading, and the cotton is loaded onto the car by the employées of the warehouse company, properly marked as to destination, and with name of consignor and consignee, this would be a delivery to the railroad company as a common carrier of the cotton, and the railroad company would be responsible to the owner of the cotton for its destruction by fire while in its possession.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 113.*]

Error from City Court of Statesboro; H. A. Boykin, Judge.

Action by A. J. Bird against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawton & Cunningham and Alex. R. Lawton, 3d, for plaintiff in error. Deal & Renfro and J. D. Kirkland, for defendant in error.

HILL, C. J. Bird recovered a verdict from the Central of Georgia Railway Company in the city court of Statesboro for \$3,052.58 as damages, the value of 41 bales of cotton which were consumed by fire while in a car of the defendant company, and the case is here on exceptions to the judgment overruling the defendant's motion for a new trial. The facts briefly stated are as follows: Bird, the owner of the 41 bales of cotton, placed them in the Farmers' Union Warehouse at Metter, Ga., marked for shipment to Savannah, Ga. This warehouse was located within 3 or 4 yards of the track of the defendant company and between 300 and 400 yards from its depot. The defendant company, in pursuance of a custom and under agreement it had with the warehouse company, placed a car for the reception of this cotton near the warehouse; it being the purpose of the owner of the cotton that it should be transported to Savannah the day after the car was loaded with the cotton. The agents of the warehouse loaded the car with the cotton, and in the afternoon, having completed the loading, closed the door of the car, but did not seal it. The evidence was in conflict as to whose duty it was to seal the door of the car, whether that of the agents of the warehouse or

that of the agents of the defendant company. The loading of the car was completed in the afternoon about 5 o'clock. On the same night, between 10 and 11 o'clock, the car with the cotton was entirely consumed by fire. A mixed freight and passenger train passed between 12 and 1 o'clock in the daytime while the car was being loaded. The next and only train that passed before the fire was a passenger train, which passed at 5:45 o'clock p. m. The agents of the warehouse company who did the loading testified that neither one of them smoked; that there were no matches about the car, and nothing else by which the cotton could have been ignited, so far as they could discover, when they closed the car and left it. It was proved by the railroad company that at the point where the car was located, although the track was up-grade, on account of its proximity to the depot, where both the freight and passenger trains were stopped, no sparks were emitted by either one of the engines of this train; the engineers of both trains testifying that their engines were simply rolling as they passed the warehouse, and that engines never emit sparks when rolling, but only when they are working. The first freight train upon which the cotton could have been moved after it had been loaded in the car was one on the next day, which was expected to take up the car for the purpose of transporting it to Savannah, its destination, and this train was expected to pass Metter on the next day between 10 and 11 o'clock in the morning.

A contract was introduced in evidence between the Farmers' Union Warehouse and the Central of Georgia Railway Company, by the terms of which the railway company agreed to issue "its regular cotton bills of lading on cars by the said Farmers' Union Warehouse at cotton warehouse situated upon the side track of the said railway company at Metter, Ga., upon the written statement of the said Farmers' Union Warehouse, their agents or employes, as to the consignor, consignee, destination, number of bales, and marks of all cotton so loaded at cotton warehouse," upon certain conditions as to the method of loading and as to the care and diligence of the warehouse company to see that the cars were in a proper and "clean condition, that is, free from anything likely to damage the cotton, such as loose matches, waste, oil, filth, etc., and [should] have the end windows of the cars closed, stripped, and sealed in a proper manner," and that when the cars had been loaded the Farmers' Union Warehouse should cause the doors thereof to "be also closed, sealed, and stripped in a proper manner." There was also introduced in evidence an agreement between the railway company and the Farmers' Union Warehouse that the former should pay the latter stipulated amounts for its services in loading the cars. There was no evidence that any bill of lading was issued for the cotton to the warehouse company, or to the shipper.

There was no evidence that the railroad company had been notified after the loading of the car that it was ready for shipment; but the evidence is undisputed that the bales of cotton were marked for destination, that the cotton was to be shipped by the first freight train passing on the next day, that the custom of the company was to deliver the cars to an adjacent entrance into the warehouse for the purpose of having the warehouse agents to load the cotton thereon, that this cotton was loaded on the car which the railway company placed there on the day the cotton was burned, and the value of the cotton was proved.

Under this evidence the attorney for the railroad company contends: (1) That there was no delivery of the cotton to the railway company in its capacity of a common carrier, nor any delivery to it as a warehouseman; and (2) that there was no evidence whatever that any spark from a passing engine consumed the cotton, or that it was destroyed by any negligence of the railway company or its agents.

Did the facts show delivery to the railway company, and, if so, was that delivery to the company as a common carrier, or as a warehouseman? Of course, if it was delivered to the railway company in its capacity of a common carrier, the plaintiff was entitled to recover upon proof of ownership, delivery, and loss. The question is not free from doubt, but our opinion is, under the law, that the facts show a delivery to the railway company as a common carrier. Civil Code, 1910, § 2730, declares that "the responsibility of a carrier commences with the delivery of the goods either to himself or his agent, or at a place where he is accustomed or agrees to receive them." Whom did the warehouse company represent in loading the cotton on the car? Did it represent the railway company, the owner of the cotton, or both? It was unquestionably the agent of the owner in receiving the cotton into its warehouse, but it seems to us plain that it was the agent of the company in loading the cotton from the warehouse on the company's car. The company by a written contract created this relationship between it and the warehouse company, so far as the loading of the cotton was concerned. It stipulated that the loading was to be done by the warehouse company and how it was to be done, and it had agreed to pay the warehouse company compensation for the work of loading the car. In addition to this, it seems to us, from the fact that the car was placed by the railway company near the warehouse, where it was accustomed to place it, and where it had agreed to place it for the warehouse, for the purpose of having it loaded by the warehouse agents with cotton for shipment, that when the cotton was loaded on the car at that place, it was a delivery to the railway company. When the cotton got out of the warehouse and into the car of the railway

company, it got into the control and custody of the railway company and out of the control and custody of the warehouse company. We think the delivery in this case under the facts was an actual delivery, and that it was accepted by the railway company. Certainly there was such constructive and implied delivery and acceptance as would make the railway company liable as a carrier.

It is insisted that there was no complete delivery, because there was something else for the shipper to do, and that no bill of lading had been issued by the company, and that there could not be in law a complete delivery until a bill of lading had been issued. The responsibility of the company as a carrier began with the completion of the delivery by the warehouse company, whether a bill of lading had or had not been issued at that time. 4 Elliott on Railroads, § 1403, and citations. In this case the bill of lading, according to the evidence, was to have been delivered to the warehouse company for the shipper. The evidence does not disclose who was to pay the freight on the cotton, or whether or not the freight had been paid. Indeed, it fails to disclose anything that the shipper was required to do, except to put the cotton into the hands of the warehouse company marked for transportation, depending upon the warehouse company and the railway company to load the car and complete the transportation. Where cattle have been placed in the company's pen for immediate shipment, and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman. 4 Elliott on Railroads, § 1404, and citations.

In the view we take of the case, it makes little difference whose agent the warehouse company was, whether that of the shipper or of the railway company, for we think the placing of the car by the company at the warehouse, and the loading of the cotton on the car marked for its destination and for immediate shipment, constituted a delivery and acceptance by the railway company as a common carrier. The evidence is undisputed that the cotton was to be shipped the next day on the first freight train, the very first opportunity for shipment. This, in our opinion, makes an immediate shipment in the meaning of that term, for it was to be shipped on the very first train of the company that passed Metter after the car had been loaded, on the morning of the next day. It has also been held that goods stored along the line of a railway company awaiting shipment, where the owner is to load them when he gets a car, are not delivered to the company until they are so loaded and ready for shipment. In the case of Fleming v. Hammond, 19 Ga. 145, it is held that "if the owner of a boat directs cotton to be left at a particular landing on the river, agreeing to receive it there, a deposit of the cotton at that

place constitutes a good delivery." It is also held in Packard v. Getman, 6 Cow. N. Y. 757, 16 Am. Dec. 475, that "where a railroad company furnishes a car for the purpose of being loaded, and assents to the placing of goods therein, the goods are as much in the possession of the company as if they had been delivered in its warehouse for shipment, and the company is liable where they are thereafter destroyed by fire, though it occurs before a bill of lading has been signed." See, also, to the same effect, East Line R. Co. v. Hall, 64 Tex. 620. In 5 Amer. & Eng. Enc. of Law, 190, it is said that "it is sufficient for the plaintiff to show that the goods were delivered to a person and at a house where goods were accustomed to be left for the carrier." "Delivery to a drayman, or other servant of the company, who is accustomed to collect and receive goods for the company at the places of business of its patrons, is a delivery to the company." 4 Elliott on Railroads, § 1406.

It is insisted by learned counsel for the railway company that the company had no notice, either actual or constructive, of the delivery of the goods. If the deposit is made in the usual manner at the place where goods have been constantly received for transportation, a railroad company may, it seems, be charged with constructive notice, even though the delivery was not made to any of its servants. The evidence in this case shows that the cotton was delivered at the place where the railroad company was accustomed to receive it. It was delivered on one of its own cars. On the very day on which the cotton was consumed the car had been taken by the railroad company and placed in front of the warehouse for the purpose of having it loaded with the cotton, and the loading was to be done by the agents of the warehouse company, which the railway company had in writing constituted its agent for that purpose. These facts bring it squarely within the principle of the ruling that where a railroad company had erected a platform on which, in the usual course of business, cotton was stored for shipment by the next train, and the cotton was destroyed by fire set by one of the company's locomotives, the shipper could recover as from a carrier. And where it was the custom to deposit cotton in the street beside the railroad company's platform, or in the company's cotton yard, a delivery there was held sufficient. 4 Elliott on Railroads, § 1411. It is needless to cite other authority, for under the authorities already cited, applied to the facts of this case, it must be conceded that the cotton, when it was consumed by fire, was in the possession of the railroad company, having been delivered and received by it as a common carrier for immediate transportation.

This conclusion having been reached, it is, of course, unnecessary to consider the other question, for the railway company as a common carrier is liable for the full value of

the cotton consumed by fire while in its possession, unless the fire was caused by the act of God or the public enemy.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 433)

RICKS v. BRIESENICK. (No. 3,464.)
(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—REVIEW—FIRST GRANT OF NEW TRIAL.

The verdict rendered not being demanded by the evidence, the discretion of the trial court upon the first grant of a new trial will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action between R. M. Ricks and R. E. Briesenick. From the judgment, Ricks brings error. Affirmed.

J. D. Sparks and J. T. Powell, for plaintiff in error. Harry F. Dunwoody, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 441)

SUMMERS v. LEE. (No. 3,518.)
(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM (§ 47*)—ACTION FOR USE—SET-OFF AGAINST BENEFICIARY.

The court erred in disallowing the defendant's plea of set-off. "If the plaintiff sues for the benefit of another person, a set-off against the beneficiary shall be allowed." Civil Code 1910, § 4343.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 101, 102; Dec. Dig. § 47.*]

2. HUSBAND AND WIFE (§ 213*)—MORTGAGE BY WIFE—ENFORCEMENT—EVIDENCE.

There being sufficient evidence to authorize the inference that the making of the note and deed by the wife to secure a loan to her was merely a colorable scheme by which her separate estate was to be subjected to the debts of her husband, it was error to direct the verdict for the plaintiff. Even if the evidence could be said to preponderate in favor of the plaintiff, the verdict directed was not demanded, for there was testimony upon which the jury might have found that the plaintiff advanced the money, knowing that it was to be used to pay the husband's debts, including his debt to the bank, and that the entire transaction was a collusive scheme by which the statute against suretyship on the part of married women might be evaded. *Central Bank v. Almand*, 135 Ga. 231, 69 S. E. 111; *McLeod v. Southern Fertilizer Co.*, 7 Ga. App. 322, 66 S. E. 802.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 213.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by E. G. Lee, for use, etc., against N. B. Summers. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. & J. H. McCalla and Munday & Cornwell, for plaintiff in error. R. W. Miller, for defendant in error.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 442)

STEWART v. STATE. (No. 3,621.)
(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

LARCENY (§ 19*) — FROM THE PERSON — KNOWLEDGE.

It appearing, without contradiction, from the evidence of the prosecutor, that his money was taken with his knowledge, the conviction of the plaintiff in error of the offense of larceny from the person is not sustained, and a new trial should have been granted. *Moye v. State*, 65 Ga. 754; *Jackson v. State*, 116 Ga. 578, 42 S. E. 750; *Williams v. State*, 70 S. E. 890.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 46; Dec. Dig. § 19.*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Charlie Stewart was convicted of larceny, and brings error. Reversed.

R. J. Jordan, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., for the State.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 255)

VOLUNTEER STATE LIFE INS. CO. v. BUCHANNAN. (No. 3,280.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§§ 121, 668*) — ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In this state the rule is well settled that a person has a right to procure an insurance policy on his own life, and to assign it to another who has no insurable interest on his life, provided it be not done by way of cover for a wager policy; and the intention of the insured in taking out the policy and in making the assignment, and of the assignee in accepting the assignment, are questions of fact for determination by the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. §§ 121, 668.*]

2. INSURANCE (§ 665*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE.

There is some evidence in the present case tending to show that the policy contract was valid, and that the assignment thereof was made in good faith for a valuable consideration.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. ASSIGNMENT OF POLICY—ESTOPPEL OF INSURER.

Where the evidence shows that an assignment or sale by the insured of a policy of insurance to one who had no insurable interest on his life was made with the knowledge of the insurance company, and the company subsequently received the premiums directly from the assignee for three years, and the policy provided that after two years it would be incontestable on any ground, would not the company be estopped from contesting the validity of the policy? And, even if not estopped, could the company make any contest of the validity without first tendering back the premiums which it had received from the assignee of the policy?

4. INSURANCE (§ 213*)—ASSIGNMENTS—PROOF OF INTEREST OF ASSIGNEE.

Where the assignment of a policy of insurance provides that "the assignment was subject to proof of interest of the assignee," and the evidence shows that the assignee made timely proof of loss, in which he stated that he held the policy as an absolute purchaser for value, and not as collateral security, and subsequently, in reply to letters from the company asking for proof of interest, wrote to the company that his interest was that of an absolute purchaser for value, and repeated the same statement to the special agent of the company, who was sent to him by the company for the purpose of finding out the interest of the assignee and making a settlement with him of the policy, this would be a substantial compliance with the provision of the assignment requiring proof of interest by the assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 483; Dec. Dig. § 213.*]

5. INSURANCE (§ 653*)—ACTIONS ON POLICIES—ADMISSIBILITY OF EVIDENCE.

There was no error in excluding the testimony of the agent of the insurance company, through whom the application for the policy was made, to the effect that he disapproved the policy because in his opinion it was a wager policy, and in also rejecting the testimony that in the town where the insured lived there was a great deal of speculation in policies of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1678, 1679; Dec. Dig. § 653.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

The exceptions made to portions of the charge are without merit, and the written requests were substantially covered by the general instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

7. NO ERROR—EVIDENCE SUFFICIENT.

No error of law appears, and the verdict is supported by some evidence.

(Additional Syllabus by Editorial Staff.)

8. INSURANCE (§ 669*)—ACTIONS ON POLICIES—INSTRUCTIONS.

In an action on a life policy, an instruction, following the terms of the contract, that the policy would be incontestable after the expiration of two years, except that the insured participate in the military service, the army or navy, in connection with instructions that unless the jury found that the contract was a valid contract it would not be applicable, because if it was a wager contract it was void ab initio, was not erroneous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by G. E. Buchanan against the Volunteer State Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith & Carswell and R. L. Maynard, for plaintiff in error. E. A. Hawkins, for defendant in error.

HILL, C. J. This was a suit on an insurance policy, to recover the face value of the policy, besides interest, attorney's fees, and damages, as provided for in sections 2549 and 4392 of the Civil Code of 1910. The policy of insurance was written on the life of Davis P. Holt, and by its terms was payable to his estate or assigns. It was dated April 26, 1906, was for \$5,000, and was duly transferred and assigned to the plaintiff for a valuable consideration on May 8, 1906. The insured died in November, 1909, and proofs of death, as required by the contract, were made by the assignee of the policy and presented to the insurance company, and demand made upon it by the assignee for payment of the amount of the policy. The evidence also showed that the insurance company had received directly from the assignee the premiums due on the policy for the time for which it was in force until the death of the insured, and that when the assignment was made the company had due notice and consented to it. The foregoing facts are not controverted. The jury returned a verdict for the plaintiff for the amount of the policy, refusing to find in favor of the claim for attorney's fees and damages, and the defendant's motion for a new trial was overruled.

[4] Two defenses were relied upon. First, it was claimed by the insurance company that the assignee had not complied with the terms of the assignment; it being provided therein that the assignment was subject to proof of interest of the assignee. The assignment does not provide how this proof of interest shall be made. The evidence shows as to this matter that in the proof of loss the plaintiff claimed that he was entitled to the amount of the policy as the "absolute owner," by virtue of the assignment. A few days subsequently, in replying to letters from the insurance company asking for information as to his interest, he wrote that he was the absolute owner of the policy, having bought the same outright for a valuable consideration, and subsequently, when the special agent of the company was sent to him for the purpose of obtaining more definite information on this subject, and for the further purpose of adjusting the loss, the plaintiff repeated what he had already written to the company, that he was in fact the absolute owner of the policy for a valuable consideration, that he had bought it outright, and that he did not hold it as collateral security for any indebtedness which the insur-

ed owed him. We think this evidence shows that there was a compliance with this provision of the policy. We do not see how there could have been a more definite and specific compliance than was made both in the letters written to the company on the subject and in the information directly given to the special agent.

[1, 2] The second defense relied upon, and which was the principal defense, was the contention of the company that the contract of insurance was invalid because it was a wagering contract; that the insured and the plaintiff (the assignee) had entered into an agreement that the insured should apply for the policy, and that after it had been obtained he would transfer it to the plaintiff in consideration of an advancement made the insured by the plaintiff of a sum of \$300 or \$400; that the insured was not able to pay the first premium, and in compliance with this mutual agreement made the application through the agent of the company; that when the policy was delivered to the insured he went to the assignee for the money to pay the first premium, and the money was advanced to him by the plaintiff for the purpose of paying the premium, and that three or four days thereafter the assignment was made in consideration of this advance and in performance of the previous agreement between the two in reference thereto, that the plaintiff knew that the insured, at the time he made the application for insurance, was a habitual drunkard, and knew that he was in a delicate state of health, and would probably die prematurely from the excessive use of liquor, and on this account the plaintiff was willing to hazard the premiums on the policy of insurance, with the hope and belief that he (the plaintiff) as the assignee, would in a short time receive the full amount of the policy; in short, that the policy was taken out by Holt and the assignment made by him to the plaintiff for the purpose of evading the law in reference to gambling contracts, and the means adopted were simply a cover for a wager policy.

As to this defense it may be stated that there were some strong circumstances tending to show that it was the truth of the transaction, except as to the charge that the insured was a habitual drunkard. This fact was not proved; but it was shown by circumstances that Holt was unable to pay the first premium, and that he did make application to the plaintiff for the money out of which the first premium was paid. But the plaintiff swears positively that Holt came to him with the policy and offered to sell it to him for \$300, and after some negotiations he did buy outright the policy from Holt, and held it under a written assignment, which was subsequently approved by the company; and he gave the \$300 to Holt and took the assignment in ignorance of the fact that the premium had not been paid. There is other testimony which bears more or less on this

defense, but the question was one exclusively for consideration by the jury. The learned trial judge clearly and fully charged the law as laid down by the Supreme Court in the case of *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, that "one has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy."

The law which controls this question of wager contracts of insurance is so fully and clearly set out in the learned and elaborate opinion of Mr. Chief Justice Fish in the decision which is cited that it will be unnecessary to add any other authority or to discuss the question any further. The law, therefore, having been correctly charged by the court, and the question of the intent with which the policy was taken out and assigned being a matter for the jury exclusively, this court cannot interfere, unless there was in the trial of the case some material and prejudicial error against the defendant. We have examined the special assignments of error very carefully and will dispose of them briefly.

[5] 1. In support of the contention by the defendant that the contract in question was a wager contract, testimony is offered that the local agent of the company, through whom the application for the insurance was made, had expressed himself as being opposed to writing this kind of insurance (meaning speculative), and that in the years 1905 and 1906 there was a good deal of speculative insurance written in Americus, the home of the applicant in this case. We think the testimony was inadmissible and immaterial for the purpose of showing that the contract in question was a wager contract, and that the citations relied upon in support of the admissibility of the evidence are not in point. The authorities cited are to the effect that other transactions than the one under investigation may in some cases be admitted for the purpose of illustrating intention. *Mutual Life Insurance Company v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 913, 29 L. Ed. 1000; *Small v. Williams*, 87 Ga. 681, 13 S. E. 589; 6 Enc. of Evidence, p. 23.

[6] 2. Several written requests to charge were duly made by the defendant. The instructions requested were pertinent to the defense, if the contract in question was a wager contract, and was therefore void. We have examined these requests in connection with the general instructions, and we find that they are fully—indeed, most favorably to the insurance company—covered by the general instructions on that subject, and it would have been superfluous reiteration for the court to have given them in charge.

[6] 3. It is also contended that the court erred in charging the jury that under the terms of the contract of insurance "it would

be incontestable after the expiration of two years, except that the insured participate in the military service—the army or navy.” It is said this instruction was not applicable to the facts of the case and was prejudicial to the defendant. This was the provision of the contract, and the court gave it in connection with the instruction that, unless the jury found that the contract was a valid contract, it would not be applicable, because, if it was a wager contract, it was void ab initio. The instruction objected to, therefore, was beneficial to the defendant, for otherwise the jury might have inferred that after two years (and it was undisputed that the contract had been in force for more than two years), it was incontestable, even if they found it was a wager contract. Besides, one of the defenses relied upon as to which some evidence was introduced, but which, as before stated, was not satisfactorily proved, was that the insured at the time he took out the policy was a habitual drunkard, and it was contended that, if this was true, he falsely represented the condition of his habits to the company, and for this reason the policy was void. The charge, therefore, as to its being incontestable after two years was referable to this defense.

[7] The foregoing is a brief discussion of the essential questions raised by the record. After a careful examination of the evidence and the charge of the court, and also the law applicable, we have come to the conclusion that the court committed no error in the trial, and that, while there were some strong circumstances tending to establish the defense that the contract was a wager contract, yet there was positive evidence on the part of the plaintiff to the contrary; and, as this was a matter exclusively for the decision of the jury, the judgment of the lower court in refusing a new trial must be affirmed.

(10 Ga. App. 442)

FORD v. STATE. (No. 3,806.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

1. DRUNKARDS (§ 10*)—OFFENSES.

A violation of the statute which forbids one to be drunk or intoxicated within the curtilage of any private residence which is not in his exclusive possession may be manifested by the indecent condition or acting of such intoxicated person. The indecent condition may exist in the degree of the intoxication, even if there is no harmful act perpetrated by the accused and no unbecoming language or loud and violent discourse.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the judgment of guilty.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Fred Ford was convicted of drunkenness and brings error. Affirmed.

G. A. Whitaker and S. M. Varnedoe, for plaintiff in error. Jas. M. Johnson, Sol., for the State.

RUSSELL, J. [1, 2] The only question presented by this record is whether the mere fact that the defendant went to the private dwelling house of another in such an intoxicated condition that, in attempting aimlessly to grab at a little child, he fell in the middle of the floor, and thereafter, without resistance on his part, was ejected from the residence. The point is made that there can be no violation of the act of 1905 (Acts 1905, p. 114), which forbids any person appearing drunk or intoxicated on any public street or within the curtilage of any private residence, unless the intoxication is made manifest by some act or language on the part of the intoxicated person. Counsel cite the rulings of this court in *Coleman v. State*, 3 Ga. App. 298, 59 S. E. 829, *Dorsey v. State*, 7 Ga. App. 366, 372, 66 S. E. 1096, and *Haines v. State*, 8 Ga. App. 631, 70 S. E. 84, in support of this position. There is no ruling in any of these cases upon the precise point here presented, and certainly nothing which conflicts with the view that the language of the statute which declares that the intoxicated condition may be manifested by indecent condition is for any reason to be disregarded.

In the *Coleman Case*, supra, it is true that the defendant was shown to have been guilty of using profane language and of doing other acts which clearly demonstrated that he was drunk, and in the opinion Judge Hill was dealing with the facts as presented. But the statement that “the purpose of the statute is to protect the public streets and highways and private residences, not so much from the presence of the drunkard as from the conduct of the drunkard as described in the act,” cannot be construed as a ruling directed in any sense to that portion of the statute which declares that the intoxication may be manifested by indecent condition alone; for, in commenting on the evidence, Judge Hill states that in the case under discussion the plaintiff in error “made clearly manifest his drunken condition by boisterousness, by *indecent condition* and acting, and by loud and violent discourse.” The *Coleman Case* was one in which the numerous acts of the defendant overshadowed any reference to his condition, and pretermitted any necessity for reference to that portion of the statute; but there is certainly nothing said in the opinion that could warrant the conclusion that the intoxication forbidden by the statute might not be manifested by the indecent condition of the accused, without anything more being shown.

The same is true as to the comments of

the writer in *Dorsey v. State*, 7 Ga. App. 366, 372, 66 S. E. 1096, which is cited. The statement in the *Dorsey Case*, that "one may be intoxicated without violating the statute, provided he is guilty of no act which violates public decency," is not exclusive of such an act as would be committed if one went to the private dwelling house of another in such a condition of beastly intoxication as to violate every rule of decency and propriety. The going is an act. The appearing within the curtilage of a dwelling house is an act on the part of the person who appears, and the indecency would depend largely upon the degree of the intoxication. The intoxication might, of itself, be so complete as to evidence an "indecent condition."

In the *Haines Case*, 8 Ga. App. 627, 70 S. E. 84, reference was made to the specific charge upon which the defendant was being tried, and to the fact that one of the acts specifically mentioned in the statute was the use of vulgar, profane, and unbecoming language. But in a subsequent portion of the opinion, the writer said that "to appear in an intoxicated condition in any portion of the area inclosed by the curtilage, whether within or without the dwelling house, is a violation of the statute." It is true that the question then under discussion was whether the law penalized drunkenness in a dwelling house, inasmuch as the language used in the statute was "within the curtilage of any private residence"; but the language quoted from the decision clearly indicates the opinion of this court that it was the intention of the Legislature to penalize the appearance of any one so intoxicated as to be in any way offensive, by reason of such intoxicated condition, to others at any dwelling house not his own. In the opinion of the writer, laws directed against the abuse of intoxicants cannot be too strictly enforced. The writ of error is without merit.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 457)

BROWN v. STATE. (No. 3,836.)
(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

REVIEW.

The evidence authorized the verdict.

Error from City Court of St. Marys; D. S. Atkinson, Judge.

Willie Brown was convicted of crime, and brings error. Affirmed.

Emmett McElreath, John J. Moore, and E. W. Brinkins, for plaintiff in error. S. C. Townsend, Sol., for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 303)

RIVERSIDE MILLING & POWER CO. v. SEABOARD AIR LINE RY.

SEABOARD AIR LINE RY. v. RIVERSIDE MILLING & POWER CO.

(Nos. 3,429, 3,430.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

CARRIERS (§ 69*)—CARRIAGE OF GOODS—ACTION FOR BREACH OF CONTRACT.

The court did not err in sustaining the general demurrer and dismissing the plaintiff's petition. The petition, as amended, was fatally defective, in that it was not alleged that the special contract for milling in transit privilege was within the power or authority of the defendant to grant. Under Act Cong. June 29, 1906, c. 3591, § 4 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892; Supp. 1909, p. 1149) regulating interstate transportation, a carrier could not grant this special contract, unless the rate had been approved by the Interstate Commerce Commission. The petition did not allege that the special milling in transit privilege, at the special rate mentioned, had been established by the defendant and included in the schedule of rates, and published as required by the act of Congress above referred to, nor allege that such privilege or the rate mentioned was open to all shippers under like conditions, or that the charges agreed to be made on the interstate transportation mentioned had been fixed and regulated in accordance with law, and therefore that the defendant was under duty to the plaintiff to make shipments for it in accordance with the contract.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 69.*]

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by the Riverside Milling & Power Company against the Seaboard Air Line Railway. Judgment for defendant, and both parties bring error. Judgment affirmed, and cross-bill of exceptions dismissed.

G. H. Aubrey, for plaintiff in error. Neel & Neel, for defendant in error.

RUSSELL, J. Judgment affirmed. Cross-bill of exceptions dismissed.

(10 Ga. App. 338)

NATIONAL PRODUCE DISTRIBUTING CO. v. CAIRO MELON GROWERS' ASS'N.

(No. 3,497.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. NO ERROR—EVIDENCE SUFFICIENT.

No material error of law appears, and there is some evidence to support the verdict.

(*Additional Syllabus by Editorial Staff.*)

2. PRINCIPAL AND AGENT (§ 79*)—MUTUAL RIGHTS AND LIABILITIES—ACTIONS—EVIDENCE.

In an action for breach of a contract by defendants to act as sales agents, to aid plaintiffs in the distribution of their melon crops, and to direct them how and where to ship to sell, by negligently advising plaintiffs, so that they shipped the melons to places where, on account of market conditions, a fair price could

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not be obtained, evidence that the melons could have been disposed of at the initial point for sums largely in excess of the price at which the sales agents sold them had some relevancy toward establishing their negligence.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 79.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for negligence of sales agents, who agreed to make reports of sales, the admission in evidence of certain writings, purporting to be sales reports, made by the agents and signed in their name, with proof that they came by due course of mail in envelopes bearing the sales agents' return card and postmarked at their address, over objection on the ground of lack of sufficient proof of execution, was not prejudicial to defendants; no other sales accounts having been received.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

Error from City Court of Cairo; S. P. Cain, Judge pro hac.

Action by the Cairo Melon Growers' Association against the National Produce Distributing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. C. Bell and Ira Carlisle, for plaintiff in error. M. L. Ledford, for defendant in error.

POWELL, J. [2] The general theory of the plaintiffs' case was that the defendants contracted to act as their sales agents and to aid them in the distribution of their melon crops, by directing them how and where to ship and sell most advantageously, and that they breached this contract by negligently advising them, so that they shipped the melons to places where, on account of market conditions, a fair price could not be obtained. Evidence that the melons could have been disposed of at the initial point for sums largely in excess of the price at which these sales agents sold them at the places to which they directed the melons to be shipped had some relevancy toward establishing the negligence thus charged by the plaintiffs against the defendants; and the court did not err in admitting the testimony.

[3] Under the contract the defendants agreed to make reports of sales. The plaintiffs offered in evidence certain writings, purporting to be sales reports made by the defendants and signed in their name, proving that they came by due course of mail, in envelopes bearing the defendants' return card, and postmarked at their address. The defendants objected on the ground of lack of sufficient proof of execution. As no other sales accounts were received, and as in the absence of these reports the defendants had not accounted for these shipments at all, the error, if any, was not prejudicial.

[1] Other similar errors are complained of; but, without going into detail (for no novel or important point is presented), we may say, in fine, that the evidence, while

not demanding the verdict, authorized it, and that, even if any errors were made, they were harmless.

Judgment affirmed.

(10 Ga. App. 451)

SEWELL v. STATE. (No. 3,876.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 941*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The evidence was sufficient to authorize the verdict. The alleged newly discovered evidence was merely cumulative and impeaching in its character, and the court did not abuse its discretion in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.*]

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Jesse Sewell was convicted of crime, and brings error. Affirmed.

J. C. Newman, for plaintiff in error. J. R. Terrell, Sol. Gen., for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 433)

METROPOLITAN LIFE INS. CO. v. MORROW. (No. 3,472.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. PARTIES (§ 95*)—AMENDMENT—NEW PARTY.

An amendment making a nominal plaintiff, who sues for the use of the party originally named as plaintiff, does not make a new party. It merely truly characterizes the original plaintiff. "A use, unable to maintain an action in his own name, may enforce his rights in the name of his assignor, suing for his use, and an amendment to this effect did not change the cause of action, nor add a new and distinct party plaintiff." *A. K. & N. Ry. Co. v. Smith*, 1 Ga. App. 163, 58 S. E. 106; *Chapman v. Taliaferro*, 1 Ga. App. 238, 58 S. E. 128.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 165; Dec. Dig. § 95.*]

2. ASSIGNMENTS (§§ 71, 59*)—NOTICE TO DEBTOR—PAYMENTS TO ASSIGNOR.

One who, for a valuable consideration, divests himself of the right to receive money due him, and vests this right in an assignee or transferee, cannot, without the consent of his assignee, reinvest himself with the right to receive it. Nor can a debtor of the assignor, who has notice of the assignment, pay the debt to the assignor, except at his own peril. "It is the established rule in the United States that an assignment for a valuable consideration, with notice to the debtor, imposes on him an equitable and moral obligation to pay the assignee." 2 Am. & Eng. Enc. of Law (2d Ed.) p. 1097.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 159; Dec. Dig. §§ 71, 59.*]

3. DEMURRER.

The plaintiff's cause of action depending, according to the allegations of the petition, upon the statement that the defendant had notice

of the assignment, the court did not err in overruling the demurrers.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Will Morrow, for use, etc., against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. Paul L. Lindsay, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 422)

HARTFELDER & COCHRAN v. CLARK.
(No. 3,325.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 354*)—BONA FIDE PURCHASERS—CONSIDERATION FOR TRANSFER.

Under the pleadings and evidence in this case, the court did not err in instructing the jury that the mere fact that the plaintiff gave only \$15 for the notes in suit would not be sufficient to authorize the finding that he was not a bona fide purchaser of the notes. "Mere inadequacy of consideration alone will not void a contract." Civil Code 1910, § 4244.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 906; Dec. Dig. § 354.*]

2. TRIAL (§ 259*)—APPEAL AND ERROR (§ 928*)—INSTRUCTIONS—REQUESTS—PRESUMPTIONS ON APPEAL.

If specific instructions are desired as to the legal effect or bearing of a particular point or fact disclosed by the evidence as related to a contention, a written request to that effect should be preferred. Where error is assigned upon the ground that the court failed to submit to the jury in his charge the question as to whether or not a suit upon the same notes as those involved in the pending action had been determined in another court, and where a plea in abatement setting up this fact had been stricken, but no exceptions have been taken to the order striking this plea, *held*, that while the pendency of the former suit might be a circumstance tending to show that the plaintiff had knowledge of the defenses to the note, and available evidence in support of the plea that the plaintiff was not a bona fide purchaser, it must be presumed, inasmuch as the charge of the court was not sent up, that the judge properly charged the jury upon the defense presented by the plea, although he made no explicit reference to the specific point in the testimony referred to in the assignment of error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 648; Dec. Dig. § 259.* Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Error from City Court of Springfield; J. H. Smith, Judge.

Action by D. H. Clark against Hartfelder & Cochran. Judgment for plaintiff, and defendants bring error. Affirmed.

P. W. Meldrim, R. W. Sheppard, and Edwin A. Cohen, for plaintiffs in error. D. H. Clark and H. B. Strange, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 476)

WOODS v. STATE (No. 3,883.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. FENCES (§ 28*)—MALICIOUS DESTRUCTION—EVIDENCE.

While good faith may be pleaded as a defense by one prosecuted under Pen. Code 1910, § 781, for maliciously and willfully injuring and destroying private property, a mere assertion of ownership, though made at the time the property is injured or destroyed, and subsequently repeated, does not demand a finding that the accused acted under an honest claim of right, especially so in the absence of any evidence to support such claim.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 62-67; Dec. Dig. § 28.*]

2. FENCES (§ 28*)—MALICIOUS DESTRUCTION.

One guilty of maliciously injuring and destroying the private property of another, to wit, "a certain plank and board fence," on his farm, "by then and there tearing down said fence, and by splitting and destroying the plank and boards of said fence," may be prosecuted and convicted under Penal Code 1910, § 781.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 62-67; Dec. Dig. § 28.*]

3. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—PRISONER'S STATEMENT.

It is not error to instruct the jury, in reference to the prisoner's statement, that they may believe it in whole or in part, in preference to the evidence, nor to add: "It is a question entirely for you to say just what weight and credit, if any, you will give to the statement."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1895-1901; Dec. Dig. § 786.*]

4. FENCES (§ 28*)—MALICIOUS DESTRUCTION—INSTRUCTIONS.

In the present case it was not error, prejudicial to the accused, to charge that "the title to the land in question will not in any way be affected by your verdict in this case. We cannot settle disputes to titles to land in this court."

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 62-67; Dec. Dig. § 28.*]

5. FENCES (§ 28*)—WILLFUL DESTRUCTION—EVIDENCE.

Where it appears that the property described in the indictment was the private property of the person therein named, and that it was willfully injured or destroyed in manner and form as alleged, a prima facie case is made out for the state.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 62-67; Dec. Dig. § 28.*]

6. REVIEW.

No error of law appears, and the evidence warranted the verdict.

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

W. S. Woods was convicted of willfully

destroying a fence. From an affirmance on certiorari, he brings error. Affirmed.

Wilson, Bennett & Lambdin, for plaintiff in error. J. H. Thomas, Sol. Gen., for the State.

POTTLE, J. The accused was tried and convicted in the county court under an indictment based upon Penal Code 1910, § 781, charging that he had willfully and maliciously injured and destroyed a plank and board fence, the private property of one Broadhurst, located on his farm, known as the "Moody Place." The judge of the superior court refused, on certiorari, to disturb the verdict, and this is the error assigned.

[1] 1. The evidence for the state showed that the land on which the fence in question was located was the property of the prosecutor, Broadhurst. The fence had been built by him several years before the transaction referred to in the indictment took place, and during all this time was in the possession of the prosecutor and claimed by him. The accused owned the adjoining farm. On or about the time alleged in the indictment he injured and destroyed a portion of the fence by sawing out of the plank sections about six inches long and pulling down a portion of the fence. Other portions fell down after having been sawed through, as above described. The accused claimed that he owned the land upon which the fence was located. He told the prosecutor and one or two others that he intended to tear down the fence, because it was on his land. His counsel insist that the evidence demanded a finding that he destroyed the fence under an honest claim of right, and that for this reason his conviction was unauthorized. Good faith is peculiarly a question for the jury. The accused introduced no evidence of his title or previous possession of the disputed land, but contented himself merely with proof of his own prior declarations in reference to his claim of ownership. A mere claim of ownership could not excuse him, nor would it be conclusive evidence of good faith. Certainly one cannot justify an injury to his neighbor's dwelling, in which he has resided for many years, upon mere proof that at the time the injury was done the perpetrator of the act said the dwelling was his, and not his neighbor's, without offering something in support of his claim of ownership other than his own assertion of title. The jury had a right to find in the present case that the claim of the accused was a mere pretext, and not made in good faith. The judge of the superior court has approved their verdict on certiorari, and this court cannot say that there was not some evidence to justify this finding.

[2] 2. It is further contended that, while the acts of the accused may have amounted to an indictable trespass, under Penal Code 1910, § 216, par. 3, he cannot be convicted un-

der section 718. Counsel rely upon the language of Mr. Justice Simmons in *Crockett v. State*, 80 Ga. 105, 4 S. E. 254, to the effect that the law now embodied in Penal Code 1910, § 781, does not embrace any crime already defined in the Penal Code. In that case the accused was indicted for setting fire to a dwelling house and convicted of malicious mischief. The Supreme Court held that his motion in arrest of judgment should have been sustained, because the offense for which he was convicted was not involved in the indictment. In the present case there was neither demurrer nor motion in arrest. The indictment charges the offense generally, in the language of section 781, and then specifically describes the particular act complained of. So there can be no doubt that the grand jury intended to charge a violation of this particular section. The real complaint of the plaintiff in error is against the indictment, and the point should have been raised by motion to quash, or at least by motion in arrest. So far as this point is concerned, a new trial under this indictment would be of no benefit to the accused. But Penal Code 1910, § 216, par. 3, makes criminal only "the pulling down or removing any fence or inclosure," and the act need not be willful. *Shrouder v. State*, 121 Ga. 615, 617, 49 S. E. 702. Here the charge is more comprehensive, and involves some elements not covered by the section last mentioned.

[3] 3. Complaint is made that in charging upon the prisoner's statement the court used this language: "They may believe it in whole or in part, or they may disregard it entirely, or they may believe it in preference to the sworn testimony in the case, if they see proper to do so. It is a question entirely for you to say just what weight and credit, if any, you will give to the statement." In *Smith v. State*, 8 Ga. App. 680, 682, 70 S. E. 42, this court said: "It must be understood that the jury has the right to believe the accused's statement in whole or in part, or to disbelieve all of it. They may believe part of it in preference to the testimony, and then disbelieve other parts, even though there is no contradictory testimony." The words, "if any," did not unduly minimize the importance of the statement, and this court will not assume that they were uttered in such a way as to have this effect. However, as repeatedly held, both by the Supreme Court and this court, the practice of confining the charge to the exact language of the statute is much better.

[4] 4. Error is assigned upon the following charge: "The title to the land in question will not in any way be affected by your verdict in this case. We cannot settle disputes to titles to land in this court." The complaint is, not that the instruction is abstractly wrong, but that the court should have charged the jury to consider whether, at the time the fence was destroyed, the accused

bona fide claimed the land. We have read the entire charge carefully, and we think the instructions in reference to the guilt or innocence of the accused were sufficient, in the absence of proper request for a more specific statement of his contentions. The charge could not have been prejudicial to the accused, but was rather more harmful to the state, because the accused introduced no evidence of his title, and the prosecutor did. In this respect the case differs from *Hateley v. State*, 118 Ga. 79, 44 S. E. 852.

[5] 5. Complaint is made of the following extract from the charge: "The court charges you further that, should you find that the defendant did injure or destroy the fence in question of W. J. Broadhurst, you would be authorized to presume that such injury and destruction was done maliciously and willfully, and you should so find, unless this presumption has been rebutted to your satisfaction." We find no error in this instruction. If the fence was in fact Broadhurst's, and at a place where he had a right to put it, proof that the accused injured the fence in the manner described in the indictment would cast upon him the onus of proving that he destroyed the fence, honestly believing he had a right to do so. See *McClurg v. State*, 2 Ga. App. 624, 58 S. E. 1064.

[6] 6. It was not error, under the evidence, to instruct the jury not to consider any of the prosecutor's subsequent acts. The charge sufficiently covered the issues, in the absence of a request for more explicit instructions. Judgment affirmed.

(10 Ga. App. 487)

RIVERS v. STATE. (No. 3,815.)

(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(*Syllabus by the Court.*)

1. OBJECTIONS TO CHARGE.

The objections to disconnected excerpts from the charge are without merit, when considered with the instructions in their entirety.

2. VOLUNTARY MANSLAUGHTER.

The law of voluntary manslaughter was applicable to reasonable deductions from the evidence.

3. INSTRUCTIONS.

The written request to charge was substantially covered by the general charge.

4. CRIMINAL LAW (§ 459*)—EVIDENCE—OPINION.

It was not material error to permit a witness, after describing the location of the fatal wound on the body of the decedent, to state that the location of the wound indicated the position of the decedent when shot.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 459.*]

5. REVIEW.

No error of law appears, and there was evidence to support the verdict.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Norman Rivers was convicted of crime, and brings error. Affirmed.

E. M. Baynes, for plaintiff in error. J. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 527)

DISTRICT GRAND LODGE NO. 18 v. SHELTON. (No. 3,262.)

(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(*Syllabus by the Court.*)

RELIEF ASSOCIATIONS.

This case is controlled by *Starnes v. Atlanta Police Relief Ass'n*, 2 Ga. App. 237 (1, 2, 3), 58 S. E. 481.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. L. Shelton against District Grand Lodge No. 18. Judgment for plaintiff, and defendant brings error. Affirmed.

O. P. Gover, for plaintiff in error. O. B. Rosser, Jr., for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 339)

CHERRY LAKE TURPENTINE CO. v. LANIER ARMSTRONG CO. (No. 3,501.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(*Syllabus by the Court.*)

1. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

2. LANDLORD AND TENANT (§ 24*)—LEASES—VALIDITY—DESCRIPTION OF PROPERTY.

The following description in a lease is sufficiently definite to identify the property covered thereby without the aid of parol evidence: "All and singular the timber suitable for turpentine purposes growing on the following described lot of land, to wit: Lot No. 151 in district 15, land lying in Brooks county, state of Georgia."

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 61-65; Dec. Dig. § 24.*]

3. LOGS AND LOGGING (§ 3*)—DEEDS (§ 47*)—ATTESTATION—DEFECTS.

Standing timber is realty, and a deed thereto should be attested with the same formality as deeds to land. The fact that a deed is attested by only one witness does not affect its validity as between the vendor and the vendee and those who take with actual notice of the deed. The defect in the execution affects only the right to record and the method of proving the execution.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3;* *Deeds*, Cent. Dig. §§ 104-110; Dec. Dig. § 47.*]

4. PARTNERSHIP (§ 138*)—CONTRACTS—EXECUTION.

While an instrument purporting to convey partnership interest in realty should be signed by the individual members of the partnership, yet the defect is not material, where it is admitted that the instrument, although signed only in the name of the partnership by one of the members, was in fact made by authority of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all the partners, and for the partnership interest, and in pursuance of the partnership business.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 138.*]

5. TRESPASS (§ 27*)—DEFENSES.

The undisputed evidence shows that the defendant had actual knowledge of the execution of the prior leases of the plaintiff when the trespasses complained of were committed. In view of this fact, any mere technical defects in the formal execution of any of the leases held by plaintiff should not protect the defendant, in view of the admitted trespasses resulting in damages to the plaintiff.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 27.*]

6. NO ERROR.

No material error of law appears.

(Additional Syllabus by Editorial Staff.)

7. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

Where there was evidence to support the verdict, and it is approved by the court, it will not be disturbed on writ of error, unless material error of law appears.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1005.*]

8. LANDLORD AND TENANT (§ 39*)—LEASES—CONSTRUCTION.

In the absence of a time limit in a lease giving the lessee the right to cut timber for turpentine, the law would give the lessee a reasonable time within which to exercise its rights under the lease; such reasonable time being a question of fact for the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 39.*]

Error from City Court of Quitman; J. G. McCall, Judge.

Action by the Lanier Armstrong Company against the Cherry Lake Turpentine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Long, for plaintiff in error.
Branch & Snow, for defendant in error.

HILL, C. J. The Lanier Armstrong Company brought suit in the city court of Quitman against the Cherry Lake Turpentine Company to recover damages for alleged trespasses, alleging that on the 15th day of November, 1907, it was the owner by lease of all and singular the timber suitable for turpentine purposes on certain described lots of land in Brooks county, Ga.; that there was a sufficient number of pine trees on these lands to cut 25,000 turpentine boxes, of the aggregate value of \$3,750; that on said date the Cherry Lake Turpentine Company entered upon these lands without legal authority or right, unlawfully took possession of the timber thereon suitable for turpentine purposes, and boxed it, and since said date had exclusively appropriated to its own use this timber, adversely to the rights of the Lanier Armstrong Company, and had been since said date, and was still at the time of the filing of this suit, extracting turpentine from the timber. The defendant company admitted the allegations that

they were using the timber described in the petition, but set up that it had a right to do so under leases which it fully set up in its plea. The jury found a verdict in favor of the plaintiff for \$2,075.02, the defendant's motion for a new trial was overruled, and the case is here for review.

On the trial it was admitted that both plaintiff and defendant claimed the timber in dispute and the right to take the turpentine therefrom under common grantors, and it was not denied by the defendant that it was cutting timber on the land for turpentine and was extracting turpentine therefrom, claiming that it had the right to do so under lease. The evidence showed that the lease under which the plaintiff held the timber and the right to the turpentine was prior in date and was recorded prior to the lease held by the defendant; and the evidence for the plaintiff also showed that the defendant had actual notice of the existence of this lease, when it took its lease and entered upon the land, taking possession of the timber and boxing the same for turpentine. The leases under which both parties claimed were introduced in evidence, and their execution sufficiently proved. Their terms and conditions will be referred to as it becomes necessary to illustrate the questions raised by the record and discussed in the course of the opinion.

Defendant's motion for a new trial contains numerous assignments of error; but the same questions involved are substantially made in several grounds of the motion, which makes it unnecessary to consider the grounds seriatim, but on the questions involved.

[1] 1. The general grounds of the motion may be disposed of by the statement that the only questions at issue between the parties were as to the value of the turpentine which the defendant had taken from the trees, and whether or not plaintiff in the court below had exercised its right under the lease to take the turpentine from the timber within a reasonable time. The other questions of fact are controlled by assignments of error in law, and need not be separately considered.

[7] There was evidence to support the verdict, and, having been approved by the court, it will not be disturbed, unless material error of law appears.

[2] 2. The leases under which the plaintiff claims title to the timber were all attested by only one witness, and all were recorded in the clerk's office of the superior court of the county where the timber was located. Defendant objected to admission of these leases in evidence: (a) Because the description of the property conveyed therein was too vague and indefinite; (b) because the leases were not attested by two witnesses, it being insisted that, being convey-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ances of interest in land, it was necessary that they be executed as deeds and attested by two witnesses, one of them an official witness; (c) that without such attestation their record was unauthorized, and therefore afforded no constructive notice. These objections apply specifically to what is known as the "White lease," which is the lease under which both parties claim from a common grantor. Here it may be stated that the leases under which the defendant claimed were properly attested as deeds and were properly admitted to record. The description contained in the White lease, through which the plaintiff claimed title, described the property as follows: "All and singular the timber suitable for turpentine purposes growing on the following described lots of land, to wit: Lot No. 151, in district 15, land lying in Brooks county, state of Georgia." Was this description sufficiently definite? It gives the number of the lot of land, the district in which located, and the county and state. The only particular in which this description is not absolutely specific and definite is in the fact that it does not state the number of acres contained in the lot of land. We do not think this important, in view of the fact that it does "convey all and singular the timber suitable for turpentine purposes growing on the land lot mentioned." It is wholly immaterial how many acres the land lot contained. All the timber located thereon suitable for turpentine purposes was specifically conveyed by the instrument. In the case of *Carter & Elliott v. Williamson & Co.*, 106 Ga. 280, 31 S. E. 651, the Supreme Court held that a description in the same language as the above was unambiguous and clear, and conveyed all the timber standing on the lands described in the lease.

The cases cited by counsel for plaintiff in error in support of the contention that the description was vague and indefinite are distinguishable on the facts from the present case. In *Douglass v. Bunn*, 110 Ga. 162, 35 S. E. 339, the conveyance failed to designate the number of the lot, or the county or district in which it was situated. In *Clarke Bros. v. Stowe*, 132 Ga. 621, 64 S. E. 786, the deed contained no other description of the timber or land included in the lease, except "all that tract or parcel of land known as lot 162½ acres on lot 169 in the Sixth district of Montgomery county, Georgia." In this instrument the 162½ acres of land in the land lot was not specifically described. In the present deed, as above suggested, it was immaterial to describe the number of acres in the land lot, because all the timber thereon suitable for turpentine purposes was covered by the lease. Where a deed conveys a designated number of acres, it should indicate by boundaries, or other description, the particular number of acres conveyed, in order to furnish indicia by which the particular tract in the land lot could be

identified. The words of description in the *Clarke Case*, supra, were not even sufficient to furnish a basis for making more specific the description by parol testimony. The other cases cited by learned counsel, *Crosby v. McGraw*, 133 Ga. 560, 66 S. E. 897, *Richardson v. Perrin*, 133 Ga. 721, 66 S. E. 899, *Singleton v. Close*, 130 Ga. 717, 61 S. E. 722, and *Harper v. Kellar*, 110 Ga. 420, 35 S. E. 667, are all distinguishable on the facts, as regards the description of the property conveyed, from that in the present case.

[3] The next objection which was made to the admissibility of what is known as the "White lease," under which the plaintiff claimed title, was that it was not attested by two witnesses, one of whom should have been a notary public or other judicial officer. This objection is based upon the contention that timber is realty, and that a conveyance of all the timber suitable for turpentine purposes was a sale of realty. In several cases the Supreme Court of this state has held that standing timber is realty, and that conveyances of standing timber are to be treated as deeds, and are to be executed with the same formality; in fact, have all the incidents of ordinary deeds to realty. *Powell on Actions for Land*, § 54; *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S. E. 218; *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *McLendon v. Finch*, 2 Ga. App. 421, 58 S. E. 690, and citations. There are numerous decisions by the Supreme Court of this state to the same effect. The fact, however, that a deed to realty is not properly attested, does not affect its validity between the parties thereto and their privies. The defect in the attestation relates to the right of recordation and to the method of proof. In the present case, while the deeds conveying the timber rights to plaintiff were not attested by two witnesses, and were therefore not properly recorded, yet their execution was not denied, and in fact it was admitted by the defendant that, when it took its subsequent lease covering the same property, it took with actual notice of the existence of this prior conveyance. It follows, therefore, that it was wholly immaterial, in so far as any right which the defendant had, that these deeds were not attested as deeds to realty. In the case of *Coody v. Gress Lumber Co.*, supra, it is distinctly held that a failure to have attesting witnesses to a deed did not render the instrument void, and upon proper proof of its execution it was admissible in evidence. See, also, to the same effect, *Parker v. Gortatowsky*, 127 Ga. 561, 56 S. E. 846. It is too well settled, however, to require further citation of authority, that an improper attestation does not affect the validity of a deed, but only its fitness for record and the method of proving its execution. The deed is still a valid contract, and is binding upon any one who subsequently takes with notice of its existence. *Johnson et al.*

v. Jones et al., 87 Ga. 85, 13 S. E. 261; Lowe v. Allen, 68 Ga. 226; Gardner, Dexter & Co. v. Moore, Trimble & Co., 51 Ga. 268; King v. Sears, 91 Ga. 577, 18 S. E. 830.

[4] 3. The next assignment of error is that the transfer of the White lease, relied upon by plaintiff in error in the court below as one of the links in the chain of title, was improperly executed, and was invalid, in that the transfer was made by one of two partners in the partnership name, and was not signed by the individual members of the firm. This objection is based upon the idea that a deed or lease to take the turpentine from standing trees conveys realty, and title was vested in the members of the partnership as tenants in common. This objection would be material, but for an admission made in the record. The transfer in question was made by J. F. Fender in the name of Fender, Tomblinson & Co., and it was admitted that the transfer of the lease in question by J. F. Fender was made "for the partnership, and by the authority of each member thereof, and in the due course of the partnership business." This admission cures the formal defect in the execution of the transfer or assignment, so far as this defendant is concerned, and places in the transferee all the title of the firm, as well as of the individual members thereof, to the property described in the transfer. In view of this admission, it is not necessary to discuss the point raised in the brief of learned counsel for defendant in error that a transfer of the right to take crude turpentine from growing trees is in the nature of a usufruct, especially where the transfer is by lease during a period stipulated for a less time than five years, and that this is distinguishable from an alienation of an interest in land.

[5] 4. It is next objected that this transfer by the partnership of the lease in question to the plaintiff was incompetent to be admitted in evidence, because the transfer was not in fact dated. The failure to date the transfer is not material, in view of the fact that the defendant had actual knowledge of the previous existence of the lease when it took the lease under which it claims. Besides, the parol evidence shows that all of the transfers of the White lease in question were made on the same day, to wit, January 25, 1907, and this was prior to the date of the instrument under which the defendant claimed its right.

[8] The defendant in the court below offered evidence to prove that there was a parol agreement, before the leases were signed and the transfer made to plaintiff, that the boxing of the timber should commence at once, and this testimony was excluded. There was no effort to show that the time limit was left out of the contract, either by accident or mistake. In the absence of a time limit, the law would give the lessee a reasonable

time within which to exercise its rights under the lease; the reasonable time being a question of fact to be determined by the jury. The rule laid down on this subject as to what would be a reasonable time would be dependent altogether upon the local conditions and the peculiar circumstances of each case. *McRae v. Stillwell*, supra; *Lufburrow v. Everett*, 113 Ga. 1056, 39 S. E. 436; *Goette v. Lane*, 111 Ga. 400, 36 S. E. 758. Besides, it further appeared from the leases to previous grantees, under which plaintiff in the court below claimed title, that from three to four years were allowed for the purpose of working timber for turpentine purposes after the boxing thereof, and that, before the expiration of this period of three or four years, the alleged trespass by the defendant had been committed.

[6] We have considered all the assignments of error that we think material to be decided, and we conclude that the verdict was right. The plaintiff in error knew that these prior leases were outstanding and in the plaintiff in the court below, and that it had been in the actual exercise of these rights, and we are satisfied that the verdict, under the evidence, was just, right, and equitable. The defenses relied upon are in the main purely technical. The essential facts are that the plaintiff held a prior written contract under which it had the right to all of the turpentine in the timber on the lands in question; that the defendant knew of this prior right, and with this knowledge took conveyances, and under these conveyances as an excuse entered upon the lands in question and deprived the plaintiff of a very large amount of the profits which it could have realized under its contract; and that the amount of turpentine which it took from the trees to which the plaintiff was entitled under its previous contract was larger than the amount of the verdict which the jury found against it. We are impressed with the view that the defendant in the court below simply took the chances of defeating the rights of the plaintiff on mere technicalities, and in the meantime securing for itself a large amount of turpentine to which it was not equitably entitled, and that to a certain extent at least this chance of speculation or profit has been reaped by it to the damage of the plaintiff.

Judgment affirmed.

(10 Ga. App. 434)

BALCHIN v. JONES. (No. 3,489.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. SALES (§ 53*)—VALIDITY—DESCRIPTION OF PROPERTY—QUESTION OF FACT.

It is only when the terms descriptive of property sought to be conveyed by a written instrument are manifestly too meager, imperfect, or uncertain to serve as adequate means

of identification that the court can, as a matter of law, adjudge the description to be insufficient. "Whether such terms will serve to identify the premises is a question of fact, and not of law."

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 53.*]

2. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITING—BILL OF SALE.

Parol evidence is admissible in aid of a defective description of personal property conveyed by a bill of sale.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 460.*]

3. SALES (§§ 148, 465*)—EVIDENCE (§ 353*)—CONDITIONAL SALES—DOCUMENTARY EVIDENCE—AUTHENTICATION.

Failure to record in time may subject the holder of a bill of sale to the risk of loss by reason of the superior diligence of the holder of some junior lien created by contract; but if he really has obtained title prior to the creation of a lien by law, his title will not be defeated by the mere failure to record. It is not essential to the validity of a reservation of title embraced in a written contract for the sale of personalty that the contract be recorded. *Hill v. Ludden*, 113 Ga. 320, 38 S. E. 752; *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 966. A bill of sale may be admissible as evidence, though it has not been recorded; and especially is the failure to record not a good ground of objection to the introduction of a bill of sale, when there is evidence that actual notice of the bill of sale was brought home to the party sought to be affected by the instrument.

[Ed. Note.—For other cases, see Sales, Dec. Dig. §§ 148, 465; Evidence, Dec. Dig. § 353.*]

4. TRIAL (§ 105*)—JUSTICES OF THE PEACE (§ 208*)—RECEPTION OF EVIDENCE—OBJECTIONS—WAIVER.

The court did not err in overruling the objection to the attestation of the bill of sale. Inasmuch as the specific objection was not made that the bill of sale was inadmissible for want of proof of proper execution, the necessity for such proof was waived. Furthermore, the admission in the petition for certiorari that the bill of sale in question was signed by the parties by whom it purported to have been executed must be treated as an abandonment of the objection upon the hearing in the superior court.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105; Justices of the Peace, Dec. Dig. § 208.*]

5. SALES (§ 145*)—BILL OF SALE—ATTESTATION—STATUTORY PROVISIONS.

The requirement of section 4203 of the Civil Code of 1910 relative to attestation is merely a provision for the admission of the paper to record.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 145.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Claim by W. J. Jones to property levied on under attachment in favor of J. J. Balchin. Judgment for claimant, and the attachment creditor brings error. Affirmed.

Worley & Nall, for plaintiff in error. C. P. Harris, for defendant in error.

RUSSELL, J. H. F. B. Paddock owed J. J. Balchin an open account, and, absconding, left certain personal property in Elbert coun-

ty. After Paddock had absconded, Balchin procured the issuance of an attachment, which was levied on certain personal property of Paddock described in the attachment. Later a special judgment was entered on this attachment in favor of Balchin against Paddock, but it does not appear that there was any record of the execution. Jones, the defendant in error, had procured a bill of sale from Paddock, by which the latter, for the purpose of securing an indebtedness of \$500, due by him to Jones, conveyed "a full and complete title" to Jones, his heirs and assigns, to "the following property, to wit: All household furniture, pictures, stove and kitchen utensils, wash pot, tubs, canned fruit, sewing machine, harness, fodder, oats, etc., and all articles not mentioned in the above; also the following in office, drugs, books, instruments, etc., with the exception of desk and bookcase, property of Tunnison & Co., and a certain amount of instruments, property of Dr. J. Matthews." The contract of sale recited that "this deed is made and executed in pursuance of the provisions of section 2771 et sequitur of the Civil Code of 1895," and purported to be signed also by Beulah D. Paddock, and to have been executed in the presence of John T. Fagan, "Commissioner of Deeds, Troy, New York" (as evidenced by that officer's certificate), in January, 1910. The fact that it bore evidence of having been recorded is immaterial, because the entry of the clerk shows that it was put to record after the suing out of the writ of certiorari in this case.

Balchin's attachment, based upon the ground that Paddock "absconds," was on October 15, 1910, levied on certain household effects, and also on certain drugs, books, and instruments, such as were referred to in the bill of sale to Jones, as well as on some articles, minutely described in the levy, which were not claimed. Upon the levy of the attachment Jones filed a claim to such of the property as is apparently within the descriptive terms employed in the bill of sale. He interposed no claim to several articles mentioned in the levy. Jones' claim of title was based on the bill of sale hitherto mentioned. On the trial of the claim case the jury in the justice's court found the property not subject to the lien of the attachment, and Balchin's certiorari, complaining of error in the justice's court, was overruled. This judgment of the superior court is the error complained of, and error is assigned upon each of the grounds upon which an assignment of error was predicated in the petition for certiorari. As the errors assigned on the ruling of the judge of the superior court in overruling the certiorari comprise the errors alleged to have been committed on the trial of the claim case in the justice's court, and pertain to the admission of testimony, it is perhaps proper that we shall state briefly the

contentions of the plaintiff in error as to the several rulings complained of.

[1] 1. The first objection urged by the plaintiff below against the admission of the bill of sale, which we have quoted, was that the description of the property intended to be conveyed was insufficient to serve as an adequate means of identification, so as to make the instrument a valid conveyance. In support of this contention he cites section 3257 and section 4186 of the Civil Code of 1910; *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 882, 48 S. E. 333; *Broach v. O'Neal*, 94 Ga. 475 (3), 20 S. E. 113. We do not think that the contention of the plaintiff in error in this regard is sustained by the authorities cited, and, indeed, it appears to be without merit. When the description contained in the mortgage is aided by parol evidence, explanatory of the terms used in the bill of sale, the description was such as to prevent the bill of sale from being void because of insufficiency in the description of the property conveyed. See *Beaty v. Sears*, 132 Ga. 516, 64 S. E. 321; *Duke v. Neisler*, 134 Ga. 594, 68 S. E. 327, 137 Am. St. Rep. 250. In *Broach v. O'Neal*, *supra*, cited by counsel for plaintiff in error, it was held that "it is only when a description of the premises is manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as matter of law." In *Patterson v. Evans*, 91 Ga. 799, 18 S. E. 31, in which the description of the mortgaged premises was in these terms: "Two hundred and ninety acres, more or less, of land situate in the Fifth district of Wilkinson county, upon which an incumbrance of \$125 exists, due October 15, 1888, taking priority of this mortgage; also two gins and one gristmill located on said described land"—the description was held to be "very meager and vague," but it was ruled that "whether such terms will serve to identify the premises is a question of fact, and not of law" (citing *Collier v. Yason*, 12 Ga. 441, 58 Am. Dec. 481, and *Oatis v. Brown*, 59 Ga. 711), and that it could not be held, as a matter of law, that the description given was so defective as to render the mortgage void. *Cherry Lake Turpentine Co. v. Lanier Armstrong Co.*, 73 S. E. 610, decided January 15, 1912.

[2] 2. But, even if the description in the bill of sale was defective, parol evidence was admissible in aid of the description. *Thomas Furniture Co. v. T. & C. Furniture Co.*, *supra*. In the first headnote of this decision it is held that, "in providing that a mortgage or a conditional bill of sale shall specify the property on which it is to take effect, the law does not require such a description as will serve to identify the property without the aid of parol evidence." There was, therefore, no error in the admission of parol evidence in aid of the description contained in the bill of sale.

[3] 3. Balchin's next ground of objection

to the admission of the bill of sale in evidence was that "plaintiff's lien on the property claimed dated from the levy of the attachment, and that the bill of sale, not having been recorded before the date of the levy, nor even at the time of the trial of the claim case, could not and would not put plaintiff on notice of claimant's interest in the property claimed based on said bill of sale, and should not be admitted to defeat plaintiff's lien, which was established before the record of said bill of sale; plaintiff's lien having been established by operation of law, and not by contract." We see no error in overruling this objection to the bill of sale. Under the terms of section 4208 of the Civil Code of 1910, the recording of a bill of sale is merely permissive. It is not compulsory. The failure to record in time may subject the holder of a bill of sale to the risk of loss by reason of the superior diligence of the holder of some junior lien created by contract; but if he really has obtained title prior to the creation of a lien by law, his title will not be defeated by the mere failure to record. *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 966. In the case at bar the plaintiff had a judgment on an attachment, and this judgment had never been entered upon any execution docket of the county, and, as already stated, Jones' bill of sale had not been recorded, so that neither party's rights were dependent upon the record. In the *Donovan* Case, *supra*, the execution, issued on the judgment against James, was entered on the general execution docket on April 19, 1893, and the deed from James to the claimants was not filed for record for more than six months thereafter, nor until November 22, 1893. In the instant case the lien of the attachment dated from the levy on October 15, 1910, before Jones' bill of sale was given, if at all, January 4, 1910. The failure to record the bill of sale afforded no meritorious ground of objection to its admissibility, and under the ruling in the *Donovan* Case, *supra*, "while the failure to record such a deed might operate to defeat the conveyance as to one who purchased subsequently of the same vendor without notice of the prior conveyance, a judgment obtained against the grantor subsequently to the conveyance, but entered upon the general execution docket prior to the record of the deed, would not, merely by virtue of such entry, become a lien upon the property previously conveyed." Furthermore, in the present case there was evidence that Balchin had actual notice of the bill of sale held by the defendant before he sued out his attachment, and it would seem that actual notice would be as effectual and binding on the plaintiff as a constructive notice afforded by the recording of the bill of sale.

In *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 508, 15 S. E. 944, it was held that "the retention of title by the vendor in a written contract of sale of personal prop-

erty, with the condition affixed that the title is to remain in the vendor until the purchase price shall have been paid, though the instrument be not recorded within the time prescribed by law, will prevail over the lien of a subsequent mortgage on the same property, executed by the conditional vendee to a creditor who gives credit and takes the mortgage without notice of the vendor's title, the mortgage also not being recorded in time." In ruling on the point Justice Simmons held that, "where both parties fail to record, both are lacking in the diligence required by law as a condition for their protection. Neither can claim a better right because the other neglected to record. The law puts them on precisely equal terms in this respect. Neither having complied with the requirement to register, they are left where they would have stood, regardless of the registry statutes. Consequently the first in time must prevail. The same considerations in justice apply to the case of a vendor reserving title; and it suffices to say that the statute manifestly intends to put him on the same ground as a mortgagee of personalty." Justice Simmons cites the case of *Steen v. Harris*, 81 Ga. 681, 8 S. E. 206, as authority, and the facts of that case are very similar to those in the case at bar, in that a conditional bill of sale under which title was reserved in a piano had not been recorded. The piano was levied upon under an attachment, at the instance of a creditor whose debt was not made on faith of the property, and was levied upon after the conditional sale had been rescinded by agreement. The rescission terminated the relation of conditional vendor and vendee before the attaching creditor levied on the property, and it was held that "the court erred in granting a new trial, setting aside the verdict finding the property not subject, for the reason that the verdict rendered was warranted by the evidence." In *Hill v. Ludden*, 113 Ga. 320, 38 S. E. 752, it was held that it was not essential to the validity of a reservation of title embraced in a written contract for the sale of personalty that the contract be recorded. The objection of the plaintiff in error upon this point, as made in the court below, was not, strictly speaking, a proper objection to the admissibility of the bill of sale, but was rather an argument against its priority, and was properly overruled.

[4] 4. The objection urged by the plaintiff in error to the attestation of the bill of sale, that it was inadmissible because it purported to have been witnessed by a "commissioner of deeds, Troy, New York," whereas, it was required to be executed before a commissioner of deeds for the state of Georgia, seems to be without merit. The only objection was to the attestation. No objection, based upon the ground that the execution of the instrument in question had not been proved, was made, and, by the failure to object, proof of the execution was waived.

Bowen v. Frick, 75 Ga. 786 (3-b). In that case it was held that the proper exception to be taken to the introduction of the notes was an objection that they were inadmissible for want of proof of execution, and, this specific objection not being made, the necessity for such proof was waived. See, also, *Anderson v. Cuthbert*, 103 Ga. 771, 30 S. E. 244, where the *Bowen* case is cited, and it is again ruled that "failure on the part of the defendants to object to the introduction of the paper in evidence would amount to a waiver of the necessity of proof of its execution, for the purpose of its admission in evidence." The objection which should have been made was that the execution of the instrument had not been proven. The objection actually made only raised the point that the person purporting to attest the execution was not a subscribing witness of such a kind as prescribed by law to entitle the bill of sale to registry. Furthermore, in the petition for certiorari, it is admitted that this said bill of sale was signed by H. F. B. Paddock and Beulah Paddock; and this admission in judicio would seem to be so binding upon the plaintiff as to have amounted to an abandonment of this objection on the hearing before the judge in the lower court.

[5] The law relative to the execution of deeds and mortgages, when attested out of this state, provides that, in order to admit such a paper to record, it shall be attested as provided in section 4203 of the Civil Code of 1910. The claimant did not contend in the trial in the court below that the bill of sale had been recorded. As a matter of fact it had not been recorded, and therefore the exception that the attesting witness was not such a one as would have authorized the registry of the bill of sale did not go far enough to amount to a contention that the bill of sale had not in fact been executed so as to convey the title of the vendor to the vendee, even though it might not have been so attested as to convey notice to third parties.

The objection that the bill of sale was void on its face, because signed by the wife as security for her husband, is not insisted upon in the brief, and therefore must be considered as abandoned.

An objection was interposed to testimony on the part of the claimant that he had told Balchin, before the levy of the attachment, that he (Jones) held the bill of sale in question. The objection urged to this testimony was that the only notice which, under the law, could or would be binding on the petitioner under the facts of the case, or that could defeat petitioner's lien on the property claimed, would be notice given by the record of the said bill of sale, and proof of any other notice than that of the record was inadmissible in evidence on the trial of the case then before the jury. As we have already ruled that the rights of Jones, under

the bill of sale, if it was in fact executed prior in date to the levy of the attachment, would not be affected by the fact that the bill of sale had or had not been recorded prior to the levy of the attachment, neither the objection nor the ruling upon it would seem to be material in a proper decision of the case. The decision in the Donovan Case, *supra*, is conclusive upon the point that the registry act of 1899 worked no change in the existing law as to the priority of liens acquired by law in a contest with prior rights acquired by contract. But, if the matter is one of any materiality, the rulings in *Hill v. Ludden*, 113 Ga. 320, 38 S. E. 752, and *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 508, 15 S. E. 944, would at least sustain the conclusion that the admission of evidence of actual notice was not harmful to the plaintiff in error, for the reason that the actual notice would seem to be as binding on the plaintiff in attachment as would have been the constructive notice afforded by the recording of the bill of sale.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 451)

CHENEY v. STATE. (No. 3,877.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

WEAPONS (§ 7*)—EVIDENCE—SUFFICIENCY.

The act of 1910 (Acts 1910, p. 134) makes it a misdemeanor for a person "to carry around with him on his person, or to have in his manual possession, outside of his own home or place of business, any pistol or revolver, without first taking out a license from the ordinary of the county of the party's residence." Where the accused had a pistol in his manual possession, on the public road, without the license thus required, the case was within the express terms of the act, and it would constitute no defense that his possession was only temporary, and solely for the purpose of transporting the pistol and delivering it to the owner, who had previously left it at the home of the accused.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 6; Dec. Dig. § 7.*]

Error from Superior Court, Putnam County; Jas. B. Park, Judge.

Sid Cheney was convicted of carrying weapons, and brings error. Affirmed.

Roy D. Stubbs, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and S. T. Wingfield, for the State.

HILL, C. J. Sid Cheney was convicted of a violation of the act approved August 12, 1910 (Acts 1910, p. 134), which is in the following language: "An act to prohibit any person from having or carrying about his person, in any county in the state of Georgia, any pistol or revolver without first having obtained a license from the ordinary of the county of said state, in which the party re-

sides. Before such person shall be at liberty to carry around with him on his person, or to have in his manual possession outside of his own home or place of business," etc. On the trial of the case the evidence clearly showed—indeed, it was not denied—that the accused had a pistol in his manual possession on the public road of the county in which he was indicted, and that he had not the license required by the statute. The defense relied upon, based alone upon the defendant's statement to the jury, was that the pistol had been left at his house by a neighbor, to whom it belonged, and that he was carrying it to the house of the owner for the purpose of delivering it to him, and was not carrying it about his person within the purview of the statute, and therefore was not violating its terms; and he requested the court to instruct the jury to the effect that if they believed, under the evidence, that he had the pistol in his manual possession on the occasion referred to, for the sole purpose of returning it to its owner, it would be their duty to acquit him. The refusal to give this instruction is assigned as error.

The judge instructed the jury that if they believed under the evidence, beyond a reasonable doubt, that the accused had this pistol in his manual possession outside of his home or place of business, no matter for what purpose, without first having obtained the license required by law, they would be authorized to find a verdict of guilty. This statement of the law was too strong, but under the facts of this case it was harmless. The object of the law is to prohibit any person, without the license required, from having about his person or carrying around in his possession a pistol or revolver. The proviso that he may have in his manual possession a pistol at his own home or place of business is the only exception made by the terms of the act. While statutes must be given a reasonable construction for the purpose of carrying out the legislative intent, they should never be so liberally interpreted as to render ineffective this intent. It certainly would afford the very broadest latitude for the evasion of the terms and purposes of the act in question if it should be held that a person without the license required by the statute could be allowed to take a pistol and carry it on his person and in his manual possession from his own home for the purpose of delivering it to the alleged owner of the pistol, who resided elsewhere, and especially where the alleged owner of the pistol lived some distance from the accused.

The law does not state how long a person shall have in his manual possession and carry about his person a pistol or revolver to constitute a violation of the statute. It simply provides that it shall be unlawful for any person to have or carry about his person a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pistol or revolver in any county of the state of Georgia without first taking out a license from the ordinary in the county in which the party resides, and the only exception to the act is that he may have the pistol in his manual possession without taking out the license while in his own home or own place of business. If he carries the pistol around on his person, or has it in his manual possession elsewhere without the license, he violates the express terms of the law. It may be true that the purpose of the statute was to lessen the pernicious habit of carrying on the person a pistol, and to supplement the law forbidding the having and carrying about the person pistols or revolvers concealed. But, if it was necessary to prove more than one act of having on the person a pistol before the evil habit was shown, the object of the law would be defeated; and this court will not construe the statute with such latitude as would not only make evasion easy, but would render the act practically ineffective.

Besides, the express language of the statute forbids the manual possession of a pistol outside of the party's home or place of business without the license, and while it may be, as suggested by Mr. Justice Lumpkin in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, a too narrow and strict construction to hold that the act would be violated by picking up a pistol that had fallen from the window of his house on the public street, for the purpose of carrying it back into his house, or in similar cases of emergency, yet it certainly cannot be reasonably contended that the act is not clearly violated under the facts of this case.

Judgment affirmed.

(10 Ga. App. 428)

J. I. CASE THRESHING MACH. CO. v. DONALSON. (No. 3,352.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. FORMER DECISIONS CONTROLLING OR DISTINGUISHED.

This case is fully controlled by the decision of this court in *Maine & Co. v. Howell*, 7 Ga. App. 311, 66 S. E. 804. The case of *Cable Piano Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 319, is distinguishable from the present case on the facts.

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 29*)—VALIDITY—OFFER AND ACCEPTANCE.

Where a purchaser gave a written order for goods, and the seller, on receiving it, executed it by shipping the goods, the contract was mutually binding, though the order provided that it was not to be binding unless it was signed by the parties thereto, and there was no written acceptance of the order by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 56; Dec. Dig. § 29.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by the J. I. Case Threshing Machine Company against J. E. Donalson. Judgment for defendant, and plaintiff brings error. Reversed.

The J. I. Case Threshing Machine Company sued John E. Donalson to recover the price of machinery alleged to have been sold to him under a written contract. The allegations of the petition, so far as material, are as follows: Defendant, on June 15, 1909, executed and delivered to plaintiff his written contract (a copy of which is attached as an exhibit), whereby he purchased certain machinery described therein, which was to be shipped to him at Jakin, Ga. The machinery was shipped to Jakin, according to the terms of the contract. Under the terms of the contract Donalson agreed to receive the machinery described therein on the cars, on arrival at Jakin, and to pay freight and charges thereon, and to pay to the order of petitioner \$172 in cash and the balance of the purchase price in notes; and if Donalson should fail to make the cash payment, or to execute and deliver the notes for the deferred payments, the written order or contract should, at the option of the plaintiff, "stand as the purchaser's written obligation, having the same force and effect as notes and mortgage," and the whole amount of the purchase money should become due and payable, and the plaintiff should "stand discharged from all warranty." It is also alleged that the plaintiff discharged its part of the contract, but that the defendant failed to execute and deliver the notes as agreed in the contract, and that the full purchase price of the machinery is, therefore, due, to wit, \$472 and interest, besides \$56 freight. By amendment it is alleged that the machinery described in the contract was shipped to Jakin, Ga., and was there tendered by the plaintiff to the defendant. The defendant filed a demurrer, setting up in effect that the contract was unilateral; that it had not been signed by the vendor, although it was provided by the express terms of the contract that it should be signed by both parties thereto before the machinery was shipped; and that the machinery was shipped against the defendant's consent, and he refused to accept it on its arrival at Jakin. This demurrer was sustained, and the petition dismissed, and the plaintiff excepted.

The contract upon which suit is based was signed by John E. Donalson, the defendant. It is an order addressed to the J. I. Case Threshing Machine Company, Racine, Wis., and requests the company to ship on or before the 15th day of June, 1909 (or as soon thereafter as transportation can be furnished), to Jakin, Ga., or other convenient station in the state of Georgia, to the under-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

signed purchaser, the machinery described in the contract. It provides that "this order must be signed by all parties before delivery of goods," and that the order "is taken subject to approval, and is to be sent to the company for acceptance or rejection." It sets forth the purchase price, and provides for terms of payment, and contains this condition: "If purchaser fails to pay said money or to execute and deliver said notes and mortgage (properly filed or recorded), it is agreed as a condition hereof that the title to said goods shall not pass, and this order shall, at the company's option, stand as the purchaser's written obligation, having the same force and effect as notes and mortgage for all sums not paid in cash, and the whole amount of purchase money shall be due and payable, and the company stand discharged from all warranty." The contract contains other warranties as to the kind and character of the machinery, and other mutual terms and conditions, and provides that if the purchaser "fails or refuses to accept said machinery upon its arrival as above specified, or in case he cancels this order, he will pay said company the freight and charges on said machinery from the factory to the place of delivery as above provided, and freight for its reshipment, and in addition thereto will pay 15 per cent. of the contract price, which it is hereby agreed shall constitute the liquidated damages for such breach of contract."

J. C. Hale, for plaintiff in error. Erle M. Donalson, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The suit is not for breach of contract, but for the purchase price of the machinery, the petition alleging that the plaintiff fully performed its part of the contract; and the only question presented for the decision of this court is whether the allegations of the petition, if proved, entitle the plaintiff to recover the agreed price of the machinery. This case seems to be fully controlled by the decision of this court in *Maine v. Howell*, 7 Ga. App. 311, 66 S. E. 804. Indeed, we think that it is even stronger and clearer as to the right of the plaintiff to recover than the case just referred to. In that case it was held that where A., by a written order, bought from B. \$180 worth of goods and merchandise, and B., on receiving the order, executed it by shipping the goods covered by it to A., the contract was not within the statute of frauds, and was mutually binding. Here the contract was signed by the defendant himself, and this written order was sent directly to the plaintiff for acceptance and performance. In the case cited the contract, as in the present case, provided that it was not to be binding unless it was signed by the parties thereto, and there was no written acceptance of the order by the plaintiff; but, on receipt of the order, the plaintiff executed the contract by filling the order according to its terms, and in the opin-

ion this court says: "This was the very highest form of acceptance."

[2] It is insisted that the plaintiff was not bound by the express warranties unless the contract was actually signed by it. We do not concur in this view. When the plaintiff performed the contract according to its terms this was an acceptance, and it followed that the plaintiff was thereupon bound by all the warranties, terms, and conditions contained in the contract, just as the defendant was also bound. The plaintiff having, therefore, accepted and performed the contract according to its terms, the defendant was bound on his part to accept the machinery, unless there was some breach of the warranties contained in the contract. He could not arbitrarily refuse to accept the machinery which had been shipped to him by the plaintiff according to his order and tendered to him at the very point of destination to which he had directed that it be shipped and delivered. It is not necessary for the party to whom the contract is addressed to accept it in writing, although expressly stipulated that it should be so accepted, if it is signed by one of the parties and is acted on by the other party. Under these circumstances it is as binding as if signed by both parties. *Vogel v. Pecok*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 248, 40 L. R. A. 591; 9 Cyc. 270. See, also, *Sheppard v. Daniel Miller Company*, 7 Ga. App. 760, 68 S. E. 451; *Cheffield v. Whitfield et al.*, 6 Ga. App. 762, 65 S. E. 807.

In the *Sheffield Case*, supra, Judge Russell uses the following language pertinent to the question now under consideration: "An offer may be accepted, either by a promise to do the thing contemplated therein, or *by the actual doing of the thing*." In *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410, it is held that "a promise may be a nudum pactum when made, because the promisee is not bound; it becomes binding when he subsequently furnishes the consideration contemplated, *by doing what he was expected to do*." Chief Justice Fish, in the course of the opinion, uses the following language: "A contract is often such that, until something is done under it, the consideration is imperfect, yet a partial performance, or a complete performance on one side, supplies the defect. If, for example, one promises another, who makes no promise in return, to pay him money when he shall have done a specified thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected and payment can be enforced" (citing numerous authorities). "A promise may be unenforceable for want of mutuality when made, yet the promisee may render it valid and binding by supplying a consideration on his part before the promise is withdrawn."

This doctrine is well settled by many adjudged cases cited by text-writers. It therefore seems perfectly clear that, when this offer was signed by Donalson and sent directly to the J. I. Case Threshing Machine Com-

pany for its acceptance or rejection, and the company accepted it by executing it according to its terms, the offer became a contract fully completed and mutually binding; and when the company performed its part of the contract, and shipped the machinery therein described to the defendant as directed, and there tendered delivery to him at the point of destination, he not having withdrawn his proposition before the contract was fully executed by the plaintiff, he could not without cause refuse to accept the machinery. He was bound then to accept it, and to pay for it as agreed, unless some of the warranties relative to the machinery were breached.

The case of *Cable Piano Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 319, relied upon by the defendant in error is distinguishable from the present case on the facts. In that case the offer to buy the piano described in the written contract was signed by the defendant and delivered to the plaintiff's salesman, who turned it over to the company's office for acceptance. The piano had already been delivered into the possession of the defendant for trial, subject to his approval, and to be paid for when the contract was accepted by the Cable Piano Company. Before the Cable Company accepted the contract, the defendant tendered back the piano, telling the plaintiff that he had decided to cancel the order. Judge Powell, in delivering the opinion of the court, expressly states that "the delivery of the piano under the contract, and acceptance thereof by the buyer, would have been sufficient to make the contract complete. The buyer's custody of the piano, under the circumstances stated, however, did not have this effect." And it was held that under the facts of that case the contract never became mutual, because the proposed buyer had a right to withdraw his consent there to before acceptance by the seller, and he exercised this right before the seller accepted the contract. There is nothing in this decision that is in conflict with what is herein decided.

For the reasons stated, we conclude that the court below erred in sustaining the demurrer and in dismissing the petition.

Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 417)

MARTIN v. MENDEL. (No. 3,324.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 132*)—PROCEEDINGS TO PROCURE—DISMISSAL OF MOTION.

The decision in this case is controlled by the rulings of the Supreme Court in *Williams v. Johnston*, 94 Ga. 722, 19 S. E. 838, *Anderson v. McClain*, 94 Ga. 798, 801, 22 S. E. 302, and *Gwinn v. Almand*, 110 Ga. 318, 35 S. E. 150.

Where more than a year had elapsed since the filing of a motion for a new trial, there was no abuse of discretion in dismissing it, on the ground that no brief of evidence had been filed, though it appeared that, at the time first set for the hearing of the motion, counsel for the movant presented to and left with the trial judge a paper which purported to be a brief of the evidence; it appearing that it was not approved as such by the judge, because it was not correct, and it further appearing that the court had several times continued the hearing, in order to enable the movant to correct the brief, or to agree thereon with opposing counsel, and that the judge, on account of the lapse of time, was unable to remember the evidence. It would in any event be fruitless to reverse the judgment dismissing the motion for new trial; for, if the trial judge does not remember the testimony, the brief of evidence cannot be approved, and without it the motion is so incomplete as to be absolutely nugatory.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 132.*]

Error from City Court of Monroe; A. C. Stone, Judge.

Action by M. Mendel against A. W. Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

W. O. Dean, for plaintiff in error. O. Roberts, for defendant in error.

RUSSELL, J. The sole question presented by the present writ of error is whether the trial judge erred in dismissing the motion for new trial upon the ground that no brief of the evidence had been filed as required. It appears that a judgment was entered in favor of Mendel against Martin on January 7, 1910. A motion for new trial was made, and the court thereupon passed an order providing that the movant should have until the hearing to prepare and present for approval a brief of the evidence, and that the judge might enter his approval upon the brief of evidence at any time in term or in vacation. The time set for the hearing of the motion for new trial was January 20th, and on that day the movant presented what he claims to be a correct brief of the evidence adduced upon the trial. The judge declined to approve the brief, holding that it was incorrect, and the case was duly continued until January 27th, when, the judge not being present, the hearing went over to the next regular April term of the court. It was thereafter continued from time to time until the 10th of January, 1911, when a motion of plaintiff's counsel to dismiss the motion for new trial was sustained by the court, in the following order: "On hearing the foregoing motion to dismiss movant's motion for new trial, and it appearing that counsel cannot agree upon a brief of the evidence in the case, and the court not being able to remember the evidence at this time, [owing] to the great lapse of time since said case was tried, and the amount of business disposed of by the court, it is therefore ordered and adjudged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the court that said motion to dismiss be, and the same is, hereby sustained, and the motion for new trial dismissed."

Plaintiff in error excepts to the order dismissing the motion for new trial, and urges that under the plain provisions of the Code it was the duty of the judge, if movant's brief was not correct, to correct and approve it; that after a lapse of several months the court cannot refuse to approve a brief of the evidence because counsel cannot agree to it and the court does not remember the evidence, for the reason that, in any case where a motion is made, it can be dismissed by the will of the court by his mere refusal to approve the brief. The history of the case is to be found in the judge's explanatory note to the bill of exceptions, and we cannot go anywhere else to ascertain the truth as to what occurred antecedent to the motion for new trial. The qualifying statement of the judge in certifying the bill of exceptions is as follows: "On January 20th, the day set for the hearing of the motion, counsel for both parties appeared, but had not agreed upon the brief of the evidence. They could not then agree upon it. The court then read over the brief presented by movant, and could not approve the same, because it was not correct. At the request of both counsel, an order was passed setting the hearing for January 27th, in order to give counsel an opportunity to agree upon a brief—all of the papers in the case then being handed back to counsel for movant. I may have been absent on the 27th, but several times thereafter I urged both counsel to try to agree upon a brief, and upon such parts of it that they could not agree the court would settle the differences, and hear the motion any day they agreed on. Counsel for movant took the position that as the 27th had passed, and no order was taken setting the hearing for a later date, the case could not be heard, except at a regular term of the court. At the regular April term of the court counsel for movant complained of being unwell and did not appear with the motion, and no order was then taken in the matter. Thereafter the court again urged counsel to dispose of the motion while the facts in the case were comparatively still fresh in the mind of the court. During all of this time the papers in the case were not in my hands. On April 28th counsel for Mendel drew an order for the court's signature setting the hearing for the next day. The court did not sign this order, for the reason that it was reported to him that movant's counsel would not agree to any day except at a regular term of the court. In the meantime counsel for Mendel presented to the court a brief containing his contention as to the evidence. The court refused to approve it, for the same reason it refused to approve movant's brief—it was not true and correct. The papers were then left

in my office until some time after the July term of the court, when they were again taken out by movant's counsel, with the understanding that counsel would get together and try to agree on a brief of the evidence. I do not now remember why the motion was not heard at the July term of the court, but I do know that counsel made no effort to have it heard or took any order for its hearing in the future. At the October term the court, of its own motion, called the case and asked if counsel had yet agreed on a brief. They answered that they had not, whereupon the court, by consent of both counsel, orally set the motion for a hearing the next day in my office. Counsel for Mendel appeared at the hour set, but counsel for movant failed to appear. The court then again set the hearing for 2 o'clock in the afternoon, and requested counsel for Mendel to notify movant's counsel. At the appointed time counsel for Mendel again appeared, and reported that he had notified counsel for movant. The court waited all day, but movant's counsel never did appear. At the January term, 1911, the court again called the case. Counsel for both parties then stated that they had not agreed upon a brief of the evidence and could not agree. At the request of counsel for movant, I then took up the evidence with counsel, but found that they could not agree on material parts of it, and on account of the length of time intervening since the trial of the case, and the great number of cases tried, and other business disposed of by the court in the meantime, I was totally unable to remember the evidence. I know that the brief originally presented by movant was not correct, but in what particulars I could not then remember, and could, for that reason, not approve a brief. The court, therefore, sustained the motion to dismiss the motion for new trial, for the reasons therein mentioned. All of the papers in the case were in the possession of movant's counsel from the time the original motion for new trial was filed until some time after the April term of court, and again from some time after the July term, 1910, to the January term, 1911, but no other brief of the evidence was ever presented to the court by movant's counsel for the court's approval, except the first one, which the court then could not approve as being correct."

From the statement of the judge it appears that the real ground upon which the motion was dismissed was that the court, after the long lapse of time, could not remember the evidence, so as to approve the brief. Of course, it followed that, if there was no brief, there could be no motion for new trial, and, the motion being defective, there was no error in dismissing it. After reading the statement of the judge, we cannot say that he abused his discretion in dismissing the motion. It is well settled that in a case like

the one at bar the approval or disapproval of the brief is a matter of discretion, and it does not appear that the plaintiff in error would gain any advantage in the case like this if the reviewing court should hold that the lower court had abused his discretion. We could not order a new trial, because the judge has not passed upon the motion. We could not direct him to approve the brief of evidence as presented, because it is not correct. We could not require him to correct it, because he does not remember what the evidence was. If in a case such as that now before us the reviewing court should hold that the judge abused his discretion, because the long delay which caused the lapse of memory was due to his laches and should reverse the judgment on the dismissal of the motion, thereby directing the judge to use his discretion in approving the brief and in passing upon the motion, we would move in a circle, because the judge does not remember the evidence, and, no matter to whom fault for the delay is to be charged, the brief cannot be approved nor the motion perfected. This would seem to be a case of a right without a remedy, because, in our view of it, where a brief of evidence is presented to the judge any time within the terms of the order of the court, it would seem that counsel for the movant has done all that is required of him under the provisions of Civil Code 1910, §§ 6089, 6090, 6093. There is no requirement that counsel for the movant for new trial should agree to the brief of evidence with his adversary. The statute says it is to be approved by the judge, and it would seem that where a bona fide effort has been made to prepare a correct brief of the evidence, and such a brief is timely presented to the court, the judge should himself correct any errors he may detect, or at least call the attention of movant's counsel to these errors, and, after pointing them out, require counsel to correct them. There is, to our minds, a striking analogy, so far as the duty of the judge in this regard is concerned, between the approval of the brief of evidence in a motion for new trial and the certifying of a bill of exceptions. However, with relation to the approval of the brief of evidence there is no statutory provision similar to that which requires a judge, upon the presentation to him of an incorrect bill of exceptions, to return it and, pointing out specifically the errors to be corrected, require the correction within a reasonable time of the errors pointed out by him.

It is true, as insisted by counsel for the plaintiff in error, that under this view of the law a judge can absolutely deprive a litigant of his rights, by refusing to approve a brief of evidence, or to point out the defects in it, until such lapse of time has occurred that the judge, not being able to remember the testimony, cannot approve any brief in

the case. And yet the same thing is true as to the grounds of a motion for new trial, which may not be based upon the evidence at all, but relate to the errors in the charge, injurious conduct of the judge, or a variety of matters which may affect the trial. As to each of these the discretion of the judge to approve, or to refuse to approve, any or all of the grounds of the motion for new trial, is unconditional and uncontrollable. The judge cannot be required to approve the statements of the grounds of a motion for new trial, however vital they may be to the movant's rights. The law leaves the exercise of the judge's discretion as to such matters solely in his hands, and without any reference to the judge who presided in the case now before us (and whom the writer knows to be absolutely honest, impartial, and just), we might repeat the old joke, that the only remedy for the wrong, if any is committed, is to get another judge at the expiration of the incumbent's term.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 462)

ROBINSON v. STATE. (No. 3,896.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 219*)—CRIMINAL LAW (§ 785*)—INSTRUCTIONS—IMPEACHMENT OF DYING DECLARATION.

"The credibility of a witness, whose testimony goes to the jury through the medium of dying declaration, is subject to the same attack as, and should be determined under the same rules governing, the testimony of living witnesses who testify upon the stand." Where therefore, the state introduces in evidence a dying declaration, and the accused attacks the credibility of the declarant, by proof of general bad character, or in any other way in which the law authorizes the impeachment of witnesses, it is the duty of the court, in response to an appropriate and timely written request, to instruct the jury that the dying declaration, as evidence, should be considered under the same rules that govern in determining the credibility of witnesses who testify from the stand. *Hall v. State*, 124 Ga. 651, 52 S. E. 891; *Nesbit v. State*, 43 Ga. 238.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 460; Dec. Dig. § 219; * *Criminal Law*, Dec. Dig. § 785.*]

2. FORMER DECISION CONTROLLING.

The exception to the charge of the court on the subject of dying declarations is fully controlled by the decision of a majority of this court in the case of *Darby v. State*, 9 Ga. App. —, 72 S. E. 182.

3. HOMICIDE (§ 309*)—ISSUES—VOLUNTARY MANSLAUGHTER.

According to the evidence, the decedent had previously made an assault with a deadly weapon upon the accused. It was a question for the jury to determine whether, between this assault and the homicide, sufficient "cooling time" had elapsed. So the law of voluntary manslaughter was involved.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 309.*]

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Will Robinson was convicted of homicide, and brings error. Reversed.

John R. Cooper, for plaintiff in error. Alfred Herrington, Sol. Gen., and Hines & Jordan, for the State.

HILL, C. J. Judgment reversed.

(10 Ga. App. 450)

KIRK v. STATE. (No. 3,867.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 938*)—NEW TRIAL—EXTRAORDINARY MOTION.

The discretion of the court in refusing to grant a new trial on an extraordinary motion therefor, based on the ground of alleged newly discovered testimony, was properly exercised, where it appeared that the testimony alleged to be newly discovered was substantially the same as in the original motion made on the same ground, and was only cumulative and impeaching in character, and would probably not produce a different verdict on a second trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

Error from City Court of Carrollton; James Beall, Judge.

Jean Kirk was convicted of crime, and brings error. Affirmed.

Buford Boykin, for plaintiff in error. C. E. Roop, Sol., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 473)

CAIN v. STATE. (No. 3,913.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. VERDICT NOT ERRONEOUS.

The verdict was not, for any reason assigned, erroneous.

2. ADMISSIONS OF STATE'S COUNSEL—SUFFICIENCY OF EVIDENCE.

The admissions of the state's counsel were not at variance with the allegations in the indictment, and the verdict of guilty was authorized by the evidence.

3. PERJURY (§ 23*)—INDICTMENT—ADMINISTRATION OF OATH.

When, in the course of a judicial investigation, an attorney at law, by the authority or permission of the court, administers the oath to a witness, he does so in behalf of the court. Consequently it may properly be alleged, in an indictment assigning perjury upon the testimony of such a witness delivered in a court of inquiry, that the oath was administered by the presiding magistrate.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 23.*]

4. PERJURY (§ 29*)—ISSUES AND PROOF.

A conviction of the offense of perjury is authorized when the evidence shows that on the prior investigation the accused testified

willfully, knowingly, absolutely, and falsely, in substance, to the effect alleged in the indictment. It is not necessary that the proof as to the alleged false testimony shall correspond literally with the allegations of the indictment.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 29.*]

5. ISSUES AND PROOF—NO ERROR.

None of the assignments of error based upon a variance between the allegations of the indictment and the proof are sustained by the record.

Error from Superior Court, Morgan County; B. F. Walker, Judge.

Druke Cain was convicted of perjury, and brings error. Affirmed.

Percy Middlebrooks, for plaintiff in error Jos. E. Pottle, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 469)

SOLOMON v. STATE. (No. 3,902.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 598*)—CONTINUANCE—GROUNDS.

There was no error in overruling the defendant's motion for a continuance, especially in view of the fact that it did not appear that the movant had subpoenaed the absent witness before he left the jurisdiction of the court, or had exercised any diligence in attempting to procure the presence of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

2. CRIMINAL LAW (§ 1038*)—TRIAL—INSTRUCTIONS—ALIBI.

Under the facts of this case, failure of the court to instruct the jury upon the subject of alibi was not reversible error, in the absence of a timely and appropriate written request. Smith v. State, 6 Ga. App. 577, 65 S. E. 300.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

3. CRIMINAL LAW (§ 563*)—EVIDENCE—WEIGHT AND SUFFICIENCY—IMPEACHED WITNESSES.

It is within the power and right of a jury to believe a witness, no matter what effort may have been made to impeach him, or what testimony has been presented for that purpose, and even though the witness be not corroborated. The credibility of witnesses is exclusively for the jury, and it is not error to instruct the jury that they may accept the explanation of a witness as to why he has made contradictory statements, even though it be not sustained by other facts or circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—RELEVANCY.

There was no error in allowing a witness to state, in explanation of his reason for leaving his former residence, that he did so because certain persons put him in fear of his personal safety. It not appearing that the defendant was one of the parties who were alleged to have intimidated the witness, the testimony could not have been prejudicial to the

defendant, but would seem to have been rather to his advantage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

5. SUFFICIENCY OF EVIDENCE—No Error.

The evidence authorized the verdict, and the trial appears to have been free from error.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Randall Solomon was convicted of crime, and brings error. Affirmed.

O'Steen & Wallace, for plaintiff in error. M. D. Dickerson, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 470)

BASLEY v. STATE. (No. 3,904.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

EMBEZZLEMENT (§ 4*)—ELEMENTS OF OFFENSE—LARCENY AFTER TRUST.

Where a master intrusts to his servant a bill, for the purpose of getting it changed and bringing back the change to him, and the servant fraudulently appropriates the bill to his own use, and does not return it or the change, he is guilty, not of simple larceny, but of larceny after trust.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 1; Dec. Dig. § 4.*]

Error from City Court of Vienna; W. H. Lasseter, Judge.

Addie Basley was convicted of larceny, and brings error. Reversed.

Alexander Akerman and John R. Cooper, for plaintiff in error. Watts Powell, Sol., for the State.

POTTLE, J. Basley was a servant upon the farm of Nobles, in Dooly county. Nobles agreed to advance Basley \$21, and Basley agreed to go to Macon and use this money in transporting his wife and household goods to Dooly county. On Wednesday Nobles gave Basley five \$5 bills in Dooly county, and Basley agreed that he would get the money changed in Macon, where he was going, and repay the \$4 the next Friday, on his return. He converted the whole amount to his own use. He was convicted of simple larceny, under an accusation charging that offense.

The case seems to fall squarely within that of Mobley v. State, 114 Ga. 544, 40 S. E.

728, where it was held: "When a master intrusts to his servant a bill, for the purpose of getting the same changed and bringing back the change to the former, and the latter fraudulently appropriates the bill to his own use, and does not return either it or the change, he is guilty, not of simple larceny, but of larceny after trust." The distinction between the case in hand and cases like Finkelstein v. State, 105 Ga. 617, 31 S. E. 589, and Walker v. State, 72 S. E. 446, was pointed out in the Mobley Case. In those cases no fiduciary relation existed between the owner of the money and the thief, and there was no bailment in a legal sense. In contemplation of law, the legal possession never passed out of the owner. Here there was a technical trust to a person standing in a fiduciary relation, and both the actual and legal possession had been voluntarily surrendered, without any fraud or artifice on the part of the person intrusted, other than that involved in the promise to repay the money at a stated time. Cunningham's Case, in 118 Ga. 125, 44 S. E. 846, Martin v. State, 123 Ga. 478, 51 S. E. 334, and Bryant v. State, 8 Ga. App. 389, 69 S. E. 121, may also be distinguished, upon the principle of Barron v. State, 126 Ga. 92, 54 S. E. 812, where Mr. Justice Atkinson very clearly points out the difference between simple larceny, where possession is obtained by fraud, and larceny after trust, where possession is voluntarily surrendered, and the relation of bailor and bailee created.

Judgment reversed.

(10 Ga. App. 458)

YOPP v. STATE. (No. 3,887.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

FORMER DECISION FOLLOWED.

The facts of this case bring it squarely within the principle of law announced by this court in Bray v. City of Commerce, 5 Ga. App. 606, 63 S. E. 596, and cases cited, and the judgment refusing to grant another trial must be reversed.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Dave Yopp was convicted of crime, and brings error. Reversed.

J. S. Adams, for plaintiff in error. Geo. B. Davis, Sol., for the State.

HILL, C. J. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(90 S. C. 359)

**SPEAKS et al. v. SOUTHERN RY. CO.,
CAROLINA DIVISION.**

(Supreme Court of South Carolina. Feb. 14, 1912.)

1. CARRIERS (§ 415*)—CARRIAGE OF PASSENGERS—INJURIES—PUNITIVE DAMAGES.

Where a carrier recklessly disregarded the right of a passenger to a reservation of a sleeping compartment, the passenger was entitled to punitive damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1598; Dec. Dig. § 415.*]

2. EVIDENCE (§ 597*)—WEIGHT—SUFFICIENCY.

Where the evidence as a whole warrants a verdict for plaintiff, it will not be disturbed on appeal merely because no one of the evidentiary facts alone would warrant it.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 597.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Bamberg County; George E. Prince, Judge.

Action by Mrs. Nettie Speaks and another against the Southern Railway Company, Carolina Division. From a judgment for plaintiffs, defendant appeals. Affirmed.

Harley & Best, for appellant. S. G. Mayfield and H. M. Graham, for respondents.

GARY, C. J. [1] This is an action for damages, alleged to have been sustained by the plaintiff Mrs. Nettie Speaks on account of the defendant's refusal to provide for her a lower berth in a Pullman car, in accordance with the terms of the contract entered into by them. The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That the plaintiffs, being desirous of going from the city of Bamberg, on defendant's trains, to the city of Baltimore, bought a ticket from defendant's said agent, and paid the price asked therefor by the defendant. That before buying the said ticket, and being desirous of securing sleeping accommodations, the plaintiffs applied to the agent of defendant at the city of Bamberg for said accommodations to be reserved, and the agent of the said defendant, on said application, applied to the traveling passenger agent of the defendant to make said reservation, and, when informed by the said traveling passenger agent that said reservation had been made for the plaintiffs, thereupon the plaintiffs purchased a ticket from the said agent at Bamberg, to the city of Baltimore, over the roads of the defendant herein and its connecting lines, and tendered the full pay for the said ticket, together with the reservation of sleeping apartments, as aforesaid, but the agent of the defendant at Bamberg declined to receive the amount of the reservation, which had been allotted to the plaintiffs, and directed them to pay for the said reservation aboard the cars at Columbia, which connecting railway arranged with the railway of defendants. That these plaintiffs,

relying upon the good faith of the defendant, its agent, servants, and employes, as aforesaid, bought the ticket, as aforesaid, from the county of Bamberg to the city of Baltimore, over the lines of the defendant and its connecting lines, and paid the price asked therefor in the city of Columbia, according to the arrangements agreed upon with the agent, servant, and employe of the defendant; and these plaintiffs arranged to take the train, and to occupy the sleeping apartments which had been so assigned unto them, but before taking said train inquired of the agent, servant, and employe of the defendant in the city of Columbia as to the pay for said reservation, and was directed by him to pay the same aboard the train, and that said reservation had been made, as was evidenced by the telegram sent by the traveling passenger agent of the defendant to the agent of the defendant at Bamberg, S. C. That these plaintiffs boarded the said train, believing that said reservation was made, and upon the assurance of the officer, agent, servant, and employe of the said defendant herein, to the person in charge of the said sleeping reservations connected with said train, assuring them that the reservations were made, and that they would be furnished with the same aboard said train. That the plaintiffs boarded the train, as aforesaid, with the said assurance of the agent, servant, and employes of the defendant herein, of its agents in charge of the said sleeping reservation; but the said agent, servant, and employe refused to put these plaintiffs in possession of the reservation, which had been made to them, although plaintiff tendered and often entreated and insisted upon their being given the reservation assigned to them, so that these plaintiffs were compelled to be up and ride in the open cars, without the sleeping reservation that had been made for them, and for which they had agreed with the defendant, its agent, servant, and employe, as aforesaid, should be furnished, and without such reservation these plaintiffs would not have bought said ticket, so that the plaintiffs grew weary, were broken down in health, and for a long time made sick by the acts and conduct of the defendant, its agent, servant, and employe. That the acts of the servants, agents, and employes of the defendant were wanton, willful, malicious, wicked, unlawful, and was intended to, and did subject these plaintiffs to great hardships, and made them sick and unfit to attend to their business, and entailed upon them additional costs, hardships, and privations, to their damage \$1,500." There was a motion for a nonsuit, also for the direction of a verdict; but both motions were refused. The jury rendered a verdict in favor of the plaintiff Mrs. Nettie Speaks for \$625. The defendant appealed upon exceptions, all of which were withdrawn except those raising the

question whether there was any testimony tending to show that the plaintiff was entitled to punitive damages.

There was testimony tending to sustain all the allegations of the complaint, with reference to the plaintiff Mrs. Nettle Speaks; and it tends to show a reckless disregard of her rights. It would subserve no useful purpose to discuss the testimony at length.

[2] The rule is thus stated in *Railroad v. Partlow*, 14 Rich. 237, and quoted with approval in *Dantzer v. Cox*, 75 S. C. 334, 55 S. E. 774: "It may be that no one of the facts would of itself warrant the inference, and yet, when taken together, they may produce belief, which is the object of evidence."

Judgment affirmed.

WOODS, J. (dissenting). The allegations of the complaint upon which the plaintiffs recovered a verdict for \$625 are fully set out in the opinion of the Chief Justice. The testimony on the part of the plaintiffs was to the effect that the defendant had contracted to furnish Mrs. Speaks with a lower berth on a sleeping car from Columbia to Baltimore, and that it failed to discharge the duty it had assumed to her as a passenger on its train. For such breach of duty the plaintiffs were, of course, entitled to recover the actual damages which resulted. But it seems to me there was not a particle of evidence warranting the conclusion that the defendant's agents were guilty of any wanton or willful disregard of the plaintiffs' rights, and that the motion for nonsuit as to the cause of action for punitive damages should have been granted.

Courteous consideration is the rule of conduct of nearly all men in their treatment of each other, and none but the abnormally brutish are willfully or wantonly inconsiderate of the rights of women. It follows that, when there is a breach of a duty owed by one man to another, the presumption of fact is strong that it is due to inadvertence or mistake, and not to willfulness or wantonness; and the presumption is still stronger when the breach is of a duty owed to a woman.

The train was run on the 18th of August as a special excursion train from Augusta to Baltimore. Accepting as true the testimony of the plaintiffs, no inference can be drawn from it more adverse to the defendant than that the train was crowded and that the failure to give Mrs. Speaks a lower berth was due to confusion and mistake in the engagement and assignment of the berths. The evidence that a passenger getting on at Chester claimed and was allowed a berth in the section where the plaintiffs were sitting does not tend to prove wanton or willful disregard of the rights of Mrs. Speaks by giving preference to another passenger, for the plaintiffs did not claim to have en-

gaged a berth in that particular section, and it does not appear that the Chester passenger got a lower berth which was the only kind the plaintiffs would accept. There was not the slightest evidence of disrespect to Mrs. Speaks or her husband; on the contrary, both of them testified that the conductor assured them there had been a "mix-up," but that he would do his best to furnish a berth, and that this assurance was repeated up to the moment when they insisted on leaving the train at Chester with the intent of taking a berth on the next train.

For these reasons, I think the circuit court erred in refusing the motion for a nonsuit as to the alleged cause of action for punitive damages.

(90 S. C. 352)

FOWLER v. TOWN COUNCIL OF TOWN OF FOUNTAIN INN et al

(Supreme Court of South Carolina. Feb. 7, 1912.)

1. MUNICIPAL CORPORATIONS (§ 918*)—BOND DEBTS—STREET LIGHTING—AUTHORITY TO CONTRACT.

A contract between a town and a corporation to light the streets of the town for a period of 10 years is of the nature of a bond debt, which, under Const. art. 8, § 7, cannot be created without the sanction of a majority of the qualified electors of the town.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 279*) — STREET LIGHTING—CONTRACT—APPROVAL BY VOTERS—ELECTION—AUTHORITY TO CALL.

Under Civ. Code 1902, § 1999, which confers upon the councils of all cities and towns power to make such rules, by-laws, regulations, and ordinances as are necessary for their security and welfare, a city council may provide for the lighting of the public streets and buildings and order an election to ascertain the wishes of the qualified electors in regard to such improvement, as the Constitution requires.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 739; Dec. Dig. § 279.*]

3. MUNICIPAL CORPORATIONS (§ 918*)—CONTRACTS—STREET LIGHTING—AUTHORITY TO MAKE.

Under Civ. Code 1902, § 2021, as amended by Act Feb. 24, 1908 (25 St. at Large, p. 1038), which makes it the duty of town authorities, upon the petition of a majority of the freeholders, to order a special election on the question of issuing bonds for any corporate purpose, set forth in the petition, a town council was authorized upon such a petition to submit to the electors the question whether the council should contract for the lighting of public streets and buildings.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

4. ELECTIONS (§ 95*)—TOWN ELECTIONS—REGISTRATION OF VOTERS.

Const. art. 2, § 11, provides that the registration books shall close at least 30 days before an election, during which time transfers and registration shall not be legal. Const. art. 2, § 12, deals specifically with the registration of electors in municipal elections, and provides

their qualifications and disqualifications, but contains no requirement for the closing of the registration books at any time before the election. *Held*, it is apparent from the context that the registration books mentioned in section 11 are the county registration books, and Civ. Code 1902, § 195, as amended by Act Feb. 26, 1908 (25 St. at Large, p. 1026), which provides that 20 days prior to a special municipal election the books of registration shall be open for the registration of qualified electors and shall remain open for 10 days, is not unconstitutional, as, in the absence of a constitutional requirement as to the time of closing, the Legislature may fix any time within its discretion.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 95, 96; Dec. Dig. § 95.*]

"To be officially reported."

Petition for injunction by J. W. Fowler against the Town Council of the Town of Fountain Inn and others. Petition dismissed.

Bomar & Osborne, for petitioner. R. M. Babb, for respondents.

HYDRICK, J. The petitioner, who is a citizen and taxpayer of the town of Fountain Inn, seeks to enjoin the town council of said town from making a contract with the Enoree Power Company to light the streets and public places and public buildings of said town for a period of 10 years.

[1] It may be conceded that the proposed contract is of the nature of a bond debt (Duncan v. Charleston, 60 S. C. 532, 39 S. E. 265), which cannot be created without the sanction of a majority of the qualified electors of the town. Constitution, art. 8, § 7.

It appears from the record that on September 1, 1911, a special election was held in said town, in which the question of making said contract was submitted to the qualified electors thereof, and the majority of them voted in favor of making the contract. It also appears that the election was duly and regularly ordered, but the petitioner questions the legality of it on two grounds: First, he contends that the town council had no authority from the Legislature to order such an election, and that, without such authority, it was void.

[2] Section 1999 of the Code (volume 1, Code 1902) confers upon the councils of all cities and towns in the state "power and authority to make, ordain and establish all such rules, by-laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns, or for preserving health, peace, order and good government within the same." Certainly the language quoted is broad enough to include the power to take every step necessary and proper to make provision for the lighting of the streets,

public places, and public buildings of the town; and therefore, upon the filing of a petition signed by a majority of the freeholders of the town, as required by the Constitution and statutes, the town council had authority to order the election.

[3] Moreover, as the making of the contract is the creation of a bond debt, section 2021 of the Code (volume 1, Code 1902) also seems to us to be applicable and to confer the necessary authority. That section, as amended by the act of 1908 (25 Stat. 1038), makes it the duty of the authorities of any city or town, upon the petition of a majority of the freeholders thereof, to order a special election "for the purpose of issuing bonds" for various purposes enumerated, concluding with the words "or any corporate purpose set forth in said petition." It cannot be denied that the contract in question is for a corporate purpose which was set forth in the petition.

[4] The second ground upon which the validity of the election is contested is because the registration books of the town were opened 20 days before the election and kept open 10 days for the purpose of registering the qualified electors of the town, and because the voters who were registered within that time voted in the election. This was done in pursuance of section 195 of the Code (volume 1, Code 1902) as amended by the act of 1908 (25 Stat. 1026). The petitioner contends that this statute violates section 11 of article 2 of the Constitution, which provides: "The registration books shall close at least thirty days before an election, during which time transfers and registration shall not be legal." It clearly appears from the context—that is, from the preceding and following sections—that the registration books mentioned in section 11 are the county registration books, in which electors in state and county elections are registered, for the very next section (section 12) deals specifically with the registration of electors in municipal elections, and provides: "Electors in municipal elections shall possess the qualifications and be subject to the disqualifications herein prescribed. The production of a certificate of registration from the registration officers of the county as an elector at a precinct included in the incorporated city or town in which the voters desire to vote is declared a condition prerequisite to his obtaining a certificate of registration for municipal elections," etc. The case of Gunter v. Gayden, 84 S. C. 48, 65 S. E. 948, cited by counsel for petitioner, is authority for the position that the registration books of the county must be closed, as to any city or town election, 30 days before such election; but there is nothing in the opinion in that case which sustains the contention that the provision of the Constitution above quoted from (section 11) requires the registra-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion books of a city or town to be closed 30 days before an election. There being no provision in the Constitution as to when such books shall be closed, the Legislature may fix any time within its discretion.

The petition is therefore dismissed.

GARY, C. J., and WOODS, J., concur.

(90 S. C. 355)

GOLDEN v. WHARTON et al.
(Supreme Court of South Carolina. Feb. 7, 1912.)

COUNTIES (§ 69*)—POLICEMEN—COMPENSATION—APPOINTMENT.

A county policeman cannot be deemed a de facto officer acting in good faith under an invalid appointment, and entitled to salary accruing after the Supreme Court decided that he had no right to the office.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 69.*]

Mandamus by R. L. Golden against J. B. Wharton and others. Petition dismissed.

D. H. Magill, for petitioner. Giles & Ouzts, for respondents.

WOODS, J. The petitioner, R. L. Golden, alleging that he is acting in good faith as a de facto rural policeman for the county of Greenwood, and as such de facto officer is entitled to the salary of the office from the 7th day of June, 1911, till the 7th day of January, 1912, asks this court to issue its writ of mandamus commanding J. B. Wharton, foreman of the grand jury, and T. G. Burnett, supervisor, G. B. Riley and George Dorn, constituting the county board of commissioners, and F. Graham Payne, treasurer of said county, to draw the order and issue a warrant to pay the salary alleged to be due the petitioner, amounting to the sum of \$583.31. The rights of the petitioner have been adjudicated in proceedings heretofore instituted by him under the following provision of Act Feb. 18, 1911 (27 St. at Large, p. 194): "Be it enacted by the General Assembly of the state of South Carolina, that upon the approval of this act it shall be the duty of the Governor, upon the recommendation of the delegation of Greenwood county, to appoint three able-bodied men of the county of Greenwood, who are of good habits and of courage, coolness and discretion, known as men who are not addicted to the use of alcoholic liquors, or of drugs, and shall commission them as county policemen, for a term of four years, subject to removal by the Governor for cause: provided, however, that no person shall be eligible to appointment who makes application for such appointment." On the petition of Golden and Elledge, this court issued its writ of mandamus requiring payment to them of the salaries provided by law for rural policemen for the two months ending May 7, 1911. In that cause reported

in 89 S. C. 113, 71 S. E. 657, the court thus stated the manner of appointment of the petitioners and the invalidity of it: "It appears that the act was approved Saturday night, February 18, 1911, the last day of the legislative session, and that the Governor on the same night appointed petitioners as rural policemen upon the recommendation alone of Hon. D. H. Magill, one of the Greenwood delegation. It is stated in the affidavit of Sen. C. A. C. Waller and Rep. W. H. Nicholson and J. W. Bowers, the other members of the Greenwood delegation, that the appointments were made without their recommendation before they had knowledge of the approval of the act or opportunity to recommend. * * * Appointment to office not being inherently an executive prerogative, it is competent for the Legislature, in conferring the power of appointment, to attach such limitations and conditions to its exercise as may be deemed proper. The statute expressly provides that the appointment of rural policemen for Greenwood county shall be upon the recommendation of the legislative delegation of Greenwood county. No such recommendation having been made, the appointment was made without authority, and the petitioners cannot be held to be officers de jure."

Considering, however, that the petitioners had performed the duties of the office in good faith under the commission of the Governor which had not up to that time been declared invalid, the court held that the petitioners were de facto officers, and that they were entitled to receive the salary for the two months ending May 7, 1911, inasmuch as neither the office nor the salary was claimed by any other persons. The writ of mandamus was accordingly issued. Subsequently, under proper proceedings, Mr. Justice Gary, applying the rule thus laid down by the court, issued at chambers another writ of mandamus requiring payment of the salary of rural policemen to the same parties for the month ending June 7, 1911, on the ground that they should be regarded de facto officers, and entitled to the salary up to June 14, 1911. When the decree was filed adjudging the petitioners to have no legal title to the office.

In the proceeding now under consideration, the petitioner claims to be still a de facto officer and entitled to the salary in the face of the decision of this court above referred to that he has no claim whatever to the office. To state the position is to demonstrate its unsoundness. It is impossible that the petitioner could have continued to assert a claim to the office or to assume to act as a rural policeman under a bona fide belief that he was an officer after it had been finally adjudged that his claim to the office was without foundation. From the date of the judgment that the petitioner was not legally appointed, and was not entitled to the office,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his attempt to act as a policeman was a mere usurpation. Such disregard of judicial authority is nothing less than an attempt to subvert the law, and is not to be sanctioned nor tolerated.

The petition is dismissed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(90 S. C. 351)

MARTIN et al. v. BLACKWELL et al.
(Supreme Court of South Carolina. Feb. 5, 1912.)

APPEAL AND ERROR (§ 554*)—DISMISSAL—
REASONS.

An appeal will not be dismissed, merely because the stenographer has lost the notes of the testimony; application to the trial judge to settle the case, if an agreed case cannot be made up, being the proper remedy.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 554.*]

Appeal from Common Pleas Circuit Court of Cherokee County.

Action by W. H. Martin and another, executors, and others against George Blackwell and another. From the judgment, defendants appeal, and plaintiffs move to dismiss the appeal. Motion overruled.

W. S. Hall, for the motion. A. C. De Pass, opposed.

PER CURIAM. Upon the consideration of the motion to dismiss the appeal, it is ordered that the motion be refused. The court will not dismiss an appeal, merely because the stenographer has lost the notes of testimony. If the appellant is not able to comply with the demands of the respondent in making up the case, and they cannot make up an agreed case, the remedy of the parties is to apply to the circuit judge, under the statutes and rules of the court, to settle the case.

In this instance, the time of the respondents to serve amendments to the proposed case has already elapsed; but under the circumstances it is ordered that the respondents have four days in which to serve their amendments to the proposed case, and that the matter proceed thereafter regularly under the statutes and rules of the court.

GARY, C. J. Time for serving proposed amendments extended 10 days.

(137 Ga. 468)

SILVEY et al. v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

1. FORMER DECISION SUSTAINED.

Upon review, the court declines to overrule the decisions in the cases of Moore v. City of Atlanta, 70 Ga. 611, and Brown v. At-

lanta Railway & Power Co., 113 Ga. 462, 89 S. E. 71.

2. STREET RAILROADS (§ 24*)—STREET RAILROAD FRANCHISE—DELEGATION OF LEGISLATIVE POWER.

A city ordinance, authorizing a street railway company to construct and lay such double tracks in the streets where it already has single tracks as it may from time to time deem proper for the purpose of rendering efficient service, sufficiently designates the streets in which the company may lay the double tracks. And the fact that the time at which such double tracks may be laid is thus left to the discretion of the company, to be exercised by it for the purpose of "rendering efficient service," does not divest the city of the legislative power involved in the grant of a franchise to the street railway company, nor does it confer upon the company itself the right to exercise an authority involving the element of governmental or legislative power.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.*]

3. STREET RAILROADS (§ 24*)—FRANCHISE—REPEAL OF ORDINANCE.

An ordinance providing that a single track may be laid in any given street is not in any sense repealed by a subsequent ordinance authorizing a street railway to lay double tracks in all streets where single tracks had been laid.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.*]

4. INTERLOCUTORY INJUNCTION REFUSED—
NO ERROR.

Under the evidence and the pleadings, the court did not err in refusing the interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

5. EMINENT DOMAIN (§ 119*)—NATURE AND EXTENT OF POWER—CONSTITUTIONAL PROVISION.

A provision in an ordinance granting a franchise to a consolidated electric railway company, authorizing the company to physically connect, merge, and consolidate the properties which it may acquire wherever it desires and to construct and lay such double tracks, curves, switches, etc., as it may deem proper for this purpose or for the purpose of rendering efficient service, is not violative of Const. art. 1, § 3, par. 1, providing that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid, though it makes no provision for the assessment or payment of damages to the property of petitioners in constructing a double-track line.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Jerome Silvey and others against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Henry A. Alexander and Smith, Hammond & Smith, for plaintiffs in error. Colquitt & Conyers, for defendant in error.

BECK, J. Jerome Silvey and other citizens and taxpayers of the city of Atlanta, all of whom resided on Forrest avenue, a public street in the city of Atlanta, and who owned property abutting on that street, filed their equitable petition against the

Georgia Railway & Electric Company, alleging as follows: The defendant is preparing to construct and operate on Forrest avenue a line of double tracks in lieu of the present single track now being operated. If this purpose should be consummated, it would, on account of the narrowness of Forrest avenue, result in the creation of a public nuisance by making it difficult and dangerous for other vehicles to use said street, and would inflict a special damage upon petitioners, not shared by the general public, by destroying the right of ingress and egress to and from their property by vehicles in the street, and would inflict upon them irreparable damages which cannot be estimated in money. The company has never been given the right, by any valid ordinance, to construct a double track, and the construction and operation of a double track would constitute an additional servitude and burden upon the fee in the street, which was not contemplated in the original dedication of the street. A large part of the value of the property of the plaintiffs is in the shade trees growing on the sidewalk, some of which are 40 years old; and in the construction of a double-track line which is to be operated by a trolley system of electric wires, it would be necessary to make a place for the trolley wires, and in doing so it would be necessary to cut off many large limbs and branches of said trees and greatly impair their beauty and symmetry. The fee of the sidewalk and roadway of Forrest avenue is in the abutting owners, and the trees are their individual property, and that the cutting and defacing of these trees would constitute an actual taking of their property. The defendant has not tendered to them any sum for the damage to be done to their property, and has made no effort to ascertain the same; and until this is done the proceedings of the defendant are without authority and void, and are a trespass upon petitioners' property. They pray for the grant of an injunction against the defendant, restraining it from constructing the double track as proposed. The defendant contends that it has authority to construct a double track, given to it in a valid ordinance passed by the municipal authorities. It denies that it would injure or damage the plaintiffs' property, or that it would actually take any of their property, or that the laying of the double track would be an additional servitude and burden upon the fee in the street; and it shows that while it will be necessary to trim some portion of the branches of the trees which grow over the sidewalk to a certain extent, the same will be done under the supervision of the park commission of the city of Atlanta, or by the authorities of said city, and will not result in any damage to the value or the beauty of the trees. Also, that on account of the growth and development of the city of Atlanta the construction of a double track is necessary in order to render efficient service

to the public. At the interlocutory hearing the court refused the injunction, and the petitioners excepted.

In an ordinance of the city of Atlanta, granting to the Atlanta Rapid Transit Company a franchise to construct a street car line on Forrest avenue, approved February 26, 1901, it is provided that "authority and consent be and the same are hereby granted to the Atlanta Rapid Transit Company, its successors and assigns, to construct, electrically equip, and operate a line of single track of street railway, with all the necessary and proper turnouts, switches, curves, and connections along and over the following route, to wit: Commencing on Forrest avenue at the intersection of said street with Peachtree street and Ivy street, and running thence on Forrest avenue to Piedmont avenue, and from Piedmont avenue to Jackson street, and if Forrest avenue be subsequently extended from Jackson street to Boulevard, thence to Boulevard. The right being given to construct, equip, and operate either a single or double track on said street from Piedmont avenue to Jackson street or Boulevard in the event Forrest avenue be so extended." The ordinance embraces certain qualifications, limitations, restrictions, and conditions upon the authority granted in the section quoted above. Another ordinance by the mayor and general council of the city of Atlanta was adopted January 27, 1902, and approved February 8, 1902, which provided for the consolidation of the Atlanta Railway & Power Company, the Atlanta Rapid Transit Company, the Georgia Electric Light Company, and the Atlanta Steam Company. The consolidated company resulting from the merger of the companies just named is the defendant in the present suit, and is the successor in title to all the rights, privileges, and franchises of the constituent companies named above, with certain specified exceptions not necessary here to note. The tenth section of the above ordinance passed in 1902 provides as follows: "Be it further ordained that said consolidated company, its successors and assigns, are hereby granted the right and permission to physically connect, merge and consolidate the said properties which it may acquire, wherever it desires, and to construct and lay such double tracks, curves, switches, connections, wires, tracks, etc., as it may from time to time deem proper for this purpose, or for the purpose of rendering efficient service, and to straighten out the kinks in its tracks and lines; it being the intention hereof to allow the full and complete consolidation of the companies hereinbefore referred to and their properties whereby the freest possible use and profit thereof may result to said consolidated company, and so that said company may consolidate, control, and operate all of said properties as it may desire, subject only to proper police laws and restrictions."

[1, 5] 1. It is insisted by petitioners that this section of the ordinance of 1902 is violative of paragraph 1, § 3, art. 1, of the Constitution of the state of Georgia, providing that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid, in that it makes no provision for the assessment and payment of damages for injury to the property of petitioners in constructing a double-track line. The question of the validity of section 10 of the ordinance of 1902, on the ground that it is violative of the constitutional provision just cited, is controlled by the decisions in the cases of *Moore v. City of Atlanta*, 70 Ga. 611, and *Brown v. Atlanta Railway & Power Co.*, 113 Ga. 462, 39 S. E. 71. We have been requested to review and reverse these cases. In our opinion the rulings made in those cases should not now be disturbed, and we accordingly decline to overrule them. See, in this connection, *Fleming v. City of Rome*, 130 Ga. 383, 61 S. E. 5.

The court was authorized to hold, under the evidence in the case, that the trimming of shade trees standing on the sidewalk in front of petitioners' property would not constitute an actual taking of petitioners' property. And where the branches of these trees extend over the streets in such a manner as to interfere with the enjoyment of the easement in a street, the city authorities would have the right to cut and trim the branches, though in so doing they should exercise due care not unnecessarily to injuriously affect the trees, their beauty and their symmetry. *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

[2] 2. In paragraph 9 of the petition it is conceded that section 10 of the ordinance of 1902, already set forth, gives to the consolidated company, in a general clause, a right to double track any of its existing lines, but the plaintiffs contend that this general grant of authority to lay double tracks should not be given effect, as it does not specify the streets in which the double tracks shall be laid, but leaves to the beneficiary company the right to select the streets and choose the time at which the double tracks shall be laid; that the grant of a right to construct a street railway in the streets of a city is the exercise of governmental power; that the legislative power thus involved in granting a street railway franchise cannot be delegated by a municipal government, and especially that such delegation would be void if made to the street railway company itself; and that if effect is given to this general clause in section 10 of the ordinance of 1902, it would amount, in effect, to divesting the city council of this governmental power in this particular respect and conferring it upon the

street railway company. We do not think this contention is sound. The franchise authorizing the laying of a single track in the street had been duly granted, so far as appears from the record; and no suggestion to the contrary is made. So far as the granting of the right to lay a double track where only a single track had previously been laid may be considered as a franchise. That, too, was granted by the city council in the exercise of its governmental power. The franchise was granted in all of the streets where single tracks had already been laid. The council knew in which streets these single tracks then existed, and this designation of the streets in which the defendant company might lay double tracks was as effectual as if it had named each one of them. The fact that the company was to exercise a discretion as to the time at which the improvements along its line should be made and double tracks should be laid was not in the nature of the exercise of any creative or legislative power, in which franchises like those under consideration must have their origin. It did nothing more than confer upon the company the authority to decide when the exigencies of traffic resulting from the growth and expansion of the city required it to increase the facilities for handling the traffic. It no more conferred upon the company the right to exercise a legislative or governmental function than would an ordinance which granted a franchise to lay a street railway in the streets of a city and which provided that the track might be laid at any time within one or two years. In each case—that supposed as well as in the actual case—discretion as to the exact time at which the work of laying the track should be commenced and performed would be vested in the company receiving the franchise; the only difference being that in the supposed case there was a limitation of time within which the privilege conferred should be exercised.

[3] 3. We cannot agree with the contention of counsel for plaintiffs in error that so much of the ordinance of 1902 as grants the right to lay a double track in streets where there was already a single track in any way contravenes or conflicts with that part of the ordinance of 1901, which allows the laying of a single track in a designated portion of Forrest avenue or throughout the length of that street. But where a single track had been originally laid under the ordinance of 1901, a double track could be laid under the provisions of the ordinance of 1902.

[4] 4. Under the evidence and the pleadings the court did not err in refusing the interlocutory injunction.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 369)

CENTRAL OF GEORGIA RY. CO. v. KING BROS. & CO. et al.

(Supreme Court of Georgia. Jan. 11, 1912.)

*(Syllabus by the Court.)***1. ASSIGNMENTS (§ 48*)—CONSTRUCTION—LEGAL OR EQUITABLE ASSIGNMENT.**

A writing executed by an employé of a railway company recited that: "I hereby sell, transfer, and assign to King Bros. & Co., doing business in the city of Atlanta, Ga., my account for salary or wages already earned by me during the month of May, 1910, and amounting to \$27.75, and due me by Central of Georgia Railway Company. I hereby direct my said employer to pay to King Bros. & Co. said account, amounting to \$27.75. This is an absolute and unconditional sale of said account, and is not a loan or advance of money, and is not a discount. I am not a debtor to the purchaser. This is an original transaction, and is not a renewal or extension of any kind." *Held*, that the instrument is an assignment of the legal title to the particular money therein specified, and is not a partial assignment of a general fund belonging to the assignor in the hands of the railway company, and therefore is not governed by the law as to equitable assignments.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 48.*]

2. VENUE (§ 27*)—ASSIGNMENT—JOINT DEFENDANTS.

The venue of the action brought by the assignee in the instrument above referred to against the Central of Georgia Railway Company and the assignor, in which the petition prayed for a judgment against the company for the amount named in the assignment, that the salary account of the assignor while in the employment of the company, to the extent of the sum stated in the assignment, "be decreed to be in" the plaintiff, and that the company "be required to pay the same over to" the plaintiff, "free from costs," was not in the county of Fulton, wherein the assignor resided when the action was instituted, but was in the county of Chatham, as the charter of the Central of Georgia Railway Company, granted by the Legislature, fixes the principal office of business of such company in the city of Savannah, Chatham county. It does not appear from the petition that the contract of employment by the company of the assignor was either executed or to be performed in Fulton county (if that would give jurisdiction there as to the company), or that the assignor had ever denied the validity of such assignment, or made any contention that the plaintiff was not entitled to the sum assigned. The fact that the assignee served written notice of the assignment upon an agent of the company stationed in Fulton county, and demanded payment of such agent of the amount stated in the assignment, did not give the court of that county jurisdiction of the company. Under the allegations of the petition, the assignor was neither a necessary nor a proper party to such action, and the joining of him as a codefendant therein with the railway company did not give jurisdiction of the company to a court of his residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 41; Dec. Dig. § 27.*]

3. DEMURRER TO PLEADING—JURISDICTION OF COURT.

The trial judge erred in refusing to sustain an appropriate demurrer made by the railway company in such action, challenging

the jurisdiction of the superior court of Fulton county as to the company.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by King Bros. & Co. against the Central of Georgia Railway Company and another. From the judgment, the defendant railway company brings error. Reversed.

M. F. Goldstein and Payne, Little & Jones, for plaintiff in error. R. B. Blackburn and Ogburn, Dorsey & Shelton, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 482)

BAIRD v. ENGRAM & ROBINSON.

(Supreme Court of Georgia. Jan. 16, 1912.)

*(Syllabus by the Court.)***1. TRIAL (§ 60*)—RECEPTION OF EVIDENCE—EVIDENCE DEPENDENT ON PRELIMINARY PROOF.**

Engram & Robinson sued Martin and Mrs. Baird on an open account. On the trial the court permitted one of the plaintiffs to testify as follows: "Martin stated that he wanted some stuff for feeding cows in the dairy business. I told Martin that I would sell them, if Mrs. Baird would agree to pay it, and they would give us a note for the amount as soon as they had bought as much as \$100 worth of stuff. Martin said that she authorized him to get the stuff, and wanted to carry away a load at that time; but I told him that he would have to see Mrs. Baird, and get an agreement to give a note also. Later Martin came, and stated that he and Mrs. Baird wanted the stuff, and that they would give the note as requested." Counsel for Mrs. Baird, who alone defended the suit, objected to this testimony, because she was not present when the conversation referred to took place, and because there was no evidence that Martin was her agent, or that any partnership existed between him and her. The judge stated that he would admit the evidence to show the transaction, but not to bind Mrs. Baird, unless the testimony should connect her with and show her a party thereto. There was a sharp conflict in the testimony of the two plaintiffs on the one side, and that of Mrs. Baird and Martin on the other, as to whether Mrs. Baird was interested in the dairy business, or bought or received the benefits of any of the articles stated in the account sued on. Martin testified that he never made the statement attributed to him in the testimony of the plaintiff, as above set out; and he and Mrs. Baird both testified that she never authorized him to purchase any of the goods, and that the dairy business belonged to him alone, and that she never got any benefit of the articles sued for. There was evidence in behalf of the plaintiffs tending to show that Mrs. Baird and Martin were partners in such business. As the jury was authorized to find, under the evidence, that a partnership in the dairy business, for which the goods were purchased, existed between Mrs. Baird and Martin, and as she purchased some of the articles in person, and they were charged to herself and Martin, we do not think that the admission of the testimony objected to, when taken in connection with the statement of the judge when allow-

ing it to go in evidence, is cause for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141-145; Dec. Dig. § 60.*]

2. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and it was not error to refuse a new trial.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by Engram & Robinson against Mrs. E. O. Baird and another. Judgment for plaintiffs, and defendant Baird brings error. Affirmed.

J. M. Lang, for plaintiff in error. J. G. B. Erwin, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 375)

VENABLE v. YOUNG.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the court erred in admitting in evidence a written instrument over objection on the ground "that said note had been changed since the execution of the same" is an insufficient assignment of error, in that it fails to show the character or materiality of the change.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

2. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

The exception to the court's charge set forth in the second ground of the amended motion for a new trial is not argued or insisted upon in the brief of counsel for plaintiff in error, and is treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4258-4261; Dec. Dig. § 1078.*]

3. SALES (§ 479*)—CONDITIONAL SALES—RECOVERY OF PROPERTY BY SELLER—SURRENDER OF WRITTEN CONTRACT.

Where, as in the present case, the written obligation of the vendee to pay for the goods purchased, and the stipulation that the title to the property is to remain in the vendor until payment is made, are contained in the same instrument, it is not necessary that it should appear that the vendor offered to surrender up the writing which contained evidence of his title to the property before bringing suit in trover to recover the same. He should, however, be in possession of the writing at the time of the trial, or sufficiently account therefor. Moultrie Repair Co. v. Hill, 120 Ga. 732, 48 S. E. 143. And if the plaintiff elects to take judgment for the property and the hire thereof, the written instrument should be delivered up to the defendant, as the election to take the property amounts to a rescission of the contract, and after judgment in the case the plaintiff would have no further demand against the defendant under and by virtue of

such writing. Glisson v. Heggie, 105 Ga. 30, 31 S. E. 113.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

4. SALES (§ 479*)—CONDITIONAL SALES—RECOVERY OF PROPERTY BY SELLER—INSTRUCTIONS.

The plaintiff in the case having elected to take a verdict for the property and its hire, the court did not err in charging the jury as follows: "If you find that the plaintiff is entitled to recover he would be entitled to recover a reasonable hire for the mules from the time this suit was brought."

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

5. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. B. Young against Sam Venable. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter A. Sims, for plaintiff in error. R. J. Jordan, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 375)

HUCKABY v. ARCHER.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 309*)—EVICTION OF TENANT—INSTRUCTIONS—DOUBLE RENT.

On the trial of the issue made by a counter affidavit filed in resistance to an affidavit for warrant sued out to evict one as a tenant at sufferance, holding over after demand for possession of the property had been made and refused, it is the proper practice for the court, in the course of his charge to the jury relative to the amount of rent, if they should find in favor of the plaintiff, to instruct them that in case any rental value of the premises had been proved the plaintiff would be entitled to recover double such rental value, and allow the jury to fix and return the amount of the double rent in their verdict. But it is not ground for a new trial for the court, instead of thus instructing the jury, to charge them as follows: "Now, if you find for the plaintiff in this case, the form of your verdict will be: 'We, the jury, find for the plaintiff against the defendant the premises in dispute.' And if you find rent, you may find rent if any rental value has been proven, and if you find that the plaintiff is entitled to recover, under the evidence and law given you in charge, you would fix the amount of rent and say: 'And we further find the value of the premises for rent to be so many dollars per month.' This question of double rent is a matter, I think, for the judgment of the court. It is for the jury to find the facts in the case."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1317, 1318; Dec. Dig. § 309.*]

2. INSTRUCTIONS.

Except as pointed out above, the portions of the charge complained of in the motion for a new trial were not open to the criticisms made.

3. APPEAL AND ERROR (§ 302*)—REVIEW—ADMISSION OF EVIDENCE—OBJECTIONS.

A ground of a motion for a new trial based upon the admission of certain testimony does not raise any question for decision here, where it fails to show what objection, if any, was urged on the trial at the time such testimony was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

4. NEW TRIAL (§ 128*)—GROUNDS—INDEFINITENESS.

The motion for a new trial contained the following ground: "The court erred in admitting the evidence of the witness W. J. Harper that the condition of the bond for titles had not been complied with, over the objection of plaintiff's counsel, on the ground that it was introduced for the purpose only to show an adverse claim, and the witness was introduced for the sole purpose of proving the execution of the bond. His evidence could not have illustrated the question of possession as ruled by the court." This ground is so indefinite, confusing, and incomplete as to raise no question for determination. *Lay v. N. C. & St. L. Ry. Co.*, 131 Ga. 345, 62 S. E. 189; *Sparks Improvement Co. v. Jones*, 4 Ga. App. 61, 60 S. E. 810.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Chas. Huckaby and W. S. Archer, Jr. Huckaby brings error. Affirmed.

W. A. James, for plaintiff in error. Moore & Pomeroy, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 318)

PURTELL v. FARRIS.

FARRIS v. PURTELL.

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Assignments of error not referred to in the brief of counsel for the plaintiff in error will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. LANDLORD AND TENANT (§ 308*)—PROCEEDINGS TO EVICT TENANT—ADMISSIBILITY OF EVIDENCE.

In a proceeding to evict a tenant holding over under Civ. Code 1910, § 5385 et seq., it was not error to exclude from evidence the record of a proceeding in court between the same parties to evict the tenant for failure to pay rent, instituted before the end of the term, where it appeared that the tenant resisted the warrant for eviction and remained in possession until after the term.

(a) Nor was it error to exclude evidence as to the release of the tenant from the contract and the substitution of another under an ar-

rangement between the alleged substituted tenant, and the real estate agents having the property in charge for rent, in the absence of evidence of authority from the tenant on the one hand, and of the landlord on the other, to make such change.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.*]

3. LANDLORD AND TENANT (§§ 118, 119, 309*)—TERMINATION OF TENANCY—PROCEEDINGS TO RECOVER POSSESSION—DIRECTION OF VERDICT.

A tenant under a lease for a specified time is under duty at the expiration of his term to surrender possession to his landlord. If he fails to do so on demand, where there has been no laches by the landlord in making the demand, he does not merely by reason of his occupancy become a tenant by sufferance, nor does he become a tenant at will, where the landlord has not in any way recognized his right to continue in possession as a tenant.

(a) In a proceeding by a landlord to evict a tenant as one holding over, where the defendant resists the eviction by making a counter affidavit, denying the relation of landlord and tenant, and the uncontradicted evidence shows that the tenant entered under a contract for a specified time, and at once after the expiration of the term continued in possession over the objection of the landlord, and there was no evidence tending to show that the tenancy was one by sufferance or one at will, there was no error in directing a verdict in favor of the plaintiff under the statute for an amount equal to double the stipulated rent for the time the defendant continued in possession beyond the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 410, 429; Dec. Dig. §§ 118, 119, 309.*]

4. APPEAL AND ERROR (§ 1103*)—DISMISSAL OF CROSS-BILL—AFFIRMANCE ON MAIN BILL.

The judgment on the main bill of exceptions being affirmed, the cross-bill of exceptions is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4383; Dec. Dig. § 1103.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceedings by E. B. Farris, as agent of the J. L. Winter estate, to evict Mrs. S. J. Purtell from leased premises. From the judgment, both parties bring error. Affirmed on direct bill of exceptions, and the cross-bill of exceptions dismissed.

J. F. Golightly and J. B. Suttles, for plaintiff in error. Mayson & Johnson, for defendant in error.

ATKINSON, J. On the 1st of September, 1908, E. B. Farris made affidavit that he was agent "of J. L. Winter estate," and that Mrs. Sarah Purtell as tenant of his principal was in possession of a described house and lot, holding the same over beyond the term for which it was rented, and that the owner, desiring possession, had demanded it and the demand had been refused by the tenant. The purpose of the affidavit was to obtain a warrant under the Civil Code, § 5385 et seq., for the removal of the tenant. A warrant was issued by the justice of the peace, and notice was served upon Mrs. Purtell personally to

vacate within three days. On the 4th of September Mrs. Purtell made a counter affidavit, reciting the former affidavit, and declaring that "she does not hold the premises from said E. D. Farris, agent for said Winter, either by lease or rent, at will or sufferance, or otherwise from the person who made the affidavit on which the warrant issued, or from any one under whom he claims the premises, or from any one claiming the premises under him. She further swears that her daughter, Arian Purtell, is tenant of said premises, and the term for which her daughter Arian Purtell rented said premises has not expired." Contemporaneously with the execution of such affidavit, Mrs. Purtell, as principal, with a named security, executed a bond whereby they acknowledged themselves jointly and severally bound to J. L. Winter estate, subject to the following conditions: "Whereas said J. D. Farris, agent as aforesaid, has made affidavit * * * to evict said S. J. Purtell from certain real estate in said county, to wit, the house and lot known as 368 Peachtree street, city of Atlanta, and said S. J. Purtell has filed her counter affidavit in terms of the law: Now should the said S. J. Purtell pay the said J. L. Winter estate such sum with cost as may be recovered against her on the trial of the case, then this bond to be void, otherwise of force." The respective affidavits and bond above mentioned were returned to the superior court, and the issue thus made was tried. Evidence was introduced in behalf of both parties. Upon direction of the judge the jury returned a verdict finding "for plaintiff on within warrant against defendant Mrs. S. J. Purtell, and that Mrs. Purtell held over for the period of two months after expiration of the term of lease, and that plaintiff recover of Mrs. S. J. Purtell the sum of \$340 and costs of suit." Mrs. Purtell by direct bill of exceptions assigned error upon this judgment and certain antecedent rulings of the judge made at the trial. The plaintiff filed a cross-bill of exceptions in which the assignments of error related solely to rulings of the court excluding evidence offered by the plaintiff.

[1] 1. One assignment of error complained of the refusal of the judge to dismiss the dispossessory warrant on the ground that the "Winter estate" was not any person authorized to sue out a dispossessory warrant, and that the warrant was void for uncertainty and for proper parties. In the brief of counsel for plaintiff in error there is no reference to this assignment of error, and under the repeated rulings of this court the assignment will be considered as abandoned.

[2] 2. The plaintiff introduced in evidence the contract under which Mrs. Purtell entered. It was executed in duplicate between "Saunders & Morris, Agents of Est. Mrs. L. S. Winter, of the first part, and Mrs. S. J. Purtell, of the other part," and was signed: "Saunders & Morris, Agents. [Seal.] Mrs. S. J. Purtell. [Seal.]" It described the

premises, and set forth the terms of the lease as being "one year, four months, and twenty days, commencing on the tenth (10) day of April, 1907, and ended on the 31st day of August, 1908," and specified the rent to be \$85 per month in advance. It was also provided that, on failure to pay rent promptly when due, Saunders & Morris, agents, should have the right at their option to declare the lease void, "cancel the same, and take possession of the premises." It was also stipulated that Mrs. Purtell should repair at her own expense any damage to water pipes caused by freezing or any neglect on her part, and to pay the water rent on said premises, and not to sublet the premises or any part thereof without the written consent of said "Saunders & Morris, Agents," and, further, that no "light housekeeping" should be done in the premises; also, that she should deliver the possession of the premises at the expiration of the lease in as good order and repair as when first received, natural wear and tear excepted. Saunders & Morris, agents, stipulated that, should the premises be destroyed or damaged by fire so as to be untenable, the lease should cease from the date of the fire, but reserved the privilege of "carding" the house for rent or sale at any time within 30 days from the expiration of the lease. Other evidence was introduced, to the effect that S. B. Turman & Co. became successors to Saunders & Morris as real estate agents for the Winter estate in renting this property, and on the 1st day of September, 1908, being the day following the date specified in the lease as the end of the term for which the property was rented, they caused Farris, one of their representatives, to demand of Mrs. Purtell possession of the property, which was refused, and he on the same date swore out the warrant to evict her as a tenant holding over. The owners of the property consisted of the six heirs of the deceased Mrs. Winter. They had authorized Saunders & Morris to execute the lease in question, but had never authorized them to change it or to lease the property to any one else. The owners themselves did not agree for Miss Purtell to be substituted as a tenant in lieu of her mother, nor authorize the real estate agents to do so for them. After possession had been demanded by Farris, as agent for the landlord, Mrs. Purtell and her daughter, who lived with her, continued to occupy the house until the end of October, making two months. After evidence to the above effect had been introduced, the defendant tendered in evidence the record of another dispossessory proceeding instituted March 20, 1908, by the heirs of Mrs. Winter against Mrs. Purtell, based on the ground that the tenant had failed to pay rent, the counter affidavit setting up certain expenses which Mrs. Purtell had incurred in order to keep the building in a tenable condition, and in which proceeding a verdict was rendered in favor of Mrs. Purtell.

On the date of the trial of the case at bar the defendant also offered the testimony of Miss Arian Purtell, her daughter, to the effect that, after the dispossessory warrant proceeding was instituted in March, the witness informed Saunders & Sparks (successors to Saunders & Morris) that her mother would not be humiliated in that way, and that they might take the house, but that, if she and her mother remained in the house, she should be the tenant, and not the mother; and that after having so stated to them that she and not her mother paid the rent to the agents, who received it and recognized her as "our new tenant." The court upon objection excluded all of the evidence so tendered by the defendant, and other evidence of similar import offered by the defendant, and error was assigned upon these rulings. The contract upon its face appears to be between Mrs. Purtell of the one part and Saunders & Morris of the other, rather than between Mrs. Purtell and the owners of the property; but such pleadings as were before the court seem to concede that it was a contract between Mrs. Purtell and owners of the property, and uncontradicted evidence was admitted, without objection, showing that it was made by authority of the owners of the property, and afterwards adopted by them. The fact that the owners of the property through their agents sought in March to evict Mrs. Purtell for nonpayment of rent would be no defense to the present suit to evict her as a tenant holding over after her term had expired, the tenant having remained in possession and resisted the eviction for nonpayment of rent by filing and sustaining her counter affidavit. It would be otherwise if the proceedings were one to evict because of nonpayment of the same rent. In that event, the judgment in the former proceeding would have been *res adjudicata*. But not so in this proceeding to evict as a tenant holding over and beyond the term for which the property was rented. Therefore the judge committed no error in excluding from evidence the record of the former proceeding; nor was it error to exclude the testimony of Miss Purtell as to the substitution of tenants in March and April next preceding October 31st, the time specified for the termination of the lease. It was not shown that she had authority from her mother to make the substitution; nor was it shown that the real estate agents had authority from the landlord to make the substitution. On the contrary, the evidence affirmatively showed that there was no such authority upon the part of the landlord.

[3] 3. Under the undisputed evidence, Mrs. Purtell and her daughter continued to occupy the house for two months after the term had expired and possession had been demanded. The stipulated rent was \$85 per month. The defendant offered evidence tending to show that the value for rent was not more than \$50 per month, contending that the ten-

ancy, if it existed at all, was a tenancy at will or a tenancy by sufferance; and that, if double rent should be found against her under the statute, it should be based upon the value of the premises for rent, and not upon the amount stipulated in the contract. Civ. Code, § 5389. The judge excluded this evidence, and directed a verdict in favor of the plaintiff for \$340, being double the stipulated rent for two months. Error was assigned upon these rulings. As we have seen, the defendant entered possession lawfully under a contract for a specified time. By the terms of the contract the tenant stipulated to surrender possession at the end of the term. Had there been no such stipulation, it would have been the duty of the tenant to surrender possession when demanded at the end of the term. 2 *Taylor's Landlord & Tenant* (8th Ed.) § 524. Possession was demanded by the landlord as soon as could be under the terms of the contract. There was no demand for further rent or conduct upon the part of the landlord from which consent might be inferred that the tenant should continue longer in possession of the premises, and under no theory could it be said that the tenancy was a tenancy at will. There was no laches or negligence of any kind upon the part of the landlord in demanding possession, nor any circumstances from which an inference might be drawn that the landlord suffered the tenant to remain in possession. When a tenancy is one at will or one by sufferance, and how a tenancy by sufferance may be converted into a tenancy at will, is elaborately discussed in *Harrell v. Willis*, 118 Ga. 906, 45 S. E. 794. The tenancy in that case was held to be one by sufferance. The report of the case does not show the fact, but the original record discloses that the term of the tenant expired December 31, 1892, and nothing was done toward evicting him, but he was suffered to remain in possession unmolested until proceedings were instituted in 1902. Thus laches upon the part of the landlord entered into the case. Under the reasoning of that case, the tenancy now under consideration was not one by sufferance. Somewhat similar to this case is *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159, where there was a delay of three months in making demand after the term had expired. In *Moore v. Morrow*, 28 Cal. 551, it was said: "A tenant under a lease for a term does not become a tenant by sufferance upon the expiration of his lease, and is only made such by the laches of the landlord in not re-entering or in not giving him notice to quit." In *Alpine Township School District v. Aloys Batche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576 (2), it was said: "A teacher lawfully in possession of the schoolhouse, who holds over without right, becomes a tenant at sufferance if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was

not that of a tenant; and a consent to the occupancy, either express or presumed from lapse of time, is not essential to create that relation." On the general subject, see 1 Underhill on Landlord & Tenant, §§ 162-164; Ives v. Williams, 50 Mich. 100, 15 N. W. 33; 1 Tiffany on Landlord & Tenant, §§ 15, 16; Jones on Landlord & Tenant, § 230. The character of tenancy being neither that of a tenant at will nor of a tenant by sufferance, there was no error in excluding evidence bearing upon the measure of damages applicable to cases of that character; and there being no issue as to the amount of stipulated rent, and the evidence being uncontradicted that the defendant remained in possession for two months immediately after the expiration of the term, and after demand for possession by the plaintiff, the judge did not err in directing the verdict.

[4] 4. None of the assignments of error are sufficient to cause the judgment to be reversed. As the judgment on the main bill of exceptions is affirmed, the cross-bill is dismissed.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 331)

ALBANY & N. RY. CO. v. MERCHANTS' & FARMERS' BANK.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 180*)—CARRIAGE OF GOODS—BILL OF LADING—CONSTRUCTION.

A contract of carriage of certain cotton received by the A. & N. Ry. Co., at Warwick, Ga., a station on the defendant's line of railroad, "consigned to O/N [order notify] E. L. Harper, Savannah, Ga., via Cordele compress," was a through bill of lading, and bound the railroad to deliver the cotton at Savannah, Ga., the destination mentioned in the bill of lading, notwithstanding a stipulation in the bill of lading that "this company shall not be responsible as common carriers of said property beyond its line of road"; it not appearing that the shipper of the cotton had expressly assented to the stipulation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 180.*]

2. CARRIERS (§ 94*) — CARRIAGE OF GOODS—ACTION FOR BREACH OF CONTRACT—VENUE.

The suit in this case was one ex contractu; and for a breach of the contract the plaintiff was entitled to sue for damages arising therefrom in the county where the contract was executed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.*]

3. CARRIERS (§ 56*)—CARRIAGE OF GOODS—ACTION FOR BREACH OF CONTRACT—DIRECTION OF VERDICT.

As a general rule, no demand is necessary to the commencement of an action founded on a breach of contract. And where a so-called demand for cotton was made by the transferee of an "order notify" bill of lading of a railroad company (which thereby agreed to transport certain cotton from and to named points within the state), before it was indorsed by the one having the legal title thereto, such demand

cannot be the basis for the ascertainment of the damages for a breach of the contract of carriage.

(a) And the direction of a verdict by the trial judge in favor of the plaintiff on the basis of a suit brought by the transferee to recover damages and interest from date of demand for failure to deliver cotton by virtue of the terms of the contract contained in the bill of lading before its indorsement is reversible error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 168; Dec. Dig. § 56.*]

4. CUSTOMS AND USAGES (§ 17*)—APPLICATION AND OPERATION—EXPLANATION OF CONTRACT.

Parol testimony is not admissible on the trial of a case brought to recover damages growing out of an alleged breach of contract for failure to deliver cotton at the point of destination named in the bill of lading to prove a custom of stopping cotton short of the point of destination for purposes at variance with the plain, unambiguous terms of the contract of carriage.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 84; Dec. Dig. § 17.* Evidence, Cent. Dig. §§ 1945-1952.]

5. CARRIERS (§ 94*) — CARRIAGE OF GOODS—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where a common carrier fails to deliver goods according to the terms of the contract, the measure of damages is the value of the goods at the time and place at which it is agreed to deliver them, less the transportation charges.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.*]

Error from Superior Court, Worth County; Frank Park, Judge.

Action by the Merchants' & Farmers' Bank against the Albany & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The Merchants' & Farmers' Bank, a banking corporation organized under the laws of Georgia and doing business at Cordele, Ga., filed its petition in Worth superior court against the Albany & Northern Railway Company, a railroad corporation operating a line of railroad through the town of Warwick in the county of Worth, and being a common carrier, and alleged the following facts: That the contracts herein set forth were made in Worth county; that the Albany & Northern Railway Company (hereinafter called the defendant) damaged the Merchants' & Farmers' Bank (hereinafter called the plaintiff) in the sum of \$5,000 by reason of breaches of contract as hereinafter set out; that on or about the 8th day of September, 1904, the defendant contracted with one John F. Wise, in the county of Worth, for the consideration of 41½ cents per 100 pounds, which the said Wise contracted to pay, that the defendant would carry or cause to be carried from the town of Warwick to the city of Savannah, in the state of Georgia, three bales of cotton, and would deliver the same or cause the same to

be delivered in the city of Savannah to the said Wise, or to any person to whom the said Wise should transfer, indorse, assign, or deliver the bill of lading or receipt issued him by the defendant for said cotton only upon the production and surrender of said receipt or bill of lading. It was further alleged that the defendant for the same consideration per 100 pounds above expressed agreed to carry 40 other bales of cotton from Warwick to the city of Savannah and deliver said cotton to said Wise or to any person to whom said Wise should transfer, assign, indorse, or deliver the receipt or bill of lading as above set forth with reference to the three bales of cotton; that said Wise delivered the 43 bales of cotton to the defendant at the town of Warwick, a station upon defendant's line of railroad, and defendant received and accepted the cotton to be carried and delivered in accordance with its contracts; that defendant issued to said Wise receipts and bills of lading for the cotton; that afterwards the receipts and bills of lading were transferred and assigned to the Merchants' & Farmers' Bank, the plaintiff in this case, in pledge, as security, for the sum of \$5,000, which the plaintiff advanced to one E. L. Harper, to whom the said Wise had agreed to sell the cotton for cash upon delivery of the cotton; that this sum was advanced by the plaintiff upon agreement between the plaintiff and Harper that the right and title to the cotton should be held by the plaintiff as security for said sum; that no part of the sum advanced, or the interest thereon, has been paid to the plaintiff; that the defendant had violated its contract by failing to carry and deliver the cotton as provided by the contract, although the plaintiff had tendered the bills of lading properly indorsed, and said cotton has been entirely lost to the plaintiff; that the value of the cotton at the time it was so lost was more than the amount of the sum advanced by the plaintiff, to wit, \$5,000. The bills of lading were the same, except that one was for three and the other for forty bales of cotton. A copy of only one, therefore, follows: "Bill of Lading for Forty Bales. Albany & Northern Railway, Warwick, Georgia, Station 9/8, 1904. Received from John F. Wise the following property in apparent good order (or condition noted), contents and value unknown, to be transported over the road and delivered in like manner to consignees or the next company or carriers (if the same is going beyond its line of road) for them to deliver to the place of destination of said property, it being distinctly understood that this company shall not be responsible as common carriers of said property beyond its line of road or while at any of its stations awaiting delivery to such carriers—the company being liable as warehousemen only. Subject to all the conditions embraced in the company's bill of lading, for which re-

ceipt should be exchanged. Consigned to O/N E. L. Harper, Savannah, Ga. Via Car Cordele, Compress. Charges advanced, \$——. Marks and numbers, D-91 to 100 inc. E-1 to 30 inc. Articles 40 B/C. Weights subject to correction 21454. J. R. Davis for the Company." This bill of lading was indorsed by E. L. Harper on September, 1904, and by John F. Wise on September 6, 1906. The defendant by its answer admitted that it received the cotton sued for and issued its bills of lading therefor upon the terms and conditions set out in the contract. It averred that it had fully kept and carried out every obligation assumed by it in connection with said cotton. All the other material allegations of the petition were denied. Under the evidence submitted to the jury, the presiding judge directed a verdict in favor of the plaintiffs, upon which judgment was duly entered against the defendant. The Albany & Northern Railway Company filed its motion for a new trial, which was overruled, and the defendant excepted.

F. A. Hooper, J. H. Tipton, and Pope & Bennet, for plaintiff in error. Jno. R. L. Smith, J. T. Hill, and T. R. Perry, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The decision of this case centers in the determination of the following questions made by the record: (1) Were the bills of lading in this case through bills of lading? (a) Is this a suit *ex contractu*; and, if so, has the court of the county where the contract was made jurisdiction to try the suit filed for the alleged breach of the contract? (b) Was the demand at Cordele such as that a failure to produce the cotton at that point at the time of the first demand constituted a breach of the contract and a basis for recovery of damages for the breach of the contract, with interest from that date? (c) Was Cordele or Savannah the proper place to make the demand, and delivery of the cotton? (d) Can the contract of carriage be varied by parol testimony to prove a custom to stop cotton at Cordele (which was billed to Savannah) for the purposes of compression, sale, etc.? (e) What is the measure of damages for breach of a contract consisting of failure to deliver cotton at point of destination?

The allegations in the plaintiff's petition were, and the evidence showed, that one John F. Wise tendered 43 bales of cotton at Warwick, in Worth county, to defendant's line of railroad to be transported to Savannah, Ga., consigned to "order notify" E. L. Harper, "via Cordele Compress," and that the cotton was received by the defendant and a receipt or bill of lading given therefor, which bill of lading is set out in the facts above recited. By the terms of the bill of lading or contract, the cotton was "to be transported over the road and delivered in like manner to consignees or the

next company or carriers (if the same is going beyond its line of road) for them to deliver to the place of destination of said property, it being distinctly understood that this company shall not be responsible as common carriers of said property beyond its line of road or while at any of its stations awaiting delivery to such carriers—the company being liable as warehousemen only. Subject to all the conditions embraced in the company's bill of lading for which receipt should be exchanged. Consigned to O/N E. L. Harper, Savannah, Ga. Via Cordele Compress," etc. We hold that the above contract of carriage was a through bill of lading, by which the carrier was bound to deliver the cotton at Savannah, the point of destination named, notwithstanding the stipulation in the bill of lading itself that the carrier would not be responsible beyond its own line of railroad. Civ. Code 1910, § 2728. This court has held in the case of Atlantic Coast Line R. Co. v. Henderson, 131 Ga. 75, 81, 61 S. E. 1111, and in numerous other cases, that a carrier might by contract limit its liability to its own line of road, but it could not do so by a mere stipulation in the bill of lading, unless the latter was expressly assented to by the shipper. See, also, Central R. Co. v. Hasselkus, 91 Ga. 382, 390, 17 S. E. 838, 44 Am. St. Rep. 37. As no such express contract appears in this case between the plaintiff and the defendant, but, instead, a mere stipulation in the bill of lading that the defendant will not be responsible beyond its own line, the defendant would be liable in damages if it be shown that it has failed to deliver the cotton at the point of destination in good order.

[2] 2. This is a suit *ex contractu* growing out of the above contract or through bill of lading and the alleged breach thereof. The contract was executed at Warwick, in Worth county, and the plaintiff brought suit in Worth superior court. It is insisted before this court that the superior court of Worth county did not have jurisdiction to try the case. The court of the county where such a contract as the above was executed has jurisdiction, and the plaintiff had the option of waiving the tort and suing *ex contractu*. *Friedman v. Seaboard Air Line Ry.*, 124 Ga. 472, 52 S. E. 763; *Bates v. Bigby*, 123 Ga. 728, 729, 51 S. E. 717; *Central R. Co. v. Brunson*, 63 Ga. 504; Civ. Code 1910, § 2798.

[3] 3. The demands for the cotton were made at Cordele; the first in October, 1904, the latter on September 18, 1907. At the time of the first demand the bill of lading for the 40 bales of cotton was not indorsed by Mr. Wise, the consignor. Plaintiff's first demand, therefore, was not good as to the 40 bales of cotton until the bill of lading had been properly indorsed so as to put the legal title in the plaintiff. In order to entitle the plaintiff to sue, it must have had the bill of lading properly indorsed, so as

to give it the legal title thereto, and the consequent right to sue as the indorsee or assignee of the bill of lading for any breach of the contract. It follows, therefore, that the verdict directed for the plaintiff on the basis of the first demand for the cotton at Cordele in October, 1904, before the bill of lading was properly indorsed, was reversible error. The plaintiff had no right at that time to make demand, much less to sue in its own right, for the 40 bales of cotton. *Haas v. Kansas City, etc., R. Co.*, 81 Ga. 792, 7 S. E. 629. The contract specified that the cotton should be delivered at Savannah, and we hold that it should have been delivered there. There are authorities to the effect that under certain circumstances, where a refusal by one party to a contract to comply with it on demand of the other party is based on a specified ground, after suit upon the contract, he will not be allowed to "amend his hold" and set up other grounds why he might have refused, thus taking advantage of the other contracting party, who might have removed such grounds at the time had they been made. But this is different from the case of a person who has no title to a chose in action at the time he makes a demand, but subsequently acquires it. If he was not authorized to sue for a breach of the contract at all at the time of the demand, but subsequently became the transferee of it, his right to sue, thus acquired, would not date back so as to authorize him to recover as of the date of the demand so made, with interest therefrom. It is to be noted that this is not a suit by the bank in trover, or in tort as pledgee, but is an action based on the contract; and that, whatever may have been its rights with respect to the cotton as security for the draft held by it, it was not the transferee of the bill of lading, and therefore was not entitled to sue for a breach of it until such transfer or indorsement of it was made.

It is also insisted that the failure of the defendant railroad company's agent at Cordele to deliver the cotton on demand was not based on the failure of the plaintiff to deliver the bill of lading properly indorsed or assigned, but solely on the ground that he did not have the cotton. Whatever the ground upon which the first refusal to deliver the cotton was based, the agent was certainly within his rights and those of the carrier in refusing to deliver the cotton to the plaintiff as the transferee until the bills of lading were properly indorsed. He may have given the wrong reason, but the right conclusion, so far as the 40 bales are concerned. This applies, of course, to the refusal of the first demand for the 40 bales of cotton, upon which the directed verdict was predicated.

In discussing the question of demand for the cotton in this case, it is not to be understood that we hold that a demand is necessary in cases of breach of contract and suit for damages therefor. The general rule is

that no demand is necessary to the commencement of an action for a breach of contract, and the exception in such cases is where the law or the contract so prescribes. Civ. Code 1910, § 5512. We have been dealing here with the question of demand solely in connection with the direction of the verdict by the court on the basis of the first demand for the cotton at Cordele, when the bill of lading had not been properly indorsed, and with the measure of damages in connection therewith.

[4] 4. The custom of the trade insisted upon refers to the custom "at destination." Civ. Code 1910, § 2730; Ga. & Ala. Ry. Co. v. Pound, 111 Ga. 6, 36 S. E. 312. And this is so notwithstanding a custom to stop cotton billed to Savannah at Cordele for compression, etc. Parol evidence of usage and custom to vary the terms of a plain, unambiguous written contract is not admissible. If the bill of lading constituted a through contract of carriage, its efficiency could not be destroyed by parol testimony, or by a custom in conflict with the contract. Civ. Code 1910, § 5788; Park v. Piedmont, etc., Ins. Co., 48 Ga. 601; Merchants' Bank v. Demere, 92 Ga. 735, 740, 19 S. E. 38; W. & A. R. Co. v. Ohio, etc., Co., 107 Ga. 512, 33 S. E. 821.

[5] 5. What is the measure of damages in this case? In directing the verdict for the plaintiff, the court made the demand at Cordele and the delivery of the cotton there on that date (October, 1904) the basis of the verdict directed. We do not think that the value of the cotton at Cordele on the date of the first demand at that place was the correct measure of damages in this case. As the bill of lading specified that the cotton should be delivered at Savannah, we think the measure of damages which the plaintiff is entitled to recover, if at all, is the value of the cotton at the time and place of delivery, less the freight, if it has not been paid. The general rule as to the measure of damages is that, if a common carrier fails to deliver goods according to contract, it is liable for the value of the goods at the time and place at which it engaged to deliver them. Cooper v. Young, 22 Ga. 271, 68 Am. Dec. 502, and citations; Taylor v. Collier, 26 Ga. 122, 126; Rome R. Co. v. Sloan, 39 Ga. 641; Atlantic Coast Line R. Co. v. Howard Supply Co., 125 Ga. 478, 482, 54 S. E. 530. Cordele was neither the initial shipping point nor the terminus specified in the bill of lading at which the delivery of the cotton was to be made. In the case of Rome R. Co. v. Sloan, supra, there was proof of the value of the cotton at Rome, the initial point, and the trial judge in that case had charged the jury that "the measure of damages is the value of the cotton at the time and place of its destination, or at any place from the point of shipment to the place of delivery, plus interest." This court in reviewing the above as an assign-

ment of error held that this charge was inaccurate, but harmless error under the facts in that case, and the finding of the jury was allowed to stand. Without entering into a discussion of the basis on which the above ruling was made, it is perhaps sufficient to say that in the present case the verdict was directed by the presiding judge on the basis of the value of the cotton at Cordele, which was an intermediate point of shipment. No error appears in any of the other grounds of the motion for a new trial.

Judgment reversed. All the Justices concur.

(187 Ga. 308)

THOMPSON v. HILL

(Supreme Court of Georgia. Jan. 9, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 111*)—VALIDITY—DESCRIPTION OF PROPERTY.

If the land intended to be granted appears clearly and satisfactorily from any part of the description in a deed, and other circumstances of description are mentioned which are not applicable to that land, the grant will not be defeated, but those circumstances will be rejected as false or mistaken.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-335; Dec. Dig. § 111.*]

2. COVENANTS (§ 47*)—PERFORMANCE OR BREACH—WARRANTY.

A deed to a parcel of land in a town described the land conveyed clearly by fixing its corner with reference to the distance from the intersection of the two streets, bounding the land on two sides by parallel streets, stating the distance between them and the number of feet which the land fronted on them. There was not in that immediate connection any mention of lot numbers. The deed then, in another paragraph, described other land conveyed, in connection with which and seemingly as a part of the description of which was added: "And being lots 66 and 75 of the J. B. Thompson property, as per plat No. 2, exhibited at auction sale thereof by Samuel W. Goode & Co., June 23, 1887." The land first described covered lots numbered 65, 66, 75, and 76. From the map contained in the record it did not appear what were the numbers of the second described parcel. The land was conveyed by one who inherited under the grantee to a purchaser, who took possession. A month after making the first deed, the original grantor made a warranty deed to another, describing the land so as to convey one-half of that covered by the first description in the other deed, "being lots Nos. 66 and 75" as per the Goode & Co. plat. There was no effort to reform the first deed. The second grantee brought suit against the holder under the first deed to recover the land described in the second deed, but failed to recover. He then sued the grantor on his warranty. Held, that he was entitled to recover.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 47.*]

3. EVIDENCE (§§ 433, 460*)—PAROL EVIDENCE AFFECTING WRITINGS—IDENTITY OF PROPERTY CONVEYED.

Parol evidence is admissible to adjust the description in a deed to the land conveyed; but if a deed conveys certain land, in the absence of any effort to have it reformed, its effect cannot be controlled by parol evidence

that there was a mistake in the description, whereby more land was included than was intended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990–2004, 2115–2128; Dec. Dig. §§ 433, 460.*]

(Additional Syllabus by Editorial Staff.)

4. BOUNDARIES (§ 5*)—"MONUMENT."

Monuments are permanent landmarks established for the purpose of indicating boundaries.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 44–48; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 5, p. 4576.]

5. WORDS AND PHRASES—"PLAT."

A plat is a representation of land on paper, appealing to the eye by means of lines and memoranda rather than by words.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5403.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. A. Hill against J. B. Thompson. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Gober & Griffin and Bell & Ellis, for defendant in error.

LUMPKIN, J. R. A. Hill sued J. B. Thompson for breach of warranty. It appeared that the defendant had a tract of land surveyed into lots, and had a sale thereof. On June 23, 1887, he executed to Y. H. Thompson a deed, which was recorded on September 1, 1887. The recited consideration was \$171. The description of the land conveyed was as follows: "All that tract or parcel of land situated, lying and being in the town of Austell, Georgia, and being part of land lot 140 in the eighteenth district of Cobb county, Georgia, commencing at a point on Hotel street two hundred and eight (208) feet from the southeast corner of Hotel and Central streets; thence east two hundred and twenty-three (223) feet to Pine street; thence south along Pine street one hundred and four (104) feet; thence west two hundred and twenty-three (223) feet to Hotel street; thence along said street one hundred and four (104) feet to the beginning. Also beginning at a point forty-nine (49) feet from the southwest corner of Thompson avenue and Central streets; thence west two hundred and twenty-nine and one-half (229½) feet to a twenty foot alley; thence south along said twenty foot alley ninety-eight (98) feet; thence east two hundred and twenty-eight (228) feet to Thompson avenue; being lots numbered 65, 76, 124 and 125 of the J. B. Thompson property, as per plat No. 2 exhibited at auction sale of same by Sam W. Goode & Company on June 23, 1887." On July 22d the same grantor executed to the present plaintiff a deed, which was recorded on October 9th. It recited a consideration of \$70, and described the land con-

veyed as follows: "All that tract or parcel of land lying and being in the town of Austell, Georgia, and being part of land lot 140 in the eighteenth district of Cobb county, Georgia, and more particularly described as follows: to wit: Commencing at a point on Hotel street two hundred and sixty (260) feet from the southeast corner of Hotel and Central streets; thence east two hundred and twenty-three (223) feet to Pine street; thence south along Pine street fifty-two (52) feet; thence west two hundred and twenty-three (223) feet to Hotel street; thence north along said Hotel street fifty-two (52) feet to the point of beginning; and being lots Nos. 66 and 75 of the J. B. Thompson property, as per plat No. 2 exhibited at auction sale thereof by Samuel W. Goode & Co., June 23rd, 1887."

Y. H. Thompson died, and one who inherited the property conveyed the land described in the first deed set out above to one Tom Jones. The latter took possession. Hill, the grantee in the second deed, brought suit in 1903 to recover the land described in his deed. A verdict and judgment went against him in 1905. In 1908 he brought suit against his grantor, alleging a breach of warranty. On the trial the court directed a verdict in favor of the plaintiff. The defendant excepted.

[1] 1. It was an ancient maxim that the first deed and the last will prevails. Shep. Touch. 88. This principle was applied to inconsistent clauses in the same instrument; so that the former of such clauses prevailed in case of a deed, the latter in case of a will. The trend of modern authorities is toward restricting the operation of this rule, so as to give effect to every part of a deed if possible; and, if this cannot be done, and there is an obvious intent derivable from the face of the instrument, the tendency is to reject only superadded parts which are repugnant thereto, if it can be done without violating some rule of law. In this state the rule as to repugnant clauses has been codified in section 4187 of the Code of 1910 thus: "If two clauses in a deed be utterly inconsistent, the former must prevail; but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect." Out of this disposition to give effect to an instrument, where practicable, doubtless arose the maxim, "Falsa demonstratio non nocet cum de corpore constat" (mere false description does not vitiate, if there be sufficient certainty as to the object). Characteristic cases within the rule, as strictly applied, were those where the description, so far as it was false, applied to no subject, and, so far as it was true, applied only to one subject. But in pursuance of the current of modern authority above mentioned it has become settled law that if the thing intended to be granted ap-

appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as false or mistaken, although it would be possible to apply them to a subject-matter so as to enlarge or diminish the grant. In seeking to determine whether a deed shows on its face what was the thing so intended to be granted, and whether there are other circumstances of description which may be rejected as false or mistaken, certain general rules have been evolved, under which ordinarily certain matters of description will outweigh or prevail over others. A few of these may be mentioned. What is most material and most certain in a description shall prevail over that which is less material and less certain. Thus courses and distances yield to natural, visible, and ascertained objects. Accordingly, when in the description of land in a deed known monuments are referred to as boundaries, they must usually govern, although neither courses nor distances nor the computed contents correspond therewith. Natural monuments have greater weight than artificial ones. Where all other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee. Tyler on Boundaries, 119, 120; Harris v. Hull, 70 Ga. 831. In the law of processioning, the Civil Code 1910, § 3820, declares that: "In all cases of disputed lines, * * * natural landmarks, being less liable to change, and not capable of counterfeit shall be the most conclusive evidence; ancient or genuine landmarks, such as corner station or marked trees, shall control the course and distances called for by the survey." This accords with the method of construing deeds above mentioned. The rule in regard to monuments is not a mere arbitrary dictum, but is founded on reason and experience. As grants and conveyances are usually made with reference to an actual view of the premises, this is treated as presumptively the case. Monuments are considered stable and certain. They are visible things, existing on the ground, indicating the extent of the land and the direction of its boundaries. Those who examine the ground can see the monuments indicating the direction of its lines and the extent of its contents. Courses and distances laid down in the deed or plat, or in field notes, are merely descriptive of the land as it is. Hence, if the deed describes the land by monuments, this will control calls for courses and distances descriptive of the same property. As natural monuments are likely to be more permanent and notorious in character than artificial monuments erected by an owner, recourse is had to the former rather than to the latter in case of conflict.

[4] As an illustration of the application of these rules, where there was a grant of an island by name in the Potomac river, and there were superadded the courses and distances of the lines, which were found to exclude part of the island, the whole island passed. It was deemed the substantial purpose to grant the island, and that the description of it was superadded. *Lodge's Lessee v. Lee*, 6 Cranch, 237, 3 L. Ed. 210. Where there was a lease of a farm on which J. B. now resides, "to contain eighty acres in one piece," and the farm actually contained more than eighty acres, the lease was held to cover the whole. *Jackson v. Barringer*, 15 Johns. (N. Y.) 471. Where a tract of land was first described as "being the same premises conveyed" to the grantor by a certain deed, and then there was an effort to give the metes and bounds, but they omitted a part of the premises first declared to be conveyed by the deed, it was held that the whole tract passed. *Foss v. Crisp*, 20 Pick. (Mass.) 121. On the other hand, where land had been laid off by a government survey into land lots, and a deed conveyed several of the land lots by number except 50 acres in the southeast corner of one of them), and added "known as the Wooldridge plantation," those words were treated as matter of further description, and not as limiting the land granted, though the lots named covered more than the "Wooldridge plantation." *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212. Where a deed conveys a lot of land expressly with reference to a plat, the courses, distances, and monuments appearing on the plat are to be considered in ascertaining the description of the land and the intent of the parties as if they had been expressly enumerated in the deed. *Schreck v. Blum*, 131 Ga. 489, 62 S. E. 705; *Aiken v. Wallace*, 134 Ga. 873, 876, 68 S. E. 937. Where a lot is conveyed according to its number in a certain plan or plat, so that it is evident that the important thing under consideration in the grant is the particular lot, and there is superadded to this a description which does not include the entire lot, it has been held that the erroneous description will yield to the conveyance by number; and it has also been said that this would be true whether the number immediately preceded the description or vice versa, if it were evident from the deed that the lot known by number was the important or certain thing in the conveyance. In *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104, the language conveying the premises was as follows: "Lot No. 3, in block 87, in the old town of Hudson, now Macon; beginning at the northeast corner, thence west to the alley, thence south eighteen feet, thence east the length of the lot, thence north eighteen feet to the beginning." This description embraced a less area than lot 3. It was held that the entire lot passed. The statement that the designation of the

number of the lot had the same effect as that of a fixed monument evidently meant that the deed showed that the main purpose was to convey the whole lot, and that an erroneous description, including less than the whole, would yield to the designation of the lot as a whole. It was, moreover, added that this would not be the case, if the deed showed a contrary intent. Strictly speaking, monuments are permanent landmarks established for the purpose of indicating boundaries. Bouvier's Law Dict. "Monuments." A plat is not a mark on the land, but a representation of the land on paper; appealing to the eye by means of lines and memoranda, rather than by words alone. The same remark may be made of some other cases in which is used similar language to that employed in the case last cited, or where there is a bald statement that lot numbers will prevail over a description by metes and bounds, as if it were an arbitrary and inflexible rule.

In a note to *Heaton v. Hodges*, 30 Am. Dec. 781, 740, that excellent annotator, Mr. A. C. Freeman, says: "There is no magic in a monument which will give it invariable control in such cases. It controls only because it is regarded as more certain than a given course or distance. If it should in a given case be less certain, the rule would fall with the reason for it, and the monument would yield to the course and distance, and an artificial monument will yield more readily than a natural one." In *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938, it was held that "the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced, when the instrument would be thereby defeated, and when the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land." In *Higinbotham v. Stoddard*, 72 N. Y. 98, a conveyance described a lot in a village as "on the southerly side of Madison street, * * * being ten feet on Madison street, thirty-two feet in rear on the northerly side of the millrace, and one hundred feet in depth from front to rear, containing twenty-one hundred square feet of ground." The distances included just 2,100 square feet. The northerly side of the millrace was more than 100 feet from Madison street. The land in question was the strip between the millrace and a line 100 feet from Madison street. It was held that it was not included in the deed. In the opinion it was said that the rule as to mentioning a visible object as a boundary and thus controlling the description by courses and distances is not inflexible, and has some exceptions; that the accuracy of the measurement, and the shortness of the lines, and the exact specification of contents by square feet in a lot in a village, indicated on the face of the deed that this was a more prominent object in the

conveyance than the mention of the millrace. In *Davis v. Rainsford*, 17 Mass. 207, it was declared that "the general rule that known monuments referred to in the description of land in a conveyance are to govern in the construction, rather than the courses, distances, or computed contents mentioned in such description, is subject to exceptions, as where an adherence to the rule would be plainly absurd." In that case the conveyance under consideration described a small strip of land as "containing between 19 and 20 square feet or thereabout, lying between my estate in Marlborough street, the estate of Davis & Brown at the corner of Marlborough and Milk streets, and the estate of said Davis, Brown, & Williams, and bounded as follows, viz., northwestwardly on the line of the estate of Davis & Brown, beginning at the southeastwardly corner of their store, and running on the wall of the store northeastwardly one foot and three inches; thence running southeastwardly on the line of the estate of Davis, Brown & Williams, where they are now building a store, six feet, ten inches; thence running southwestwardly, on the line last mentioned, four feet, four inches; thence northwardly and westwardly seven feet, eight inches, to the corner of Davis & Brown's store, the place of beginning. It is understood that the wall of the store, which said Davis, Brown & Williams, are now building on their lot herein mentioned is to be placed exactly on the line last described," etc. There was also a sketch on the back of the deed representing the land. Testimony was offered to show that the line of Davis, Brown & Williams was a well-known line fixed by monuments; that it was three feet and six inches northeastwardly from the point of beginning, instead of one foot and three inches; and that, therefore, the deed conveyed this larger strip. In the opinion the general rule was recognized, but it was stated that the reason for it was that references to monuments are less liable to mistakes than courses and distances; but that it was not an inflexible rule, without exceptions, and that, under the particular facts of that case, including the nature of the strip conveyed, the exactness of measurement, and the provision that the store to be erected should be placed exactly on the line last described, the deed itself evinced a greater probability that the boundary mentioned was a mistaken one than that there was an intent to convey a strip so much larger than that described by measurements. This decision has sometimes been referred to as exceptional, and has not escaped some criticism. But it may be cited to show that certain calls for boundaries or even monuments have not always been treated as arbitrary and absolute, where the other terms of the deed showed that they should not prevail. *Parks v. Loomis*, 6 Gray (Mass.) 467 (where it was said that "a false demonstration, though a reference to a nat-

ural monument, may be rejected in construing a deed"); *Bond v. Fay*, 12 Allen (Mass.) 86; *Lovejoy v. Lovett*, 124 Mass. 270; *Gano v. Aldridge*, 27 Ind. 294; *Ely's Adm'r v. U. S.*, 171 U. S. 220, 18 Sup. Ct. 840, 43 L. Ed. 142.

If the rule as to monuments is not arbitrary and without exception, but will yield in a given case, where it appears from the deed to be less certain than other descriptions, a reference to a number on a plat is not sacrosanct, regardless of everything else in the deed. While it is often, indeed generally, of controlling force, where it indicates the main intent as to the land to be granted, the rule that it will control is not inflexible. In *Summerlin v. Hesterly*, 20 Ga. 689, 65 Am. Dec. 639, an entry of levy by a sheriff on several lots of land described one of them as being "fractional lot, whereon John Smith now lives, No. 81, in the 4th District of originally Coweta, now Heard county." In an action of ejectment one of the parties claimed under the sheriff's sale. It was shown by parol that the fractional lot on which John Smith lived at the time of the sheriff's entry was the lot in suit; and that although the number of it was not that stated in the entry of levy, but was 189, there was no such lot as that stated in the levy which was a fractional lot; or that, if such lot was a fractional lot, it was not occupied by John Smith. The reference in the entry of levy and the sheriff's deed to the number of the lot was rejected as inaccurate, leaving the remaining description to stand. In *Johnson v. McKay*, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 186, a mortgage described the land covered by it as in a named county, containing 15 acres, "known as the Zachariah Emerson place, part of lots number one hundred and twenty-five (125) in the eleventh (11) district, one part No. not known." It appeared that no part of the Emerson place was embraced in lot No. 125. It was held that the general description of the property as the Emerson place was sufficient, and the reference to lot No. 125 was treated as surplusage, under the maxim, "*falsa demonstratio non nocet*."

[2] 2. The difficulty of decision in this case arises not so much in declaring the principles of law as in applying them to the facts. An examination of the deed under consideration shows that it first contains a clear, definite and exact description of the land, beginning at a point on a named street 208 feet from the southeast corner of that and another named street. It has as its eastern and western boundaries two streets, and its frontage on each of them is specified as 104 feet, and its depth between the streets as 223 feet. No mention of lot numbers is made in connection with such description, either immediately preceding or immediately following it. Next follows a distinct paragraph, describing other land having frontage on another street of 98 feet and a depth

of 228 feet. In closing this latter description, and apparently as a part of it, occur the words "being lots numbered 65, 76, 124 and 125 of the J. B. Thompson property, as per plat No. 2 exhibited at auction sale of same by Sam W. Goode & Company on June 23, 1887." While punctuation is not of great force in determining the meaning of a conveyance, it is worthy of note that in the description of the second piece of land conveyed the different calls are separated by semicolons, and after the description of the last line, and separated from it only by another semicolon, occur the words above quoted.

[5] The plat was introduced in evidence, and there is brought to this court what is stated to be so much of it as relates to the lots in controversy. It shows a block divided by a line running north and south through the center and by lines running east and west with surrounding streets on three sides and an alley on the fourth. Each lot so represented has entered on its front line the figures "52." A number also appears entered in the middle portion of the lot. Treating the figures "52" as representing the street frontage in feet, and counting from the corner of the block, the first description of the land in the deed above mentioned would include lots 65, 66, 75, and 76. The plat in the record does not show the location or numbering of the second tract described. This is not an effort to reform the deed, nor is it a controversy between the first grantor and the grantee. The second grantee brought suit against the first to recover the two lots mentioned in his deed, but a judgment was rendered against him. This was not conclusive upon the grantor, as he does not appear to have been vouched. The second grantee, having lost the lots conveyed to him, now sues the common grantor for breach of warranty. Upon the facts of the case we think he should recover. The description in the first deed of the land granted is clear, definite, and exact. It shows a reference to measurements on the land itself by reference to the street corner, the beginning point of the lot conveyed, the side streets, and the frontage on each. It is followed by a description of other land, as a part of which there is a reference to a plat. But we do not think that this is sufficient to cut in half the description of the first lot conveyed. In most of the cases where the reference to lots by number or by name prevailed, the effort was to decrease the amount included in the lot granted by reason of an added description by courses and distances. If resort is had to the rule of construction favorable to the grantee, or to that relative to utterly inconsistent clauses, it leads to the same conclusion.

[3] 3. The grantor testified, in effect, that the first deed was a mistake, if it included lots 66 and 75. But we do not think that in a proceeding like the present one such ev-

idence can prevail over the deed itself. Parol evidence is competent to adjust the description in a deed to the land conveyed. If there are references to monuments or boundaries, it can be shown where they are located. If a place is described by name, it can be proved what land was known by that name. It can be shown that certain calls in a deed do not touch or apply to the lots sought to be conveyed. Sometimes occupation or the practical construction given to a deed by the subsequent acts of the parties thereto may be admissible. But it has been held that parol evidence is not admissible to control the legal effect of a deed, nor to show that a description which the law will disregard ought to prevail. *Benedict v. Gaylord*, 11 Conn. 332, 30 Am. Dec. 299; *Roberti v. Atwater*, 42 Conn. 269; *Bond v. Fay*, 12 Allen (Mass.) 86.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 376)

GEORGIA R. & BANKING CO. v. RIVES.
(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 303*)—INFIRM PASSENGERS—DUTY OF EMPLOYEES.

While generally it is no part of the duty of the employees of a railway company in charge of a passenger train to physically assist passengers to alight therefrom, the duty of rendering assistance may arise from special circumstances, such as blindness of an unattended passenger, which is known to the conductor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1232; Dec. Dig. § 303.*]

2. CARRIERS (§ 314*)—INJURIES TO BLIND PASSENGER—NEGLIGENCE—PLEADING.

A petition alleged, among other things, as follows: A conductor of a passenger train, with knowledge of the blindness of a passenger, promised to assist him in alighting from the train, but failed and refused to do so. When another passenger undertook to assist him, the conductor refused to let them alight at the usual place and in the usual way, but directed them to go through another car, which was used for baggage and express matter, and the mode of egress from which was more dangerous than that from the ordinary passenger car. The exit had to be made through a door in such car by going upon a platform which was wet and slippery on account of rain, and which was about on a level with the car door, between which and the platform was an open space. By reason of his blindness, the plaintiff did not know of the peril, and was given no warning of it. He stepped from the door in the usual way, and without negligence on his part, and was caused to fall partly upon the platform and partly into the open space, whereby he was injured. *Held*, that such petition was not subject to general demurrer.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

3. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—PROXIMATE CAUSE—QUESTION FOR JURY.

Under such facts, if the fellow passenger failed to warn the plaintiff of the danger, it could not be declared as matter of law, on

demurrer, that this was such an intervening cause as prevented the negligence of the conductor from being the proximate cause of the injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Error from Superior Court, Warren County; D. W. Meadow, Judge.

Action by George F. Rives against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Rives brought suit against the Georgia Railroad & Banking Company, alleging, in brief, as follows: On or about June 16, 1909, he took passage on one of the defendant's passenger trains, for the purpose of going from Sharon to Crawfordville. In order to do this, it was necessary to change cars at Barnett, an intermediate station on the defendant's line. The plaintiff was totally blind and in bad health and helpless. His condition was known to the conductor, who helped him get aboard the defendant's train at his starting point. He told the conductor that he would have to be helped to get off the train at Barnett, which assistance the conductor agreed to render. He was accepted as a passenger and paid full fare. The train consisted of two cars. The one in front was divided into two compartments; that next to the engine containing seats for passengers, and the other being used as a baggage and express car. The second car was the regular passenger car, in which the plaintiff was riding. On reaching Barnett, the train was pulled up to the depot or station sufficiently far for the baggage car next to the engine to be alongside the platform, but not far enough for the passenger car to be beside it. The platform was about on a level with the door of the baggage car, with an open space about 12 or 14 inches wide between the platform and the car. In this position the train stopped. Contrary to his promise, and in violation of the defendant's legal duty to the plaintiff, the conductor and the defendant neglected and refused to render the plaintiff any assistance whatever in alighting from the train. After the plaintiff had waited as long as he thought he could, in order to get off the train and cross over to the other train, he was approached by a passenger who assisted him from his seat to the door of the car. The other passenger and the plaintiff were about to alight from the passenger car in the usual and ordinary manner, by descending the steps of the car. The conductor, who was standing close by, in the exercise of the defendant's right to designate the doors and steps by which its passengers should leave its trains, directed the other passenger to take the plaintiff through the next car, refusing to allow the plaintiff to alight in the usual and ordinary manner, and neglecting and refusing to assist him in getting off the

train, although requested so to do. The defendant and its conductor knew that the plaintiff was being directed to alight in an unusual manner, attendant upon which were dangers unknown to the plaintiff, but known to them, and they refused and neglected to give the plaintiff any notice or warning of such dangers. Unable to see, and not knowing anything about the next car, the plaintiff believed it to be a passenger car similar to the one in which he had been riding, and he, with the other passenger, acting under the direction of the conductor, entered such car. The compartment into which they entered was full of baggage and express packages. Employees were unloading baggage and packages, and a large number of the passengers were engaged in alighting from the train through the baggage door on the side of the car, which was the only door through which they could leave the car. It was raining and the hurry of the employees in unloading the baggage and passengers, and the hurry and confusion of the passengers in trying to alight from the train without getting wet, constituted an unusual and disorderly procedure, which defendant knew was going on, and which defendant was bound to render orderly. Plaintiff knew that the car through which he was passing was different from that which he left, and that something unusual was taking place; but, having received no notice or warning that he was to alight from the train in any way other than the usual and ordinary one for passengers in alighting from trains, and no notice or warning of the dangers to him of the unusual procedure, he was unable to know just where he was or what was taking place. While he and the passenger accompanying him were in the act of stepping out of the baggage car door onto the depot platform, and while he was exercising all possible caution and prudence which could be used by one in his condition, and just as he had placed one foot on the platform, his foot slipped on the wet surface thereof, and he fell into the space between the platform and the baggage car. The platform had been rendered very slippery and unsafe to alight upon by the hard rain; and this the defendant knew or could have known by the exercise of reasonable or ordinary care, and it could have rendered the platform safe to alight upon by sprinkling sand thereon. The defendant was negligent in neglecting and refusing to assist him in alighting from the train; in directing him to alight in an unusual and dangerous manner; in failing to warn him of the dangers attendant upon his alighting in the manner directed by it; in allowing the "unorderly" procedure in the baggage car; in failing to maintain a safe platform upon which to alight; in failing to warn plaintiff of the dangers incident to alighting upon the platform; and in failing to exercise that extraordinary diligence for his safety to which he was entitled. By

reason of the fall, he has endured much pain and suffering, and has been permanently injured.

By amendment it was alleged as follows: When the plaintiff undertook to step from the baggage car, he did not know but that he was alighting from the train in the usual and ordinary manner by descending the steps leading from the car door down to the ground, nor did he know that his foot would step onto a wooden platform level with the door of the baggage car. He therefore undertook to step forward, intending to bring his foot down as he usually alighted from a passenger car. Under these circumstances his foot came suddenly in contact with the platform, while his heel went down into the space between the car and the platform, causing him to lose his balance and fall partly on the platform and partly into such space.

The defendant filed a general demurrer to the petition. It was overruled, and the defendant excepted.

Jos. B. & Bryan Cumming and Jas. M. Hull, Jr., for plaintiff in error. Alvin G. Golucke and Jas. Davison, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1, 2. In *Southern Ry. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015, it was held that ordinarily it is no part of the duty of the employees of a railway company in charge of a passenger train to physically assist passengers to alight therefrom; but that the duty of rendering such assistance may arise from special circumstances. A like ruling was made in *Cent. Ry. Co. v. Madden*, 135 Ga. 205, 69 S. E. 165, 31 L. R. A. (N. S.) 813, where a sick passenger complained of improper treatment. In *Southern Ry. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68, Chief Justice Simmons, in delivering the opinion, said that there was much respectable authority for the proposition that where a passenger is manifestly aged, infirm, sick, or of defective eyesight, it becomes the duty of the railway carrier to render to him or her such assistance, provided that the servants of the carrier know, or by reasonable attention to their duties, ought to discover the fact of such infirmity. The authorities which he cited fully support the position announced, both by reasoning and by citation of adjudicated cases. In 3 *Thomp. Neg.* §§ 2845, 2846, 2847, the learned author strongly declares the position, and severely criticises the decisions of some courts. See, also, *Ray on Passenger Carriers*, § 67; 2 *Shear. & Red. Neg.* (5th Ed.) § 510; 1 *Fetter on Carriers of Passengers*, §§ 106, 108; 2 *Hutch. Car.* (3d Ed.) §§ 992, 993.

[1] The underlying principle is that a carrier of passengers is bound to use extraordinary care for their safety in connection with their carriage and discharge; that what such care requires to be done depends on the facts of the case; and that if a passenger is mani-

festly infirm, sick, or blind, and this is known to the servants of the carrier, or ought to be discovered by reasonable attention to their duties, extraordinary care must be used in the light of such facts.

In *Daniels v. Western & Atlantic R. Co.*, 96 Ga. 786, 22 S. E. 956, the case was decided on headnotes. It was said that "If, under any circumstances, a railroad company is under a duty to render an infirm passenger physical personal assistance in alighting from a train," yet as the evidence failed to show such a state of facts as would require the rendering of such assistance to the plaintiff, the verdict was right on the substantial merits of the case, and if the charge complained of was erroneous, it did not require a new trial. The reporter's statement of facts shows that the testimony for the plaintiff was that she was infirm and weak in her hands, on account of rheumatism; that her son helped her on the train, and a colored porter helped her on the car where she rode; and that her son told this porter that she was sick and would need help in getting off the car, and the porter said he would help her. No notice of the plaintiff's condition was given to the conductor. For the defendant it appeared that neither the conductor, his flagman, nor the baggage master knew anything about the infirmity of the plaintiff. The decision is criticised in 2 *Shear. & Red. on Negligence* (5th Ed.) § 510, note 4. In *Western & Atlantic R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913 (a decision by five justices), the principle above stated was recognized; but it was held that a voluntary promise by a conductor to aid a passenger in getting off of a railroad car at a certain station did not impose upon the company any liability for a failure of the conductor, after reaching such station, to enter the car and assist the passenger from her seat to the place of exit from such car, where it did not appear that the conductor had notice of any condition of the passenger or circumstances which would render such assistance necessary. Here the passenger was alleged to have been received with full knowledge of his blind and unattended condition, and it was alleged that a promise of assistance was given.

[2] 3. It was argued that the conduct of the conductor, if negligent, was not the proximate cause of the plaintiff's injury. It was alleged that the train was stopped with the car used partly for baggage and express purposes and partly for passengers opposite a platform which was about on a level with the door through which baggage was delivered; that the conductor not only failed to render the plaintiff assistance, as he had promised to do, with full knowledge of the plaintiff's blindness, but when a passenger tried to assist the plaintiff to alight in the usual manner by going down the steps of

the car in which he was riding, the conductor directed that the plaintiff be carried through the next car which was the express car, and from which the only mode of egress was by means of a way surrounded by baggage and packages, and through an unusual door, upon a slippery platform of unusual height for passengers to alight upon, and with a vacant space between the car and the platform.

[3] It cannot be said, as matter of law, that if the conductor neglected his duty to assist the plaintiff, and, upon seeing a fellow passenger undertake to help him, directed the plaintiff to be carried into a position of greater danger, with no warning or assistance to accomplish a safe alighting, this was not the proximate cause of the injury. Nor can it be declared, on demurrer, that, under such circumstances, the company could escape liability because the fellow passenger, who was aiding the plaintiff, failed to warn him of the peril. No positive act of the other passenger intervened between the negligence of the defendant's conductor and the injury, causing the latter and breaking its connection with the former.

Several of the decisions cited in the brief of counsel for the plaintiff in error were in cases of injured employes, and none of them are controlling of that now under consideration. The present case is one for submission to the jury, under proper instructions, and the judge correctly overruled the general demurrer.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 370)

FULLER v. CORKER MOTOR CAR CO.
(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 110*)—STOCK ISSUE—CANCELLATION—INJUNCTION.

The petition does not set forth a case entitling the plaintiff to the relief sought, and it should have been dismissed upon general demurrer.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 110.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Corker Motor Car Company against M. Z. L. Fuller. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. Fuller, for plaintiff in error. Evins & Spence and Jerome Moore, for defendant in error.

BECK, J. The Corker Motor Car Company filed an equitable petition against M. Z. L. Fuller, and alleged, in substance: That at the time the plaintiff company was being organized Fuller represented to the organizers that he had a contract with the Haynes Automobile Company of Indiana, which was

reasonably worth \$5,000, and proposed to transfer the same to the plaintiff corporation for \$5,000 of stock in said company; that his offer was accepted, and the stock was issued to him; "that when the time came for M. Z. L. Fuller to transfer and assign his contract with the Haynes Automobile Company to the Corker Motor Car Company, as he had agreed to do, he produced a printed form of contract which he stated embodied all the terms and conditions of the original contract existing between him and the Haynes Automobile Company, covering the Southern territory, and which was binding and of full force and effect between them; [and] that said Haynes Automobile Company would make, at his instance and request, a like contract with your petitioner direct, in lieu of the contract which existed between him and that company." Petitioner further alleged that, "relying upon such representations, it agreed to take a contract direct, and did receive a contract made with the Haynes Automobile Company"; but it has since discovered that, at the time Fuller represented that he had a contract with the Haynes Company, he had no such contract, but was an agent in the employment of that company, sent to this territory for the purpose of placing such a contract. The petition also contains the following allegations: "(13) That on or about May 23, 1910, at a regular meeting of the board of directors, a motion was made and carried that, whereas the said Fuller was grossly incompetent of performing the duties of sales manager of the company [the petitioner], his position as sales manager should cease on May 31, 1910, and that his compensation for the same should cease on the same date. (14) That since that time, to wit, June 15, 1910, the said Fuller, although having been discharged by the board of directors and his salary discontinued, still continues to assert his authority as sales manager and has given and is giving the officers of said company all manner of trouble, in that he stays around the place of business of the company, gives orders to the clerks, stenographers, and help in general, and persists in answering the mail, and in general making himself obnoxious to every one concerned, to the great injury to the business of the Corker Motor Car Company." Petitioner prays for a decree canceling the stock issued to Fuller, and that he be enjoined from interfering with the business and affairs of petitioner in the manner alleged. The court overruled a general demurrer to the petition, and the defendant excepted.

The petition does not set forth a case entitling the plaintiff to relief in a court of equity, and the general demurrer to the same should have been sustained. While it is true, according to the allegations in the petition, that the statement of the defendant first made to the proposed incorporators of the Corker Motor Car Company, to the effect

that "he was the owner of a contract from the Haynes Automobile Company," was not true, and he was not in a position, at the time this statement was made, to transfer said contract to the company as organized, or then to be organized, and that this fact would, upon its discovery, have justified the incorporators in then refusing to deliver the stock to Fuller, if it had not already been delivered, or in demanding its return and cancellation if it had been delivered, they did not take either of these steps; but, after the defendant had produced a printed form of contract which he stated embodied all the conditions of the original contract between him and the Haynes Automobile Company, upon his representation that the Haynes Company would make a like contract directly with petitioners, petitioners proceeded to negotiate with the Haynes Company, with which company it is a necessary inference from the petition that they were brought into relations through the defendant himself and his existing connection with the last-named company. The plaintiff company was organized for the purpose of selling automobiles. They desired a contract with a motor car company. They obtained the contract they desired with the Haynes Company, the very company with which the defendant in the first instance had proposed to secure them a contract. It is true he had proposed to secure it by transferring a contract which he untruthfully represented to be already in his possession; but, it subsequently appearing that he did not have it, he proposed to put the plaintiff company in the way of getting the contract. They acted upon his suggestion in regard to the matter; they availed themselves of the defendant's knowledge of the Haynes Automobile Company's desire to have an agency for the handling of automobiles in this territory. The only difference between what the plaintiffs received and that which they expected to receive from the defendant was a direct contract with the Haynes Company, instead of a transferred contract. There is no suggestion that the contract which was finally made with the Haynes Company was not as desirable and as valuable as the one which the defendant had proposed to transfer to them. It does not appear that the plaintiff company could have secured this contract with the Haynes Company but for the knowledge of the defendant as to the situation of the Haynes Company and his advice and representation. And we do not think that the plaintiff, having secured the contract with the Haynes Company under the circumstances shown in the petition, is entitled to have the stock issued to Fuller surrendered up and canceled, as it prays. In this connection, see the case of *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S. E. 898. Moreover, it appears that this contract with the Haynes Company was a profitable one, and that after it was made the defendant in this case acted as a sales

manager for the plaintiff company, and was finally dismissed from that position, not because of his misrepresentations in regard to the contract with the Haynes Company, but on the ground that he was incompetent to perform the duties pertaining to that position.

Nor do we think that the bill should have been retained for the purpose of granting injunctive relief against Fuller, on the ground that he was interfering with the affairs of the plaintiff company, their employes and agents. The petition failed to allege facts authorizing an injunction.

Among other deficiencies, it is not distinctly alleged that the defendant has been notified of the fact of his dismissal, nor that he has been requested to remain away from the office or to desist from the acts which are set forth as the basis of the complaint against him.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 432)

RICHARDSON v. PERRIN.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—PETITION.

An equitable petition alleged, in brief, as follows: The parties entered into a contract giving to the plaintiff an option to purchase certain land, the lines of which were agreed upon, except one; and as to it the beginning point was fixed, and its general direction agreed upon, so that it should intersect with a certain line, and thus its terminus could be readily ascertained. In reducing the contract to writing, by mutual mistake of law on the part of the parties and also of the scrivener, the description inserted did not carry out the intention of the parties, and was too vague to sufficiently describe the land. For reasons set out, the owner of the land would obtain an unconscionable advantage if the plaintiff were not permitted to reform the contract. *Held*, that the petition was not subject to general demurrer.

(a) The petition was not subject to the special demurrer filed, on the grounds therein contained.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

2. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—NEGLIGENCE OF PLAINTIFF.

No such negligence on the part of the plaintiff appeared on the face of the petition as to render it demurrable on that ground.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

3. REFORMATION OF INSTRUMENTS (§ 32*)—TIME TO SUE—PROVISION OF CONTRACT.

If an option to purchase the land was given, and within such time he elected to purchase it and offered the purchase money to the defendant, who refused to carry out the contract, the expiration of the time for the exercise of the option would not destroy the right of the plaintiff to file an equitable petition to reform

the contract as to an insufficient description of the land.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 32.*]

4. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—PETITION.

An allegation that the plaintiff had bargained the land covered by the contract for a profit of \$1,400, but could not carry out the sale if the defendant could take advantage of the mistake in reducing the contract to writing, tended to show that a gross injustice would be done to the plaintiff and that the defendant would obtain an unconscionable advantage, and was not demurrable as irrelevant and immaterial.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 36.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by L. L. Richardson against G. G. Perrin. Judgment for defendant, and plaintiff brings error. Reversed.

G. G. Perrin and L. L. Richardson entered into a written contract, which contained the following: "Said second party has this day rented from first party, for the years 1905, 1906, 1907, 1908, and 1909, the following lands: All that part of lands on the public road leading to Elberton from Carpenter's Mill [beginning] at a certain piece of woods just south of C. W. Morris's home, thence running a westerly direction to the pasture fence on west side of pasture, and thence following the line a southerly direction and back to the public road, and then down said road to the beginning point." After certain other terms, not material here, the contract continued: "In addition to the foregoing, the following special agreement is entered into between the parties: It is further agreed that should said L. L. Richardson choose to purchase 200 acres on the upper end of the above lands at the end of three years from the first of this lease, he has the privilege of doing so at the price of fifteen dollars (\$15.00) per acre, said Richardson to pay \$1,000.00 cash, balance as agreed upon at the time." This contract was signed by both parties.

Richardson filed an equitable petition against Perrin, seeking to have the contract so reformed, so as to express the true agreement of the parties as to the land covered by the option. He alleged, among other things, as follows: Prior to the execution of the written contract, it was distinctly agreed between the parties to what were the exact boundaries of the land, except as to precisely where the line beginning at a certain piece of woods just south of C. W. Morris' house and running thence in a westerly direction to the pasture fence on the west side of the pasture should intersect the line between the land of Perrin and that of W. J. Eavenson, so as to cut off exactly 200 acres. In the absence of a survey this point of intersection could not be fixed; but the point from which this line was to begin

and the direction it was to take were agreed upon, and no mistake could be made in thus ascertaining the exact tract covered by the option. Perrin owned a tract of land containing over 400 acres, and the line described as beginning at a piece of woods just south of Morris' house, and running in a westerly direction to the pasture fence on the west side of the pasture, was the line that would separate the land covered by the option and the other land of Perrin. The contract of option, as agreed upon between the parties, covered the following tract of land: Beginning at the piece of woods just south of C. W. Morris' house, and running in a westerly direction to the pasture fence on the west side of the pasture, intersecting the line between G. G. Perrin and W. J. Eavenson at the point where 200 acres would be cut off the southern end of the whole Perrin tract by following the lines from this point of intersection between said G. G. Perrin and the adjacent landowners, viz., W. J. Eavenson, ——— Adams, and the estate lands of J. W. Tibbets, to the public road leading from Elberton to Carpenter's mill, thence down said road to the beginning point, in 315th district G. M., county of Elbert, state of Georgia, containing 200 acres. The contract was written by T. W. Campbell, a bookkeeper, who was not acquainted with such work, "and, by accident and mistake of both parties thereto, did not sufficiently describe the premises so optioned, but that petitioner in good faith made this contract of lease and option to cover the premises described, * * * and it was agreed between him and the said G. G. Perrin, and that the insufficiency of description was not discovered by either party until said G. G. Perrin refused to accept the purchase price and make petitioner a deed, and when the matter was referred to their respective counsel. Petitioner alleges that there was an honest mistake of law as to the effect of said contract of lease and option on the part of both contracting parties, because of its inefficient description, and this mistake operates as a gross injustice to this petitioner and gives an unconscientious advantage to said G. G. Perrin"; because the plaintiff would not have leased the land for the term and at the yearly rental agreed upon, without the option to buy at the expiration of three years, which was a part of the consideration of the lease; because, further, he had made valuable improvements on the land, by building a storehouse at a cost of \$100 and making other improvements not required of a lessee; and because of the fact that he bargained this 200 acres to a person named for the sum of \$4,400, thereby making a clear profit of \$1,400, to which he was justly entitled, and which he would have received but for the insufficiency of description in the written contract, and the taking advantage thereof by Perrin. "Petitioner alleges that T. W. Campbell, the draftsman of the contract of lease and option, made a

mistake of law in making this insufficient description of the premises so as to carry out the real intention of the parties, and out of this mistake a gross injustice has been done petitioner and an unconscientious advantage has been given said G. G. Perrin." Within the time fixed by the contract he tendered to the defendant the amount of the purchase price and called on him to comply with the contract, which the defendant refused to do.

On demurrer the petition was dismissed. The plaintiff excepted.

Geo. C. Grogan, for plaintiff in error. Sam L. Olive, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The defendant, who was an owner of land, entered into a written contract with the plaintiff to lease to the latter certain land for five years, with an option on the part of the lessee to purchase 200 acres after the expiration of three years from the beginning of the lease. The plaintiff filed an equitable petition, seeking to compel the defendant to specifically perform the agreement to sell. It was held that the description of the land to be sold was too indefinite to authorize a decree of specific performance. *Richardson v. Perrin*, 133 Ga. 721, 68 S. E. 899. The plaintiff then filed the present petition, seeking to have the written contract so reformed as to express what he alleged was the actual agreement between the parties as to the description of the land to be sold. Construed as setting up a mistake of fact, the allegations of the petition were insufficient. It was not alleged distinctly that the parties intended to put any particular words of description into the contract and failed to do so by reason of accident or mistake, or that they did not know what was in the written contract, or what instructions were given by them to the scrivener as to putting some particular thing into the contract, which he omitted to do by accident or mistake. But construed as setting up a mistake of law, the petition was sufficient to withstand the grounds of the demurrer which were urged against it. An honest mistake of law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity. Civil Code 1910, § 4576; *Rogers v. Atkinson*, 1 Ga. 12; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706. In *Collier v. Lanier*, 1 Ga. 238, it was held: "Where an instrument is drawn and executed, which professes and is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." This principle as

to a mistake of law in the draftsman has been codified in section 4577 of the Civil Code of 1910. See, also, *Wyche v. Green*, 11 Ga. 159. It is not meant that if a person knows that a material portion of an agreement is omitted from the written contract, but relies on the parol promise of another to carry that part of the agreement into effect, he can afterwards have the instrument corrected by inserting such provision. *Ligon v. Rogers*, 12 Ga. 281. There is a clear distinction between adding provisions to a written contract by parol, and making a contract speak what the parties intended it should express, and thought it did legally express, when they executed it.

In the present case it was alleged that all of the lines of the land covered by the option were agreed upon prior to the making of the written contract, save one, and it was to begin at a certain point and run in a westerly direction until it intersected with a line fence at a point which would include within the boundaries 200 acres; that this was sufficient to define the land; that the parties undertook to express in writing the contract, and both honestly believed that the description as written was sufficient to define such land; and that, by mutual mistake of law, by both of the parties and the scrivener, the written contract did not express the actual contract by sufficiently describing the land thus agreed to be included in the option. The allegations were sufficient to withstand a general demurrer. Whether in some respects the petition may have been subject to special demurrer, so as to require more fullness of allegation, need not be considered. A special demurrer was filed, attacking various paragraphs of the petition; but the petition and its paragraphs were not subject to be dismissed for any of the reasons set up therein.

[2] 2. No such negligence on the part of the plaintiff appears on the face of his petition as to authorize a dismissal on that ground. Civil Code 1910, § 4571. Some cases in this court have gone quite far in the direction of denying equitable relief to a party who claimed that he thought a certain provision or agreement was included in a written contract, but failed to read it without any sufficient cause therefor. But they do not control this case, in which a mistake of law on the part of the parties to the contract and the draftsman is alleged.

[3] 3. It was urged that, because the time for asserting the option had expired, there was no contract to reform, and the equitable petition seeking reformation was therefore demurrable. We cannot concur in this position. If the contract should be reformed, it would stand as if originally so written, as between the parties. It was alleged that within the time prescribed by the contract the plaintiff elected to purchase the land,

and tendered payment therefor, and that the defendant refused to carry out the contract. It is the exercise of the option, not the reformation of the contract, which must take place within the time limited, if the contract fixes a limit.

[4] 4. There was no error in refusing to strike from the petition the allegation in regard to the contract made by the plaintiff to sell the land at a profit of \$1,400, and his inability to carry out such contract because of the refusal of the defendant to convey the land to him. This tended to show that the land was of greater value than that contracted to be paid for it, and that a gross injustice would be done the plaintiff, and the defendant would obtain an unconscientious advantage, if he were permitted to refuse to carry out the contract as made, and if it were not reformed.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 432)

JONES v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 159*)—EVIDENCE.

The action being for the negligent homicide of the plaintiff's husband, and there being no complaint that any error of law was committed upon the trial, and the jury being authorized to find from the evidence that the plaintiff's husband could, by the exercise of ordinary care, have avoided the consequences to himself of the defendant's negligence, it cannot be said that a verdict in favor of the defendant was without evidence to support it, and therefore the judge did not err in refusing to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 159.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by Carrie Jones against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

P. P. Proffit, for plaintiff in error. Geo. O. Grogan, T. J. Brown, and A. G. & Julian McCurry, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 438)

T. J. LINDER & SONS et al. v. HARTWELL BANK et al.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

There was no error in refusing to grant an interlocutory injunction in this case.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by T. J. Linder & Sons and others against the Hartwell Bank and others. From an order refusing an interlocutory injunction, plaintiffs bring error. Affirmed.

A. G. & Julian McCurry, for plaintiffs in error. Jas. H. Skelton and W. L. Hodges, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 464)

ZORN v. UPSON BANKING & TRUST CO.
(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.

This being the first grant of a new trial, the judgment of the court below sustaining the motion for a new trial will not be disturbed; the evidence not being such as to demand a verdict in favor of the party prevailing at the trial. Smith v. Maddox-Rucker Banking Company, 185 Ga. 151, 68 S. E. 1031.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863; Dec. Dig. § 977.*]

Error from Superior Court, Upson County; E. J. Reagan, Judge.

Action between W. T. Zorn and the Upson Banking & Trust Company. From a judgment granting a new trial, Zorn brings error. Affirmed.

J. Y. Allen and W. Y. Allen, for plaintiff in error. M. H. Sandwich and Bloodworth & Bloodworth, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 464)

BUSH v. BOYKIN.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 190*)—MUNICIPAL COURTS.

The bond of the plaintiff in certain certiorari proceedings instituted to set aside the judgment of a mayor's court, because of its entire failure to comply with the provisions of the act approved December 10, 1902 (Acts 1902, p. 105), was void. McDonald v. Ludowici, 8 Ga. App. 654, 60 S. E. 337.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

2. CERTIORARI (§ 72*)—DISMISSAL—JUDGMENT ON BOND.

The superior court, having dismissed the writ of certiorari upon the ground, among others, that the bond was void, could not enter a valid judgment against the surety on the bond for costs in the certiorari proceedings, and having erroneously entered a judgment against the surety, which showed on its face that it was invalid, properly at the next term, upon motion

of the surety against whom judgment had been entered, set aside the same.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 214-218; Dec. Dig. § 72.*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action between I. B. Bush and G. Boykin. From a judgment in the mayor's court, Bush brought certiorari. From a dismissal of the writ, he brings error. Affirmed.

W. I. Geer, for plaintiff in error. P. D. Rich, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 368)

McCRAV v. ALLEN.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 554*)—CONSOLIDATED CASES—EXCEPTIONS BY ONE PARTY—REVIEW.

Where three cases were, by order of court duly granted, consolidated and tried together, and three of the losing parties made separate motions for new trials, all of which were overruled, and only one of the movants filed a bill of exceptions bringing the case to this court, only the assignments of error made in the bill of exceptions and in the motion for a new trial filed by the excepting party can be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 554.*]

2. REVIEW ON APPEAL.

No errors of law are complained of by the excepting party, and the evidence authorized the verdict.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action between Elizabeth McCray, executor, and E. L. Allen, administratrix. From the judgment, McCray brings error. Affirmed.

W. C. Davis and I. S. Chappell, for plaintiff in error. Geo. B. Davis, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 438)

J. J. & B. L. BOND & CO. v. MCINTIRE.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

The only grounds of the motion for a new trial being the general grounds, which attacked the verdict as contrary to law and evidence and without evidence to support it, and there being sufficient evidence to authorize the verdict, and the presiding judge having overruled the motion, this court will not reverse the

judgment. Civil Code 1910, § 3604; *Rnan v. Gunn*, 77 Ga. 53; *Rosser, Armistead & Co. v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152; 31 Cyc. 1601; 2 Clark & Skyles on Agency, § 537.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

2. FORMER DECISION DISTINGUISHED.

In *Hodgson v. Raphael*, 105 Ga. 480, 30 S. E. 416, the evidence tended to show that the owner of a horse allowed his agent to take the animal to a livery stable for the purpose of trading it, that the agent so constituted raffled the horse and became the winner, and that he then sold it to another person receiving a part of the purchase price in cash, and accepting in satisfaction of the balance the cancellation of a debt due by himself to the vendee. In doing this he apparently dealt with the horse as his own. The distinction between that case and the one at bar, as appears in the record, is clear.

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action between J. J. & B. L. Bond & Co. and C. D. McIntire. From the judgment, J. J. & B. L. Bond & Co. bring error. Affirmed.

Worley Adams and L. J. Brown, for plaintiffs in error. W. R. Little, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 475)

WALTERS v. JOSEY.

(Supreme Court of Georgia. Jan. 16, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of irrelevant evidence, which is not hurtful to the complaining party, affords no cause for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

2. TRIAL (§ 39*)—RECEPTION OF EVIDENCE—OFFER OF PROOF.

Where a defendant executor, in an action of complaint for land, set up that the plaintiff's wife, under direction of the plaintiff, had written a letter authorizing the sale of the land, and that the testatrix of the defendant had purchased it thereunder and paid the purchase price in full, and where the wife of the plaintiff, while testifying as a witness, denied that the letter was written by her, other letters which she admitted having written were not admissible in evidence, for the purpose of comparison in proof of the genuineness of the first, over objection, where such letters had not been submitted to the adverse party before he announced ready for trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. 92-98; Dec. Dig. § 39.*]

3. APPEAL AND ERROR (§ 706*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

This court will not reverse the judgment of the court below, refusing a new trial, on the ground that certain conversations alleged to have been material in their bearing upon the issues of fact in the case were excluded from the evidence, when the conversations which the

court refused to allow the movant to prove are not set forth literally or in substance in the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.*]

4. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by W. M. Josey against R. B. G. Walters, executor. Judgment for plaintiff, and defendant brings error. Affirmed.

Evans & Evans, for plaintiff in error. W. E. Armistead, for defendant in error.

BECK, J. Josey brought an action in ejectment against the executor of his mother to recover two tracts of land which the plaintiff inherited from his father, and which the defendant claimed had been sold by the plaintiff to his mother. The jury returned a verdict in favor of the plaintiff for the premises in dispute. A new trial was denied, and the defendant excepted.

[1] 1. The defendant was the executor of the plaintiff's mother, and he resisted the suit of her son upon the ground that the land in controversy had been purchased by defendant's testate, the mother of plaintiff, and that the purchase price had been paid. The plaintiff denied that he had sold the land to his mother, or that she had paid for the same; and thus the controlling issue of fact in the case was made. One of the grounds contained in the motion for a new trial assigns error upon the ruling of the court in admitting, over the objection that the same was irrelevant, the following testimony of a named witness: "I know William Josey [the plaintiff], and I know his mental condition. It is weak; he is a weak-minded man." The plaintiff in this case was not seeking to set aside any conveyance, or any other document conveying title to the land in question, on the ground of mental incapacity to execute a valid conveyance; and it would therefore seem that the evidence was open to the criticism pointed out—its irrelevancy.

But we do not think that its admission was hurtful to defendant. If hurtful at all, the injury was to the party offering it, the plaintiff, in view of the fact that as a party to the case he had undertaken to state and explain certain matters involved in the controversy, and to uphold his contention by his own testimony relative to material facts in the case, and the value of his testimony was, to a certain extent, dependent upon the accuracy of his memory; that and his truthfulness would both necessarily be considered by the jury in passing upon the value of his testimony given before them, and evidence that he was of feeble intellect would necessarily diminish

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the weight of his testimony. To that extent he, and not the complaining party, was injured by the evidence under criticism.

[2, 3] 2, 3. The rulings in headnotes 2 and 3 require no discussion or elaboration.

[4] 4. We have indicated above the controlling issue in the case. There was sufficient evidence to support the finding of the jury upon that issue, and this finding should not be set aside.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 431)

MULLING v. EXCHANGE BANK OF WAYCROSS.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 938*)—REVIEW—SIGNATURE—PRESUMPTIONS.

Where a bill of exceptions appears to have been signed by the trial judge on a given date, and contains no affirmative statement that it was tendered at a different date, the legal presumption is that it was tendered on the date of the certificate. *Allison & Davis v. Jowers*, 94 Ga. 335, 21 S. E. 570.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.*]

2. APPEAL AND ERROR (§ 537*)—DISMISSAL—DELAY IN CERTIFYING BILL OF EXCEPTIONS.

A bill of exceptions, having been tendered the trial judge for his certificate on a given date, was returned by him to counsel for plaintiff in error for correction, and was certified at a date 50 days later. In the absence of any statement as to the cause of the delay, it must be held that such delay was unreasonable, and that therefore the bill of exceptions must be dismissed. *Atkins v. Winter*, 121 Ga. 75, 48 S. E. 717; *Dykes v. Brock*, 123 Ga. 395, 57 S. E. 700; *Meador v. Callicott*, 129 Ga. 631, 60 S. E. 863.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 537.*]

Error from Superior Court, Tattnall County; P. E. Seabrook, Judge.

Action between J. M. Mulling and the Exchange Bank of Waycross. From the judgment, Mulling brings error. Dismissed.

Way & Burkhalter, for plaintiff in error. Jno. C. McDonald and Wilson, Bennett & Lambdin, for defendant in error.

FISH, C. J. Writ of error dismissed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 439)

ROBERTS v. WANSLEY et al.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 982*)—EXECUTION OF SENTENCE—SUSPENSION.

A judge of the superior court of this state has no authority to suspend the execution of a sentence imposed by him in a crim-

inal case, except as incidental to a review of the judgment under which the sentence was imposed. *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548, and cases cited.

(a) The statement of the judge in orally passing sentence on the accused, where the written sentence imposed a fine of \$150 and also imprisonment in the chain gang for the term of 12 months, that so much of the written sentence which was subsequently entered upon the minutes of the court as related to the imprisonment of the accused in the chain gang was suspended, on condition that the accused would not again commit the same offense for which he had been convicted, was ineffectual to suspend that portion of the sentence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE.

Accordingly, under the evidence in the present case, the judge did not err in refusing to discharge the applicant for habeas corpus from the custody of the chain gang, to which he had been sentenced.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 982.*]

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Application by John Roberts for writ of habeas corpus against J. W. Wansley and others. From an order denying the writ, relator brings error. Affirmed.

Alex. Johnson and Adams & Brown, for plaintiff in error. Geo. L. Goode and Clifford Walker, Sol. Gen., for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 477)

RICHARDSON v. CLAYTON.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

MECHANICS' LIENS (§ 281*)—FORECLOSURE—SUFFICIENCY OF EVIDENCE.

A contractor's lien was foreclosed against a certain lot, and a special judgment obtained against it, and a general judgment against the man who was alleged to be the owner of it. The lien described the property as "part of lot No. 54 in the Third district of White county, Georgia, containing two acres, more or less, and formerly owned by V. R. Hunter and purchased from him," giving the metes and bounds thereof. The execution issued was levied on the land, the entry containing the same description. The person who was the defendant interposed a claim to the land as administrator of his deceased wife. The entry of levy recited that the defendant was in possession, and the claimant thereupon admitted a prima facie case and assumed the burden of proof. *Held*: (1) Under the recitals in the lien, the execution, and the levy, it was not necessary for the claimant to show title in V. R. Hunter, the person recited to have been the former owner, and from whom it was stated to have been purchased. (2) In such a case, where the claimant introduced a deed from

such person to his intestate, proved that he was her husband and administrator, that they lived together in the house with their family until her death, that she left two children as heirs, beside her husband, and that the estate owed unpaid debts, and there was no conflicting evidence, a verdict finding the property subject was without evidence to support it.

(a) The mere proof by the contractor that he built the house under a contract with the defendant in *fi. fa.*, and completed it in accordance with the contract, that the defendant paid him a part of the contract price, but failed to pay him the balance, and that the contractor informed the defendant that he would file a lien on the building, and the latter gave him a description of the property, was not sufficient to rebut the evidence recited in the preceding headnote, or to authorize the finding that the property was subject.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 281.*]

Error from Superior Court, White County; J. J. Kimsey, Judge.

Action by C. M. Clayton against J. A. Richardson, administrator. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. H. Underwood and H. H. Dean, for plaintiff in error. G. S. Kytile and B. P. Gaillard, Jr., for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 473)

COLLIER v. CLAY et al.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 37*)—ASCERTAINMENT—SUFFICIENCY OF EVIDENCE.

The evidence in this case authorized the finding and holding of the court below, to which was submitted all questions of law and fact.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.*]

2. BOUNDARIES (§ 30*)—ASCERTAINMENT—PARTIES.

The plaintiff and defendant being purchasers of contiguous lots of land from a common grantor, who was the administrator of a named decedent and sold the land at an administrator's sale, and the issue being as to which of the two parties to the case had title to a strip of land along their common boundary line, the court did not err in refusing, upon motion of defendant's counsel, to make the administrator, who had previously been discharged from his office, a party to the case, although notice had previously been served upon the administrator as such, notifying him to come into court; and that "he is vouched in court to defend the suit."

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 30.*]

3. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Matters raised in a bill of exceptions which are not argued or referred to in the brief of counsel will be treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, De Kalb County; J. T. Pendleton, Judge.

Action by J. N. Clay and others against J. E. J. Collier. Judgment for plaintiffs, and defendant brings error. Affirmed.

Alonzo Field, for plaintiff in error. Mark Bolding and J. Howell Green, for defendants in error.

BECK, J. [1] 1. The plaintiff in error purchased, at an administrator's sale, certain land belonging to the estate of the intestate. The description of the lot purchased by him is as follows: "The lot or parcel of land lying and being in land lot one hundred and forty-four (144) in the Fifteenth district of originally Henry, now De Kalb, county, Georgia, said tract of land containing 63 acres, more or less, and commencing at the northeast corner of said land lot, and running thence north 88 degrees west 2,072 feet along the north line of said land lot to the branch; thence in a southeasterly direction along the sinuosities of said branch 1,551 feet; thence east 1,650 feet to the east line of said land lot; thence north 2 degrees east 1,489 feet to the beginning point." From the description of the tract or lot embraced in plaintiff in error's deed, it will be seen that the line on the east of the tract of land purchased by him coincides with the land lot line between land lots 144 and 143 throughout the extent of the eastern boundary of the land purchased by the plaintiff in error. In order to ascertain the eastern boundary, it was necessary merely to locate the land lot line between the two land lots mentioned above. Plaintiff in error was of the opinion that the eastern boundary of the land which he purchased was the line indicated by certain stakes a certain distance to the east of the line which the court, under the evidence, found to be the true land lot line; but his deed did not call for the line as fixed by stakes, and did not attempt to indicate the true eastern boundary of the land sold to him, otherwise than by identifying it with the land lot line; and the instrument with these descriptive words was accepted by the purchaser at the administrator's sale. That being true, he acquired title to no land east of the true land lot line. And under the evidence in the case the court was authorized to find that the true land lot line was to the west of the stakes, as contended by the defendants in error, plaintiffs in the court below, and to hold that the strip of land between the true line and the line marked by the stakes belonged to the plaintiffs in the court below, the defendants in error. Hall v. Davis, 122 Ga. 252, 50 S. E. 106.

[2] 2. The bill of exceptions recites that the defendant in the case gave "J. Howell Green, and the said J. Howell Green as administrator of the estate of Nancy Ford, deceased, notice to come into court and de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fend his (J. E. J. Collier's) title. * * * The said J. Howell Green appeared, and the court passed up an order in the premises, to wit: 'J. Howell Green having appeared before the court in the above-stated case in obedience to the foregoing notice, and resisted becoming a party defendant in said case, and stating that he is no longer administrator of the estate of Nancy Ford, deceased, having been discharged therefrom, the court declines to require him to become a party defendant in said case upon the showing made by the movant, J. E. J. Collier.' The notice referred to is attached as an exhibit to the bill of exceptions filed pendente lite, and is addressed to J. Howell Green, administrator of the estate of Mrs. Nancy Ford, deceased. It recites the fact of this suit having been brought against the defendant, and that J. Howell Green, as administrator of the estate of his intestate, had said land surveyed by a surveyor prior to the sale of the same on the 2d day of October, 1896; and that, as administrator, he had sold of the estate of his intestate the tract of land described in his deed; and that this notice was served "to vouch you in court to defend said suit." Plaintiff in error excepted generally to the order of the court set forth above. Inasmuch as there is no denial of the fact that J. Howell Green had been discharged as administrator of the estate of his intestate, of which estate the lands in question constituted a part, the court properly refused to make the discharged administrator a party to the case.

[3] 3. The bill of exceptions contains an exception to the exclusion of certain evidence; but this exception is not argued or referred to in the brief of counsel for plaintiff in error, and is therefore treated as abandoned.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 427)

PERRY v. REYNOLDS.

(Supreme Court of Georgia. Jan. 12, 1912.)

(*Syllabus by the Court.*)

1. EXECUTORS AND ADMINISTRATORS (§ 57*)—RECOVERY OF POSSESSION—ACTION BY GRANTOR'S ADMINISTRATOR.

Where one, to defraud his creditors, conveys and transfers his property to another, his administrator cannot maintain an equitable action against the transferee to get possession of the property for the purpose of paying the creditors of the decedent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 309; Dec. Dig. § 57.*]

2. PLEADING (§ 204*)—DEMURRER.

But where a petition brought by an administrator is based, not only on the claim of right to recover the property transferred, under the circumstances indicated in the preceding headnote and for the purposes there stated, but also on the right to recover the property for the estate of the decedent, on the ground that

the latter was of such unsound mind at the time of executing the conveyance as incapacitated him to make a valid contract, the entire petition should not be dismissed upon general demurrer.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 204.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by E. J. Perry, administrator, against J. E. Reynolds, guardian ad litem of James Irwin Reynolds. Judgment for defendant, and plaintiff brings error. Reversed.

Jno. R. Wilson and Russell & Custer, for plaintiff in error. Will H. Krause, for defendant in error.

BECK, J. This petition was brought by E. J. Perry, as administrator of Mrs. M. J. Reynolds, against J. E. Reynolds, guardian ad litem of James Irwin Reynolds. It seeks to have a deed, executed by the said Mrs. Reynolds to the said James Irwin Reynolds, her grandson, canceled, and other equitable relief.

The petitioner bases his right to the relief sought upon two grounds: The first is that the deed was executed for a totally inadequate consideration, and was of the nature of a voluntary conveyance for love and affection; and that, as the administrator of his intestate, he is entitled to recover possession of the land, which is now in the possession of the defendant, in order that he may sell the same for the purpose of paying the valid demands of creditors against the estate of his intestate, the intestate being insolvent at the time of her death, unless the deed referred to be treated as invalid, and the property be decreed to be a part of her estate. The other ground is that the decedent was, at the time of the execution of the deed, "mentally incapable of executing said conveyance, by reason of her long-continued illness and the infirmities of age; and that at the time said deed is purported to have been made she was totally incapacitated and of such unsound mind that she was unable to make a legal and valid conveyance." The plaintiff prayed that, should the court find upon the trial that any consideration whatever was paid by the grantee in the deed, "then the equity over what was actually paid be sold for the benefit of the estate." Demurrers, both general and special, were filed. The court did not pass upon the special demurrers, but granted an order sustaining in terms the general demurrer.

[1] 1. So much of the petition as may have for its purpose the setting aside of the deed, because it was executed upon an inadequate consideration, or a consideration merely of love and affection, and that for this reason the administrator is entitled to recover the land for the purpose of bringing

the same to sale, in order that the debts against the estate of the decedent may be paid with the proceeds, was clearly open to demurrer. An administrator cannot recover land which had been conveyed by his intestate, though the conveyance was a voluntary deed and without consideration, merely for the purpose of subjecting the property thus conveyed to the demands of creditors against the estate. In such an action, he stands in no better situation than his intestate would have stood had she, in her lifetime, brought an action to recover the property for the purpose of using it in paying debts which might have existed against her. This precise question was decided by this court in the case of *Crosby v. De Graffenreid*, 19 Ga. 290, where it was said: "A., to defraud his creditors, transfers his property to B., and dies. His administrator files a bill against B. to get possession of the property, that he may, with it, pay the creditors. Held, that there is no equity in the bill."

[2] 2. But if, as alleged in the petition, Mrs. M. J. Reynolds was, because of mental unsoundness, incapable of contracting at the time of the execution of the deed, after her death her personal representative had the right to bring this petition for the purpose of setting aside the conveyance. *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708. And if the conveyance in the present case was not purely for love and affection, but some consideration, though inadequate, was paid, a decree may be molded, under the allegations of this petition and the prayers thereof, that would protect any rights which the grantee may have as to the consideration which he may have actually paid for the conveyance.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 460)

YATES v. JONES et al.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

1. SALES (§ 244*)—RIGHTS OF PARTIES—BONA FIDE PURCHASER—SUFFICIENCY OF EVIDENCE.

The evidence did not support the finding of the auditor in favor of the defendant in error, and it was error to overrule the exception based on the ground that it was contrary to law and without evidence to support it.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 700-702; Dec. Dig. § 244.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 234*)—TRANSFER OF TITLE—SELECTION OF PROPERTY.

Where plaintiff advanced money in part payment of 40,000 feet of lumber of given character and dimensions, to be sawed for him and placed in a designated yard, and 47,000 feet of lumber were sawed and placed in the yard, plaintiff did not become a bona fide purchaser,

where he never received, marked, and accepted the lumber.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 657-680; Dec. Dig. § 234.*]

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by T. S. Yates and others against one Madden. To a finding in favor of B. F. Jones, T. S. Yates brings error. Reversed.

Persons & Persons and C. J. Lester, for plaintiff in error. Willingham & Willingham, for defendants in error.

BECK, J. The report of the auditor before whom the case was tried contained the following finding: "I find likewise that all the lumber one inch thick on and coming from the third yard on which the mill was located, which I shall hereafter call the Jones lumber, was sawed for plaintiff Jones; and that he was a bona fide purchaser of such lumber, advanced \$162 on the purchase price of same, and was equitably entitled to a specific performance of his contract, and is entitled to have the lumber delivered to him as a good-faith purchaser upon tendering to defendant any amount still due for same under his contract of purchase." Mrs. Yates, who claimed to be a bona fide purchaser of the same property, filed exceptions to this finding on the ground that the same was contrary to the evidence. The court below overruled her exceptions, to which ruling she sued out bill of exceptions to this court.

[1] While there were numerous parties to this case, and the pleadings made many issues, the exceptions to the findings and rulings of the auditor were comparatively few; and finally, under the ruling of the judge sustaining the auditor in all other respects and ruling against all other exceptions to his report, the issues were narrowed to the single one growing out of an exception to the finding of the auditor in favor of the defendant in error, Jones; and thus but a single question is presented for determination, and that is whether or not the auditor's holding was correct that Jones was the bona fide purchaser of certain lumber, on the purchase price of which he advanced the sum of \$162, and was equitably entitled to a specific performance of his contract with one Madden, against whom the petition in the case had been filed by persons alleging themselves to be creditors and lienors. The testimony of Jones, which it is contended supports and authorizes the finding of the auditor, is set forth in the bill of exceptions, and in substance is as follows: "Mr. Madden's sawmill was located near Mr. Kimball's in 1909. I bought 40,000 feet of lumber from him in 1909. I agreed to pay him 75 cents per hundred. I paid him \$162 on the lumber. The receiver sold this lumber. The announcement was made at the time of the sale by my attorney, Mr. Willingham, that I had

bought the lumber and had paid part of the purchase price and was ready to pay balance. I am still ready to pay the balance and carry out my contract. The lumber Mr. Yates was interested in was at the first and second settings. My lumber was at the third setting. I went to Mr. Madden's mill and confirmed the trade for lumber that had been made by my agent. I let him have the money to run his mill with. I have never had any part of the lumber delivered to me. Mr. Madden skipped out when I wanted the lumber checked out to me. It was understood between Mr. Madden and myself that this was to be full value of the lumber. I did not receive any lumber from Madden. The money I advanced was for running the mill. I understood from what he told me that this was all the lumber. He cut 47,000 feet during the time. I was to buy 40,000 feet. I kept advancing him money with the understanding that I could get all the lumber cut at this setting. Forty seven thousand feet was all he cut and was all I could expect to get. It was about 7,000 feet more than I was originally to get. My lumber was to be cut at the third setting. Madden moved the mill to the third setting. The lumber at the first and second settings was to be 1½ inches thick. I had my lumber cut 1 inch thick. About 47,000 feet was sawed with my money. Madden was not present when I checked the lumber." The witness Towery, introduced on behalf of Jones, testified: "I am father-in-law of B. F. Jones. I act as his agent when he is away. I made the trade with Mr. Madden for Mr. Jones. Mr. Madden was then at the second setting, and he moved his mill to the third setting and sawed lumber for Mr. Jones. The lumber was to be cut 12 to 16 feet long, and 4, 6, 8, and 10 inches wide, and 1 inch thick, as per Mr. Jones' order. The lumber was to be cut for 75 cents per 100 feet. Mr. Jones and myself paid something on this lumber. Mr. Jones ratified the contract. He went over to the mill and ratified it, and paid out money to Madden on the contract. No certain amount of lumber was to be sawed. All of the lumber cut at the third setting was for Mr. Jones. I do not know whether Mr. Yates furnished any money for the third setting or not. No lumber was ever delivered to Mr. Jones, and no money was ever refunded to me or to Mr. Jones. I did not have any writing with Mr. Madden. I gave him no instructions in writing. Madden told me that he needed money to run his mill, and that he wanted this money to run the mill with. Said he could not run the mill without the money. I was to get the lumber after it was cut and dry. I do not know how much he cut at the second setting after I advanced the money. I do not know how much was cut at the third setting. I never checked up any lumber at either stand." Other evidence was introduced by Jones, contradicting Yates' testimony, to the effect that

he had checked up the lumber which Jones claimed, and that it had been delivered to him (Yates).

[2] While the testimony of Jones in his own favor, that he advanced the sum of \$162 to Madden, who was operating a sawmill, and that this \$162 was in part payment of 40,000 feet of lumber of given character and dimensions which Madden, the owner and operator of the sawmill, was to cut for Jones, we do not think that under the evidence the contract of sale of the lumber at any time became complete and executed, but rather that it remained an executory contract of sale. It is to be borne in mind that, at the time Jones made the advancement of the money to Madden, the lumber for which this money was advanced was not in esse. It was still to be produced by cutting timber into the dimensions stipulated. And while it was piled, after having been cut, upon a designated yard, it was never received, marked, and accepted by Jones, but was piled in the yard referred to, with some 7,000 feet of other lumber. Before Jones could have become the bona fide purchaser of the lumber, as the auditor found him to be, acceptance and delivery, actual or constructive, should have appeared.

In the case of *Clarke v. Wolfe*, 115 Ga. 320, 41 S. E. 581, it appears that Clarke Bros. and one Clifton entered into a written contract for the sale of certain timber, in which contract it was stipulated that the latter, who was operating a sawmill, agreed to deliver to Clarke Bros. "all of the timber and lumber he [Clifton] may cut * * * (from the present date) from the lands purchased or to be purchased from the Southern Pine Company of Georgia, * * * in Montgomery county, Ga. The foregoing to be square edge, well manufactured, fresh, of good quality showing good heart on four sides, saw butted both ends, true, etc. Free from all defects." Clarke Bros. were to pay for the timber at certain rates varying with certain "averages." They made advances to Clifton from time to time, and the latter had delivered them timber cut from the land referred to in the contract. It was held by this court that the agreement contained in the writing was an executory contract for the sale of timber and lumber, and title to the same would not pass to Clarke Bros. until the timber had been sawed and delivered to them, and that the sale by Clifton of any portion of the timber or lumber before it was actually delivered to Clarke Bros. would have the effect to pass the title to the purchaser and defeat any claim which Clarke Bros. might have on the lumber or timber thus sold. The court said further: "In such a case they would be remitted to their action against Clifton for damages for the breach of his contract. Clarke Bros. had no title, under the contract, to any timber or lumber which had not been actually delivered to them." See,

also, in this connection, *Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303, and *Nat. Bank v. Crowley*, 24 Mich. 492.

If Yates were a bona fide purchaser of the same lumber from Madden, though his contract of sale was subsequent in date to the contract between Madden and Jones, he would have acquired a good title to the lumber, and Jones would be remitted to his action for damages against Madden; for even if, as against Madden, in view of his insolvency, Jones had a right to a decree for specific performance, this could not be enforced as against a bona fide purchaser of the property in controversy.

In his report the auditor refers to a telegram introduced in evidence by Jones, purporting to be from Madden to Jones, which Jones claimed Madden authorized Yates to write for him; but the telegram is not set forth in the report in words or in substance, the auditor merely stating that the telegram had been lost or misplaced, and that he would endeavor to find and attach it. Of course, in this state of the record, we cannot undertake to construe the telegram, nor determine what effect it would have upon the relative rights of Yates and Jones, nor consider the argument of counsel that Jones "entered definitely into the contract and began furnishing money to Madden, assured by a telegram from Madden, which Yates subsequently admitted to Jones he had himself written for Madden, that everything was arranged all right."

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 362)

HAYES v. HAYES et al.

(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 59*)—AMENDMENT—SUBJECT-MATTER.

Where it appears that, in a suit brought against several defendants, the plaintiff in the court below, against whom the verdict was rendered upon the trial, sued out a bill of exceptions to the judgment of the court overruling his motion for a new trial, and named the defendants in the case as J. H. (one of the defendants) et al., and did not otherwise designate the defendants, and the bill of exceptions was duly served upon the attorney of record for all of the defendants, the bill of exceptions may be amended by adding the names of all of the defendants.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 106-111; Dec. Dig. § 59.*]

2. EXECUTORS AND ADMINISTRATORS (§ 439*)—ACTIONS—INTERVENTION IN ACTION BY OTHERS.

Where complaint for land was brought by one who claimed title to the property sued for under a deed from his mother, it was alleged that the mother had died since the execution of the deed, leaving no property and no administrator, and that the defendants named in the petition, together with the plaintiff, were all of

the heirs at law of the decedent, one showing that he was the duly appointed and qualified temporary administrator of the decedent, and that he was in possession of the property sued for, was, upon his intervention duly filed praying that he be made a party defendant, properly allowed to become a party defendant to such suit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 439.*]

3. JUDGMENT (§ 713*)—PLEADING—RES ADJUDICATA.

The demurrer to the plea of res adjudicata in this case should have been sustained, inasmuch as the parties to the record in the suit relied upon as the basis of the plea of res adjudicata were not the same as those of the present suit, and the issue therein was entirely different.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Action by W. H. Hayes against John Hayes and others. Judgment for defendants, and plaintiff brings error. Reversed.

R. J. Bacon and Walter F. Hall, for plaintiff in error. J. T. Hill, for defendants in error.

BECK, J. W. H. Hayes brought complaint for land against E. W. Hayes, T. P. Hayes, John Hayes, Mrs. T. W. Bowen, and Rosa Bowen. The last named being a minor, a guardian ad litem was appointed for her. It was alleged in the petition that the plaintiff claimed title to the real estate sued for, under a deed from Mrs. Mary Hayes, deceased, and that Mrs. Mary Hayes died intestate on November 15, 1908, leaving no debts nor any estate, and that no administrator had been appointed on her estate. The defendants named filed their plea; and John Hayes, showing that he was the temporary administrator of Mrs. Mary Hayes, deceased, and that he had duly filed his bond and qualified as such administrator, and further showing that he had in his possession, custody, and control all the property, real and personal, of the decedent, including the property sued for in this case, asked to be allowed to intervene as temporary administrator for the purpose of protecting the interests of the estate, and he was accordingly allowed to intervene and be made a party defendant. Upon the trial a verdict was rendered in favor of the defendants. Whereupon the plaintiff made a motion for a new trial, and, this being overruled, he excepted.

In the bill of exceptions it is recited that the cause was one wherein "W. H. Hayes was plaintiff and John Hayes et al. were defendants." No specification as to who were the parties defendant in the case and to the bill of exceptions were made other than as stated above. Acknowledgment of service was made upon this bill of exceptions, and signed by "J. T. Hill, Attorneys for Defendant, as Appears of Record, John Hayes, Mrs. S. W. Ba-

con, J. O. Littlejohn, Guardian of Rosa Bowen, and T. P. Hayes." When the case was called for a hearing here, counsel for defendants in error made a motion to dismiss the bill of exceptions, on the following grounds: "(1) No one is named or otherwise disclosed by the bill of exceptions as plaintiff in error, or as defendant in error. (2) John Hayes et al. are named as defendants in a certain cause tried at the November term, 1910, of Crisp superior court, and by further reference to said bill of exceptions it will be seen that John Hayes intervened as temporary administrator of the estate of Mary Hayes, and not in an individual capacity, and no service has been made on the said John Hayes as administrator of said estate, and there has been no waiver of service. (3) The service made of the bill of exceptions is insufficient, for the reason that J. T. Hill acknowledged service for certain defendants, naming them, but does not acknowledge service for any one as defendant in error, and neither by reference to the bill of exceptions nor to the acknowledgment of service on the same can it be ascertained who are the defendants in error." Counsel for plaintiff in error asked leave to amend by adding, to the name of the defendant in error (John Hayes, the other parties who were the defendants in the court below.

[1] 1. Section 4, of an act entitled "An act to regulate and prescribe certain matters of review, procedure and practice in the courts of this state, and for other purposes," approved August 21, 1911 (Laws 1911, p. 149), provides that, "where a bill of exceptions which can be identified as excepting to a specific judgment is served upon counsel of record in the case, such service shall be held to bind all parties whom said counsel represented in the trial court." And section 5 provides as follows: "That where an acknowledgment of service has been procured as provided in section 4 of this act, the bill of exceptions may be amended in the reviewing court by making any person a party defendant in error to the case who is bound by such service, although such person may not have been named in the bill of exceptions." This statute is purely remedial, relating entirely to matters of practice; and therefore, while passed subsequently to the signing of this acknowledgment to the bill of exceptions, it is nevertheless applicable thereto. Pending cases were not excepted from the operation of the statute, which is general and universal in its terms relatively to matters dealt with. That being true, service upon J. T. Hill of the bill of exceptions was sufficient to bind all other parties defendant for whom he appeared as counsel according to the record. He appeared as counsel of record for all the parties defendant named in the original petition and as counsel for John Hayes in the petition to be allowed to intervene as

temporary administrator and to be made a party defendant in the case.

[2] 2. Under the facts stated in the second headnote, the temporary administrator was properly allowed to intervene as a party defendant.

[3] 3. Upon the trial of the case, in addition to the defense set up, the defendants offered a plea of res adjudicata, which was demurred to generally by the plaintiff. The plea of res adjudicata contained the record in the case of Mrs. Mary Hayes (the decedent referred to above) against E. W. Hayes; the same being proceedings instituted in the superior court of Crisp county to evict the defendant E. W. Hayes, as a tenant holding over, from the property now in controversy. In the eviction proceedings E. W. Hayes, who was there proceeded against, filed a counter affidavit, deposing that he was then holding the land in controversy under W. H. Hayes, and that he had lawful possession of same, and that it belonged to W. H. Hayes. Upon the trial of the issue thus made W. H. Hayes was sworn as a witness in such cause, and was fully cognizant and aware of what the issue was in said case. The trial of said eviction proceedings resulted in a verdict and judgment for the plaintiff Mrs. Mary Hayes, against E. W. Hayes. What is stated above in this division of the opinion, together with the exhibits of the affidavit of warrant, entries thereon, and the counter affidavit in the eviction proceedings, constitutes the plea of res adjudicata. The demurrer thereto was overruled. This was error. Under the decision in the case of Patrick v. Cobb, 122 Ga. 80, 49 S. E. 806, title to the land was not involved in the eviction proceedings. In the case cited, the court said: "An issue made by the filing of a counter affidavit to a summary proceeding to eject a tenant, under Civil Code 1895, § 4813 et seq., is tenancy or no tenancy, and the question of the plaintiff's title is not involved." The ruling above made renders it unnecessary to discuss the assignments of error in the motion for a new trial; each of them being involved in the question of the sufficiency of the plea of res adjudicata.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 429)

MALONE v. MALONE.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

TRUSTS (§§ 17, 18*)—EXPRESS TRUSTS—VALIDITY OF ORAL TRUSTS.

Emma Malone, as next friend of her six minor children by her deceased husband, James Malone, brought her equitable petition against Mary Malone, the mother of the decedent, alleging that he left at his death a policy of insurance upon his life, payable to the defendant; that the defendant had informed the petitioner that the insurance had been made pay-

able to the defendant, with the understanding (to which defendant agreed) that she was to hold the proceeds as trustee for the minor children in the event of the death of the insured; that the defendant, while claiming no interest in the proceeds of the policy, proposed to use the interest from the fund to support the children, on certain stated conditions which constituted no part of the contract between decedent and the defendant; that there was no writing as to the terms of the agreement between decedent and his mother. Petitioner prayed that the court establish a trust in favor of the children in the proceeds of the policy of insurance. *Held*, that the petition sought to have an express trust declared in the absence of any writing creating or declaring the same; and the court properly sustained the general demurrer.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Emma Malone, as next friend, against Mary Malone. Judgment for defendant, and plaintiff brings error. Affirmed.

Emma Malone, as next friend of her six minor children, filed an equitable petition against Mary Malone, alleging as follows: James A. Malone, the husband of petitioner and father of said children, was a locomotive engineer. He died, leaving a policy of insurance on his life for \$3,000 in the Brotherhood of Locomotive Engineers, and the same was payable to the defendant, who is the mother of James A. Malone. The defendant informed petitioner of defendant's exact situation, to wit, that the insurance had been made payable to defendant, with the understanding that she was to hold the proceeds as trustee for the children of James A. Malone in the event of his death; that the defendant's said son made defendant the trustee, rather than his wife, because he believed his mother was a better business manager than petitioner; and that defendant accepted said trust. The insurance money has not been collected, but the defendant has "proposed to put the same in bank when collected and pay the interest to the support of the said children of petitioner, and then only on condition that petitioner shall allow said Mary Malone to have control of said children and place them in a Roman Catholic convent in Savannah." Such conditions constituted no part of the contract between James A. Malone and Mary Malone. The principal of the insurance money will have to be encroached upon, from time to time, to support said children. Petitioner is unable herself to do so. She is prepared to work and do her best to support and maintain her children, but considers the demand made upon her to surrender them to the care of others is unnatural, and so foreign to any arrangement made between Mary Malone and James A. Malone as justifies petitioner in bringing her petition for the removal of defendant as trustee under the insurance pol-

icy. Petitioner knows of no written contract between her husband and his mother, and understands that there was nothing in writing as to the terms of the agreement between them.

The prayers are: For judgment establishing defendant's relation to said fund, lest, after her death, it be claimed that said fund is a part of defendant's individual estate; that the court establish a trust in favor of the children in the proceeds of the policy; that the use of said fund by the defendant be restrained; that a new trustee be appointed and required to give bond; and that such trustee, or the legal guardian of the children, be authorized to encroach upon the corpus of the fund for the support and maintenance of the children; and for general relief. By amendment it was alleged that, since filing the original petition, the proceeds of the policy had been collected by the defendant; that she was holding the same, pursuant to the understanding had with her son in his lifetime; and that she was refusing to aid petitioner in any way. A general demurrer was sustained, and the plaintiff excepted. The court retained in force the order restraining the defendant from disposing of the \$3,000 until the judgment of the Supreme Court.

B. B. McCowen and W. K. Miller, for plaintiff in error. D. G. Fogarty and Hamilton Phinzy, for defendant in error.

BECK, J. (after stating the facts as above). The headnote states the facts alleged which are material to the decision of the question of law raised by the general demurrer to the petition. Other facts, as appears from the foregoing statement, were alleged which might have been material in considering whether or not, had a trust been declared and decreed, of which the minor children of the plaintiff were the beneficiaries, the defendant should be removed from her office as trustee and another substituted, and whether the encroachment upon the corpus of the estate should be allowed, in view of all the circumstances set forth; but these additional facts became immaterial after it was determined that no trust had been created.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 478)

SOUTHERN TITLE GUARANTEE CO. et al.
v. LAWSHE.

(Supreme Court of Georgia. Jan. 16, 1912.)

(Syllabus by the Court.)

1. VENUE (§ 5*)—NATURE OF ACTION—CANCELLATION OF DEED.

An equitable petition to cancel deeds as a cloud on the plaintiff's title must be brought

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the county of the residence of a defendant against whom substantial relief is sought.

(a) The suit, as originally filed, was of this character.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 5.*]

2. VENUE (§ 13*)—NATURE OF ACTION—CANCELLATION.

Amendments attaching an abstract of the deeds under which the plaintiff claimed, and alleging that the substantial defendant, which held a deed to secure a debt, and was proceeding to exercise a power of sale contained in it, had "no valid title to the land or lien thereon," and praying that "judgment be rendered adjudicating the title to the above-described lands to be in the plaintiff," did not change the suit into an action of ejectment or complaint for land, or authorize it to be tried in the county where the land lay.

(a) The mere proceeding to exercise the power to sell, contained in a deed to secure a loan, did not of itself constitute any such ouster or adverse possession as authorized the bringing of an action of ejectment.

(b) If the amended suit should be treated as an action of ejectment, or in the nature of ejectment, involving the title to land, so as to be tried in the county where the land lay, it was fatally defective in allegations, and was subject to dismissal on general demurrer.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 13.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by Mrs. W. J. Lawshe against the Southern Title Guarantee Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Mrs. Willie J. Lawshe brought her suit in the superior court of Gordon county against the Southern Title Guarantee Company, a corporation having its principal office and place of business in Floyd county, with an agent in Gordon county, and against E. H. and C. E. Davis of Floyd county. She alleged, in brief, as follows: She is the owner of lots of land 52, 126, and 128 in the twenty-fifth district and third section of Gordon county, by grant from the state of Georgia to W. B. W. Dent, and from said Dent by will to the mother of plaintiff; plaintiff being the only heir of her mother. The Southern Title Guarantee Company advertised the land for sale at public outcry on the first Tuesday in May, 1909, under a pretended deed to secure a debt, with power of sale from E. H. and C. E. Davis, dated January 7, 1909, to secure an alleged note of \$1,000, dated said date and due March 6, 1909, which deed was recorded April 19, 1909. The company, through its agent, intends to sell the land at public outcry, or by private sale, and is negotiating a private sale, when it has no title to the land or lien thereon. Defendants claim under a pretended deed from W. B. W. Dent to William Solomon, and from William Solomon to W. W. Ashburn, and from Ashburn to E. H. and C. E. Davis, and from said Davises to the Southern Title Guarantee Company. The

deed herein referred to is spurious and invalid, and is a cloud upon plaintiff's title. Upon information and belief, plaintiff alleges that the deed from W. B. W. Dent to William Solomon, dated January 5, 1851, recorded December 21, 1907, in Book T of Deeds, page 382, in the clerk's office of the superior court, is a forgery. Plaintiff alleges that she was remediless at law, and prayed that the defendants be enjoined from selling, conveying, or mortgaging the land in controversy, or from granting any easement thereon; and that the deeds from Dent to Solomon, from Solomon to Ashburn, from Ashburn to the Davises, and from the Davises to the Southern Title Guarantee Company be declared null and void; and that they be canceled as clouds upon plaintiff's title; and for process and general relief.

The plaintiff filed three amendments to her petition. By the first, she attached as an exhibit an abstract of title "to the lands sued for," and alleged "that defendants claim title to said lands, although defendants have no valid title thereto or lien thereon," and added a prayer for a judgment adjudicating the title to the lands described in the plaintiff. By the second amendment, she alleged that she held the lands under certain muniments of title. By the third, she struck certain paragraphs of the original petition, alleging that the defendants claimed under certain deeds, which were spurious and invalid, and one of which was alleged, on information and belief, to be a forgery, and, in lieu thereof, alleged as follows: "That defendants have no valid claim of title to said lots, but the defendants claim under certain alleged, pretended deeds, which are spurious and invalid, and are clouds upon plaintiff's title."

The Southern Title Guarantee Company filed a demurrer, among other grounds, because the petition set forth no cause of action, and because it shows, on its face, that the superior court of Gordon county has no jurisdiction of the case, as none of the defendants against whom substantial relief is prayed reside in Gordon county, but are residents of Floyd county. All of the defendants filed their plea to the jurisdiction, in which they set up that they were not residents of Gordon county, but were residents of Floyd county; that they had never resided in Gordon county, nor did they have any agents who could accept service, or against whom substantial relief could be granted. The Davises alleged that they had no title to the property described in the petition, but that they had parted with the title, prior to the filing of the petition, by quitclaim deed. The defendants also filed an answer, in which they stated that it was done without waiving service, their plea to the jurisdiction, or their general or special demur-

ers. The court overruled the demurrer, the plea to the jurisdiction, and a motion made to continue the case on account of surprise; all of which rulings the defendants assigned as error. The court directed a verdict for the plaintiff, upon which judgment was entered, and the defendants excepted.

Geo. A. Coffee, for plaintiffs in error. Paul F. Akin and J. M. Lang, for defendant in error.

LUMPKIN, J. [1] From the report of facts, it will be seen at a glance that the original petition was equitable in its nature. The sole purpose was to cancel certain deeds as a cloud on the title of the plaintiff, to enjoin a sale under a power contained in a deed made to secure a debt, and for general relief. If it set out any cause of action at all, it was purely equitable in character. The mere allegation that the defendants "had no valid title to said land or lien thereon," and the prayer for process, did not make the case an action of ejectment. It appeared on the face of the petition that the substantial defendants resided in another county; and that there was no jurisdiction to try the case in the county where it was brought. Civil Code 1910, § 6540. The point was raised by demurrer and by plea to the jurisdiction. The defendants also filed an answer, in which it was stated that it was filed without waiving service, or their demurrer or plea to the jurisdiction. Both the plea and answer were verified on May 12, 1909. The entry of filing on the latter was dated June 15, 1910, "by order of the court." The entry on the former was dated June 21st. It was urged that this waived objection to the jurisdiction. If so as to the plea, the point was also made by the demurrer, which appears to have been urged before the answer was filed.

[2] Three amendments to the petition were filed, in the effort to confer jurisdiction on the court. By the first, the plaintiff alleged that she claimed under a certain chain of deeds. By the second, the plaintiff attached an abstract of title "to the land sued for," and alleged that "the defendants claim title to said lands, although defendants have no valid title thereto or lien thereon." It was also prayed that "judgment be rendered adjudicating the title to the above-described land to be in the plaintiff." By the third amendment, the plaintiff struck from the petition the allegations as to the chain of deeds terminating in that held by the defendant corporation, and alleged that the defendants had no valid chain of title to the lots, but claimed "under certain alleged pre-

tended deeds, which are spurious and invalid, and are clouds upon the plaintiff's title."

It is contended that the action was one of ejectment, or its statutory equivalent; and, if not so originally, that it became so after the amendments were made. Primarily an action of ejectment was to recover land from one who held it wrongfully. We need not discuss what character or extent of ouster or adverse possession will authorize the bringing of an action of ejectment. Nor is it necessary to decide whether a purely equitable action can be brought in a county where there is no jurisdiction, and be amended into an action of complaint for land which could be properly brought here. We know of no law authorizing a plaintiff, who alleges that "she holds certain lands" under certain deeds, to bring a suit in a county where the land lies against a person who lives in another county, and who has no possession of the land, and has in no way ousted the plaintiff, and confer jurisdiction on the court of the former county by alleging that the defendant holds a deed to secure a debt; that his claim is not valid, and the plaintiff has a title which he would like to have declared good. This is not the meaning of the constitutional provision fixing the venue of actions, respecting titles to land, in the county where the land lies.

It is said that the defendant corporation is proceeding to exercise the power of sale contained in the security deed, and is in "constructive possession" of the land. A mere proceeding to exercise a power of sale contained in a deed to secure a debt is not alone such an ouster or adverse possession of the land as furnishes a basis for an action of ejectment. If the petition, as amended should be treated as in the nature of an action of ejectment, it was fatally defective.

The rule that in ejectment, lease, entry, and ouster must be admitted, which is invoked in behalf of the defendant in error, applies where there is an allegation of lease, entry, and ouster, or what is considered equivalent thereto, in a statutory form of action to recover land. It can hardly be contended that an action of ejectment would lie with no allegation of ouster, or that the consent rule would supply such a failure of allegation. And the rule that where there is a right there is a remedy, and the court having jurisdiction of the case will, if necessary, frame a remedy, which is also urged, cannot help the defendant in error, because here the court has no jurisdiction of the case. It should have been dismissed accordingly.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 440)

PETERS v. QUEEN INS. CO.

(Supreme Court of Georgia. Jan. 12, 1912.)

*(Syllabus by the Court.)***1. INSURANCE (§ 618*)—ACTIONS—VENUE.**

Under Civil Code 1910, § 2563, a nonresident insurance company may be sued in the county where the company had an agent and place of doing business when the contract of insurance was made and the cause of action arose, although the company has abandoned its agency in that county and has no agent there at the time of the suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1536-1539; Dec. Dig. § 618.*]

2. INSURANCE (§ 627*)—ACTIONS—NONRESIDENT COMPANY—SERVICE OF PROCESS.

Where in such a case the company has no agent or place of doing business in the county, service of suit may be perfected, under Civil Code 1910, § 2564, by leaving a copy of the original suit and process at the place where was located the agent and place of doing business of the company continuously from the time of the execution of the contract to the time of the company's discontinuance of the agency in that county.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. § 627.* Corporations, Cent. Dig. §§ 2603-2627.]

3. COURTS (§ 217*)—CERTIFIED QUESTIONS—REVIEW—CONSTITUTIONALITY OF ACT.

No constitutional question is propounded to this court by the Court of Appeals, and therefore no question as to the constitutionality of any act of the Legislature is passed upon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. § 217.*]

Evans, P. J. dissenting.

Certified Question from Court of Appeals.

Action by Beulah Peters, administratrix, against the Queen Insurance Company. Judgment for defendant, and plaintiff brings error to the Court of Appeals, which certifies certain questions to the Supreme Court. Questions answered.

The Court of Appeals certifies to the Supreme Court the following question of law:

"On October 30, 1909, a petition was filed in the city court of Moultrie against a non-resident insurance company, because of a loss which had been occasioned to the plaintiff, who was insured under one of its policies. The petition alleged that at the time the contract of insurance was made (October 29, 1908), and at the time the cause of action sued on arose (December 8, 1908), the defendant had an agent and an agency in Moultrie, in Colquitt county. Process was issued in usual form, directed to the sheriff of the city court of Moultrie. The sheriff made the following return of service: 'I have this day served the within papers by leaving a copy of the same at the place where was located the agency or place of doing business of said defendant company continuously from January 1, 1906, to December 14, 1908; said defendant company now having no agent or place of doing business in said county, the agency or place of doing business of said

company at said time (January 1, 1906, to December 14, 1908) being located in the second story of the building known as the Moultrie Banking Company Building, corner of North Broad and West Broad streets, Moultrie, Ga., that being the place where said copy was by me so left as above stated. W. W. Boyd, Sheriff, City Court of Moultrie.' At the return term of the court the defendant specially appeared and moved to dismiss the action, for lack of jurisdiction as to either the case or the defendant, because it is not disclosed by the petition that at the time of the filing of the suit the defendant company had any agent or agency in the city of Moultrie or in the county of Colquitt; also because it appears from the return of the sheriff that the defendant company had no agent or agency or place of doing business in said city or in said county at the date the alleged service was made, or at any other date subsequent to December 14, 1908. Was the action subject to dismissal because of the facts set forth in the grounds of the motion?"

J. A. Wilkes and Shipp & Kline, for plaintiff in error. King, Spalding & Underwood, for defendant in error.

BECK, J. The act of 1861 providing for the situs of suits against insurance companies and the service of process in suits brought thereunder is codified in the Code of 1873 as follows: "Sec. 3408. Whenever any person may have any claim or demand upon any insurance company having agencies, or more than one place of doing business, it shall be lawful for such person or persons to institute suit against said insurance company within the county where the principal office of such company is located, or in any county where said insurance company may have an agency, or place of doing business, was located at the time the cause of action accrued, or the contract was made, out of which said cause of action arose." Section 3409 declared: "In all such suits, service shall be effected upon such insurance company by leaving a copy of the bill or writ with the agent of the company, if any; if no agent should be in the county, then at the agency or place of doing business, or where the same was located at the time such cause of action accrued, or the contract was made, out of which the same arose." These sections were construed in *Empire State Ins. Co. v. Collins*, 54 Ga. 376, wherein it was held that, "under sections 3408, 3409, of the Code, an action against an insurance company must be instituted in the county where its principal office is located or where it has an agency or place of doing business when suit is brought, and which agency or place of business was located in the county at the time the cause of action accrued, or the contract was made out of which the cause of action arose."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

This case was decided at the January term, 1875.

Subsequently section 3408 was amended by inserting between the word "business" and the word "was" the following "or in any county where such agency or place of doing business" (Acts 1878-79, p. 54), so that the section as amended would read as follows: "Whenever any person may have any claim or demand upon any insurance company having agencies, or more than one place of doing business, it shall be lawful for such person or persons to institute suit against said insurance company within the county where the principal office of such company is located, or in any county where said insurance company may have an agency or place of doing business, or in any county where such agency or place of doing business was located at the time the cause of action accrued, or the contract was made, out of which said cause of action arose." This amendment wrought a change in the original act. In the Collins Case the latter part of the section was construed in conjunction with the former, so that in order to locate the venue of the suit there must be an agency or place of doing business at the time the suit was brought, and this agency or place of doing business must have been located in such county at the time of the accrual of the cause of action or the making of the contract.

[1, 2] By the amendment suits against an insurance company having an agency or more than one place of doing business may be located (1) in counties where the principal office of such company is located; or (2) in any county where the company may have an agency or place of doing business; or (3) in any county where such agency or place of doing business was located at the time the cause of action accrued; or (4) in any county where such company had an agency or place of doing business at the time when the contract was made out of which the cause of action arose. Though this act was in existence at the time the case of *Atlanta Home Ins. Co. v. Tullis*, 99 Ga. 225, 25 S. E. 401, was decided, no reference was made to it in the decision, and the court followed the ruling pronounced in the Collins Case. Inasmuch as no reference was made to the amending act of 1879, this decision is not to be accepted as a construction of that act. Except as amended by the acts of 1902 (Acts 1902, p. 53), substituting the word "agent" for "agency," sections 3408, 3409 of the Code of 1873, as amended by the act of 1879, are codified in the present Civil Code, §§ 2563, 2564, with some immaterial verbal changes.

[3] No constitutional infirmity is raised in the record as to that part of the act which allows a suit to be located in a county where the contract was written, or cause of action accrued, without respect to the company's having an agent or place of doing business there at the time the suit is instituted; nor

is any constitutional objection urged against the provision that, if no agent should be in the county, the process in the suit brought under this section may be served where the agent or place of doing business was located at the time the cause of action accrued, or the contract was made, out of which the same arose. This court is committed by numerous precedents to the proposition that a constitutional question must be made in the court below, before this court will undertake to pass upon it. Whatever may have been done sometimes in particular cases, or whatever may be the practice in courts of error in some other jurisdictions, this is the rule laid down by the decisions of this court. *Sanders Mfg. Co. v. Dollar Savgs. Bank*, 110 Ga. 559 (3), 35 S. E. 777; *Roberts v. Keeler*, 111 Ga. 185, 36 S. E. 617; *Laffitte v. Burke*, 113 Ga. 1001, 39 S. E. 433; *Sayer v. Brown*, 119 Ga. 539 (3), 46 S. E. 649; *Newkirk v. Sou. Ry. Co.*, 120 Ga. 1048, 48 S. E. 426; *Carswell v. Wright*, 133 Ga. 714 (4), 66 S. E. 905; *Cooper v. Natl. Gert. Co.*, 132 Ga. 529, 64 S. E. 650, and many others. Indeed, Civil Code 1910, § 6203, declares that "the Supreme Court shall not decide any question unless it is made by a special assignment of error in the bill of exceptions," etc. Unless we hold this section of the Code unconstitutional, it is conclusive of the question. At any rate, it indicates a concurrence between the legislative and judicial views on this question. Thus by repeated decisions of this court the rule is firmly fixed as to cases coming before us upon writs of error.

Is the case different as to questions certified to the Supreme Court by the Court of Appeals? In the amendment to the Constitution, establishing the Court of Appeals and declaring its jurisdiction and practice, a rule is prescribed as to this matter. Civil Code 1910, § 6506 (codifying a portion of this amendment), contains the following provisions on the subject of the certification of questions by the Court of Appeals to this court: "Where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court; and thereupon a transcript of the record shall be transmitted to the Supreme Court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the question so certified, and the Court of Appeals shall be bound by the instruction so given. * * * The Court of Appeals may at any time certify to the Supreme Court any other question of law concerning which it desires the instruction of the Supreme Court for proper decision; and thereupon the Supreme Court

shall give its instruction on the question certified to it, which shall be binding on the Court of Appeals in such case." It will be seen that by this amendment to the Constitutional provision was made for the Court of Appeals to certify to this court two classes of questions: (1) Constitutional questions; (2) any other questions on which they may desire instruction. As to constitutional questions, it specifies a question raised in a case in the Court of Appeals, and which is necessary for the decision of the case there, and provides that that court shall so certify to this court. The "other" questions mentioned evidently referred to questions other than such constitutional questions, for which special provision had been made. To hold that, on a general question of the Court of Appeals making no reference to any constitutional question, this court would search the Constitution to determine whether any conflict between it and the act of the Legislature under consideration could be found, would, we think, conflict with the whole spirit of our decisions, as well as with the manifest intention of the Constitution itself.

As the record does not disclose any constitutional attack made upon these Code sections, and as the Court of Appeals has asked no instruction on that subject, we cannot interpret them to mean anything other than what is clearly expressed. We therefore answer the question propounded by the Court of Appeals in the negative. All the Justices concur, except EVANS, P. J., dissenting, and HILL, J., not presiding.

EVANS, P. J. (dissenting). I agree with my Associates as to the construction to be given to the statute fixing the venue of suits against insurance companies and providing for the service of process of suits brought under the statute. But I cannot concur with them that, in answer to a question of law from the Court of Appeals, the law as it is written in a statute, however it may palpably collide with the Constitution of the state, must control the case, in the absence of a direct attack on the statute made in the bill of exceptions to the Court of Appeals. It was written in the first Constitution of Georgia, and repeated in all subsequent ones, that it is the duty of the courts to declare void all legislative enactments which contravene the Constitution. Obediently to this mandate, the Supreme Court in its early history adjudicated the constitutionality of statutes without so much as a reference of antagonism between the act and the Constitution being contained in bills of exceptions. Later on the practice grew up to allege in the assignments of error that the act was unconstitutional, without stating the particular clause of the Constitution which the act was alleged to offend. Finally the practice culminated into a rule of procedure that the Supreme Court would not

decide a constitutional point, unless the point was passed on by the trial court, and in raising the point the particular constitutional provision alleged to have been violated by the act was specifically indicated. The rationale of this rule is, as I apprehend it, that the Supreme Court was established to review errors of law committed in the trial court; and unless the conflict of a statute and the Constitution is urged in the trial court, and the ruling duly excepted to, this court will not undertake to pass upon a question not made in the trial court.

Whether I am right or wrong in my analysis of the basal support of the rule, I am fully persuaded that neither the formula of its pronouncement nor the spirit of its essence requires its application to certified questions of law from the Court of Appeals. The Constitution was amended about seven years ago by the establishment of the Court of Appeals, which court was given exclusive jurisdiction within a limited sphere. In order to avoid conflict of decisions, it was provided that the Court of Appeals was bound by the precedents of the Supreme Court. It was further provided that the Court of Appeals should not pass on the constitutionality of any statute, but if a statute was attacked as unconstitutional, and exception was taken to the ruling of the trial court thereon, that the Court of Appeals should certify such constitutional question to the Supreme Court for decision. It was further provided that the Court of Appeals might certify any question of law to the Supreme Court, and must follow the law as enunciated by the Supreme Court in answer to the question. In determining the question of law certified by the Court of Appeals, this court is not reviewing the judgment either of the Court of Appeals or of the trial court. It is simply deciding the law question submitted to it by the Court of Appeals. If the law question is submitted in a concrete form, and its solution involves the consideration of two statutes apparently conflicting, it is our duty to decide on the operation of each. The question cannot be answered without doing this. If subsequently to the passage of the statute under consideration the General Assembly had passed an act declaring that all insurance companies having agents in this state must be sued in a county where an agency is located, would it not be our duty to pass upon the repugnancy of such a statute to the one sub judice, and decide which one is to control? If a statute be in opposition to the Constitution, and if both the statute and the Constitution apply to the particular case, so that the court must either decide the case according to the Constitution or according to the statute, which is to control? If the courts are to regard the Constitution as superior to the statute, where both apply, then the Constitution must control the case. So I conclude that when the Court of Appeals inquires of this court the legal effect of cer-

tain facts, and a statute in opposition to the Constitution and the Constitution both apply to the facts, and either the statute or the Constitution must control the decision, then it is the duty of this court to reject the statute and give full force and effect to the Constitution.

The Constitution requires that a defendant must be sued in the county of his residence. An insurance company may not necessarily be a corporation; but, whether such company is a partnership or a corporation, it can be sued only in the county of its residence, if a judgment in personam is sought. It is competent for the General Assembly to enact that an insurance corporation of its own creation may be located for purposes of suit as a resident of each county where it has an agent or agency. But it would not be competent for the Legislature to override the Constitution and enact that a domestic insurance company is suable in a county where it had neither agent nor place of doing business at the time of the suit. All citizens of the United States, including corporations, are guaranteed the equal protection of the laws, and where foreign and domestic corporations are doing business in this state by means of agents, the law providing for the situs of suits where in personam judgments are sought must apply to both alike. Furthermore, that provision of the Code section which provides for service of process on a former place of business in a suit instituted in a county where the defendant has neither agent nor place of business clashes with the due process clause of our Constitution. I will not undertake to elaborate upon the unconstitutional feature of the statute, because that point is not reached in the difference between my Brethren and myself. I am firmly of the opinion that the answer to the question of the Court of Appeals should be that the case in the city court of Moultrie should be dismissed.

(187 Ga. 447)

UNITED STATES CASUALTY CO. v.
NEWMAN.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

INSURANCE (§ 627*)—ACTION ON POLICY—
SERVICE OF PROCESS.

Under the circumstances contained in the recital of facts made by the Court of Appeals in propounding the question as to which it desires instructions by this court, the city court of La Grange had not acquired such jurisdiction of the defendant as would authorize it to proceed to try this action and to render a judgment against the defendant therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. § 627; Corporations, Cent. Dig. §§ 2603-2627.]

Certified Question from Court of Appeals.

Action by J. D. Newman against the United States Casualty Company. Judgment for plaintiff, and defendant appeals to the Court of Appeals, which certifies a certain question to the Supreme Court. Question answered.

The Court of Appeals certifies to this court for its instruction thereon the following question of law, the determination of which is deemed necessary to a proper decision of the above-stated case:

"On July 28, 1909, the plaintiff in error, which is a nonresident insurance company, had an agency at La Grange, in Troup county, and W. C. Ford, of said county, was the agent in charge of said agency, and continued as such throughout the year 1909. On said date, and at said place, and through said agent, said company issued its policy insuring one H. W. Newman against death from certain accidental causes; the defendant in error being named as the beneficiary. On December 17, 1909, while said policy was in effect, said H. W. Newman was accidentally killed in a way by which it is alleged that the company became liable on said policy. (For the purpose of this question, the liability of the insurance company on the policy is to be taken as existing.) On February 21, 1910, Mrs. Newman (the defendant in error) filed an action on said policy in the city court of La Grange. The clerk of that court on that day issued process in usual form, returnable to the March term of the court. On February 24, 1910, the sheriff of that court made return that he had served the defendant by serving 'W. C. Ford, their agent, personally' with a copy of the writ. The clerk also issued a second original and process addressed to the sheriff of Fulton county and his deputies (no order of court directing the issuance of this second original is shown); and on February 24, 1910, a deputy sheriff of Fulton county made return that he had served the defendant by personally serving 'John H. Mullin, the agent and attorney designated by said defendant upon whom service can be made.' At the appearance term the defendant traversed the return of service which had been made by the sheriff of Troup county, and set up that on the day when the service was made Ford was not its agent, and occupied no relationship to it which would make service on him effectual as against the defendant, and that it had no agent in Troup county on that date. The defendant also specially appeared and moved to dismiss the action on the ground that service had not been legally perfected, because the service on Ford was ineffectual, as he was not its agent; and service in Fulton county on its agent Mullin was nugatory, as there was no authority of law for the making of that service, nor for

the issuance of the second original and process directed to the sheriff of Fulton county and his deputies. Said Mullin was, at the time the suit was filed and the service made, a resident of Fulton county, in charge of an agency of the defendant company in Atlanta, in that county, and had been designated by the company as its agent to acknowledge service on suits and as agent upon whom service might be perfected, as is required by law. The traverse as to the service on Ford was sustained; and as a matter of fact it is stated, as a part of this question, that W. C. Ford was agent for the defendant company up to December 31, 1909, when his agency terminated, and that since that date the defendant company has not had an agent or agency in Troup county. Under the facts recited, did the city court of La Grange have such jurisdiction of the defendant as to authorize it to proceed to try said action and to render judgment against the defendant therein?"

Slaton & Phillips and Hatton Lovejoy, for plaintiff in error. W. T. Tuggle, for defendant in error.

BECK, J. In case of suit against a non-resident insurance company under the facts and circumstances set forth in the foregoing statement of the facts preliminary to the question in regard to which the Court of Appeals has asked the instructions of this court, under the decision in the case of *Peters v. Queen Insurance Company*, 73 S. E. 664, this day decided, the method of perfecting service by process is pointed out by the statute. Under the provisions of section 2563 of the Civil Code the city court of La Grange had jurisdiction of the subject-matter and of the defendant, inasmuch as the defendant had an agency at La Grange, in said county, at the time of the execution of the contract sued on. The person who was the agent of the company at the time of the execution of the contract had ceased to represent the defendant company as its agent prior to the bringing of this suit. Consequently service upon him of the process was entirely nugatory. The method of service in the case as it stood at the time of bringing the suit is clearly pointed out in Civil Code, § 2564, and could be effected by leaving a copy of the original suit and process at the agency or place of doing business of the company at the time of making the contract out of which said suit arose. Inasmuch as the statute provides, under the decision which we have referred to above, a plain method of perfecting service in the county where the suit was brought, there was no necessity or authority for the issuance of the second original for service upon a person resident in another county, who had been designated by the defendant company

as its agent and attorney upon whom service could be made. The necessity which the court recognized in the case of *Devereux v. Atlanta Ry. & Power Co.*, 111 Ga. 855, 36 S. E. 939, as a ground for the court's exercising a power to take proper steps to have service made, because of a lack of a provision in the statute for the same, did not exist here. It was not necessary for the court or its officers to travel out of the statute in order to assert its jurisdiction by causing its process to be served on an officer or agent of the defendant in person.

Inasmuch as there was no service in the one way provided for in the section of the Code last cited, and the only way in which, under the circumstances set forth in the recital of facts preliminary to the submission of the question by the Court of Appeals, service could be effected, the court had not acquired such jurisdiction of the person of the defendant as would authorize it to proceed with the trial of the suit, and the question of the Court of Appeals must therefore be answered in the negative. All the Justices concur, except HILL, J., not presiding.

EVANS, P. J. I specially concur in the judgment. My views on the subject appear in my dissent in the case of *Peters v. Queen Insurance Co.*, referred to in the opinion.

(137 Ga. 459)

BRACKIN v. JEFFERSON FIRE INS. CO.
(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

ACTION AGAINST INSURANCE COMPANY.

This case is controlled by the decisions this day rendered in the cases of *Peters v. Queen Ins. Co.*, 73 S. E. 664, and *U. S. Casualty Co. v. Newman*, Id. 667.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by G. B. Brackin against the Jefferson Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hawes & Pottle, for plaintiff in error. Smith, Hammond & Smith and E. S. Longley, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur, except Hill, J., not presiding.

(137 Ga. 373)

J. B. CARR & CO. v. WITT et al.
(Supreme Court of Georgia. Jan. 11, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 224*)—DEMURRER—DECISION—CONSTRUCTION.

The plaintiffs filed their petition against the Metropolitan Amusement Company and Carl Witt, alleging that they had entered into a contract with the Amusement Company

for the improvement of a certain building located on a lot belonging to Carl Witt; that petitioners, who were general contractors, had, "in addition to the original contract, furnished material and labor for the improvement of the building," amounting to a stated sum; that the Amusement Company paid a part of their obligation growing out of the contract, but a balance is still due petitioners; that "while said contract for the improvement of said premises was entered into between petitioners and Metropolitan Amusement Company, said contract was ratified and assented to by Carl Witt, who was at the time of the execution of said contract, and now is, the owner of the above-described property." Plaintiffs in due time filed and had recorded their claim of lien for the improvement of the property, embracing in their claim the lot of land and the original building thereon, alleged to be the property of Carl Witt. Witt filed general and special demurrers to the petition. The court sustained the general demurrer, and passed the following order: "The general grounds of the demurrer are sustained, and the petition is dismissed, on the ground that the facts stated in the petition do not make a case against Carl Witt, or establish a lien against his property, or his property as described in the petition. Special demurrers are not passed upon." *Held*, that the general order passed by the court had the effect of dismissing the case as to Carl Witt and his property, and did not affect the right of petitioners to prosecute the suit to judgment against the other defendant, if, under the facts stated in the petition, they could proceed with the suit against that defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 568; Dec. Dig. § 224.*]

2. MECHANICS' LIENS (§§ 73, 271, 275*) — RIGHT TO LIEN—ENFORCEMENT—PLEADING.

The general demurrer of Carl Witt to the petition was properly sustained.

(a) A contractor, furnishing material and making improvements under a contract with a tenant upon the land occupied by the tenant, does not thereby acquire a lien as against the owner of the land, although the owner, with knowledge of the contract between the tenant and the contractor, consented that the improvements be made.

(b) The allegation that Carl Witt "ratified and assented to the contract" means nothing more than that Carl Witt gave his consent that the improvements should be made under the contract between the tenant and the contractor, and does not mean that he adopted the contract as one made for him by the tenant acting as his agent, so as to bring him into contractual relations with the contractor making the improvements and furnishing the material. *Pittsburgh Plate Glass Co. v. Peters Land Co.*, 123 Ga. 723, 51 S. E. 725; Cent. of Ga. Ry. Co. v. Shiver, 125 Ga. 218, 53 S. E. 610.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 105, 500; Dec. Dig. §§ 73, 271, 275.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. B. Carr & Co. against Carl Witt and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Green, Tilson & McKinney, for plaintiffs in error. Colquitt & Conyers, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 411)

GEORGE W. MUELLER MFG. CO. v. BENTON.

(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 84*)—SALES OF GOODS—NATURE OF CONTRACT.

Independently of the correspondence by mail between the parties, the contract for the purchase of the goods involved in this case fell within the provisions of the statute of frauds, relative to the purchase of goods and wares amounting to \$50 or more.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 84.*]

2. SALES (§ 22*)—VALIDITY—CORRESPONDENCE—OFFER AND ACCEPTANCE.

The correspondence between the parties through the mails failed to show an offer of the seller, accepted by the purchaser unequivocally, unconditionally, and without variance, and that assent to the same thing, in the same sense, which is essential to a complete and binding contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

3. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

The letters written by the plaintiff to the defendant, which were excluded from the evidence, contained nothing which could strengthen the incomplete contract between the parties, being in the nature of self-serving declarations made by the plaintiff to the defendant after the close of the correspondence, so far as defendant was concerned, relative to the purchase of the personal property in question; and they were properly repelled, when offered in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

4. NONSUIT.

The case was properly nonsuited.

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by the George W. Mueller Manufacturing Company against L. O. Benton. Judgment for defendant, and plaintiff brings error. Affirmed.

A. S. Thurman, for plaintiff in error. Greene F. Johnson, for defendant in error.

BECK, J. George W. Mueller Manufacturing Company sued L. O. Benton for \$175, the price of certain secondhand bank fixtures which the plaintiff claimed were sold to the defendant for the Planters' & Merchants' Bank, of Warrenton, Ga. At the conclusion of the evidence introduced by the plaintiff, the defendant moved for a nonsuit, which was granted by the court, on the ground that there was never a complete contract; that the minds of the parties did not meet as to the exact terms of the sale. To this ruling, the plaintiff sued out a bill of exceptions.

[1] 1. Up to the interchange of the letters embraced in the correspondence between Benton and the plaintiff company, the contract for the sale of the goods in question

was clearly within the statute of frauds. The subject-matter of the contract was the sale of certain goods to the amount of more than \$50, and no part of the goods was delivered and received, and nothing had been given in part payment or in earnest to bind the bargain. The contract up to the time referred to rested entirely in parol, and was not binding on either of the parties, even though both understood clearly what goods were embraced in the contract and the terms relative to payment. Civil Code, §3222, subd. 7.

[2] 2. But we have to consider whether or not the correspondence that ensued between the alleged vendor and purchaser made a complete contract for the sale of the goods. On February 28, 1907, the plaintiff wrote to the defendant that, having reference to the set of bank fixtures as to the purchase of which negotiations had been had, the former understood the latter to say that he was willing to pay \$175 for them as they were, adding: "If this is the case, please advise us at once and send your check for same, as we will crate the fixtures and hold them for you until you are ready to have them shipped." Prompt attention to the matter was requested. On the same date, the defendant wrote to the plaintiff, the two letters crossing in the mail, as follows: "Referring to my conversation with you, relative to the secondhand fixtures, beg to advise that I accept your proposition for \$175, and will send you shipping instructions in the near future." Seven days later the plaintiff wrote to the defendant, as follows: "We acknowledge receipt of your letter of the 28th ult., which crossed our letter of same date to you, regarding secondhand fixtures. Please send us your check for the amount of \$175, and we will crate the fixtures and store them for you until you are ready to have them shipped. Or, give us authority to draw on you for that amount."

There appears in the correspondence an unsigned letter in the following terms: "Dear Sir: I will remit you when I return home for the other fixtures bought of you. The board of directors will want to buy a directors' table for this bank; and you may send them prices and cuts of same, if you have any cuts on hand." Under date of March 28, 1907, there appears the following from defendant to plaintiff: "Please ship out at once to Warrenton, Ga., the \$175.00 set of bank fixtures which I bought for that bank, and oblige." Two days later plaintiff replied to this as follows: "We have your letter of the 28th, saying for us to ship at once the Warrenton Bank the fixtures which you bought for \$175.00. If you remember correctly, you promised to send Mr. Krueger, our secretary, a check for this amount. Do so, and on receipt of same we will be pleased to crate and ship these fixtures at once."

On April 1, 1907, defendant sent this inquiry to plaintiff: "In reply to your letter

attached, I wish to inquire if you refuse to ship the fixtures purchased unless we pay for same in advance of shipment? This demand has never been made on me or on any of our banks before by any one; and if made by you in this case, you should explain yourself." Plaintiff answered the letter of inquiry thus: "Dear Sir: We herewith acknowledge receipt of your favor of the 1st from Adrian, Ga., and in reply we wish to say that you will remember in former letter from you, you advised us that you were going to send your check some time ago, for the \$175.00. But we have not received same, and we ask that you let same come forward. You know exactly what you bought and the condition of the fixtures, and we would like to deal with you direct in this matter. We will crate the fixtures and ship to the Warrenton Bank as directed; but we do not know but that these people, after receiving their fixtures, will have all kinds of complaints regarding these fixtures and may not want to pay purchase-price, giving all kinds of excuses. For that reason, we shall ask you to send us your check direct and have the Warrenton Bank to make settlement with you for the fixtures." Then follows a letter from J. C. Evans, cashier of the bank at Warrenton, to the plaintiff, under date of April 9th, and the answer of the plaintiff company to Evans, in the following words:

"Warrenton, Ga., 4/9/1907.

"Messrs. Geo. W. Mueller Co., Atlanta, Ga.—Dear Sirs: Mr. Benton advises me that he has bought the fixtures for Planters' & Merchants' Bank, Warrenton, Ga., from you. We are now ready for same. Can you give us any promise as to when we may expect them? Yours truly, J. C. Evans, Cashier."

"April 11, 1907.

"Mr. J. C. Evans, Cashier, Planters' & Merchants' Bank, Warrenton, Ga.—Dear Sir: Replying to yours of the 9th in reference to the secondhand fixtures bought by Mr. L. O. Benton, we wish to say we will make shipment of same not later than day after tomorrow. Trusting this will be satisfactory, we are, yours very truly, G. W. Mueller Mfg. Co."

On the day following the last letter, the plaintiff wrote the defendant as follows: "Enclosed we hand you B/Lading of shipment of fixtures bought for the Planters' & Merchants' Bank, Warrenton, Ga. Please send us N. Y. exchange of purchase price \$175." And under date of April 15th plaintiff wrote the defendant that, having had a letter from the bank instructing them to ship the fixtures at once, they had been shipped as per instructions and invoice and bill of lading sent to defendant, for which they requested a check from the defendant. Thereupon, under date of April 19th, the defendant wrote, saying: "I am somewhat surprised at your favor of the 12th inst., enclosing B/L for fixtures shipped to Planters' & Merchants' Bank at Warrenton, Ga. I have your letter

in which you absolutely refused to ship them until you first had in hand my check to cover them; and upon receipt of this letter, we began to figure on other fixtures. Mr. Evans of Warrenton left early this week for Talladega, Ala., to see the set down there, and will return by Columbus, Ga. I have not heard from him yet as to what he did. He will in all probability buy either the Talladega set or at Columbus. In the meantime, however, I will endeavor to place the set shipped Warrenton elsewhere."

Plaintiff then tendered in evidence certain letters written by plaintiff to the defendant after the shipment of the goods to the bank at Warrenton, requesting payment for the goods, calling attention to their former correspondence, requesting remittance in payment of the purchase price, asking for explanation as to why the defendant did not honor certain drafts, and stating that "legal steps" would be taken, unless payment be made; also a letter from the plaintiff to the agent of the Georgia Railroad, acknowledging receipt of a notice of a return shipment of 16 pieces of old bank fixtures from Warrenton, Ga., by the Merchants' & Planters' Bank, and giving notice that the plaintiff company refused to accept this shipment.

[3] The court refused to admit in evidence the letters by the plaintiff company to the defendant subsequently to the date on which the shipment of the bank fixtures was made to Warrenton, except the letters of April 12th and 15th, as hereinabove set forth; and this ruling is assigned as error. We think, however, that these letters were properly excluded. As between the plaintiff and the defendant, the rights of the parties (that is, of the plaintiff to demand payment and the liability of the defendant to make payment) were to be considered and determined in the light of the facts and circumstances as they existed at the time of the shipment of the bank fixtures to Warrenton, Ga., upon receipt by the plaintiff of the letter from Evans, cashier, hereinabove set out. Mere statements in letters of the plaintiff's understanding of the contract and demands by him on the defendant, and threats of legal procedure, though made to the defendant himself, could not create any liability on the part of the defendant, in the absence of anything to show that the defendant made any further statements or agreement upon his part. We must look to the correspondence, and decide from the contents, of the various letters whether there was a contract for the sale and purchase of the goods between the parties to this case.

A careful reading of these letters will show that there was not such a meeting of minds as to the terms of the sale and payment for the goods as would constitute a complete contract. It will be observed that the plaintiff insisted in the various letters to Benton that he should send his check in payment for the goods; and that the plaintiff would then

crate and set aside the goods subject to his order. If these demands for a check as the condition precedent to the setting aside of the goods, subject to Benton's order, mean anything, they indicate that the plaintiff continued to insist that payment in advance was a condition precedent to the completion of the sale. While a contract can be made by correspondence through mail, as well as when the parties are together, the same rules applying in either case, in order to make a binding contract, the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be a mutual assent of the parties thereto, and they must assent to the same thing in the same sense. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract. *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; 9 Cyc. 267. In the case just cited, it was held that, when a party living in Chattanooga, Tenn., proposed to sell a certain lot of land which he owned in Rome, Ga., and the owner of the land wrote to the party in Rome that she would accept a certain amount for the property in question, one-third cash and the balance on time, "her offer meant that she would accept the cash and make deed to the purchaser in Chattanooga; and when such other party wrote, accepting her offer, and saying that the money was ready at Rome, and directing her to send the deeds to Rome, it was not a full acceptance of the offer she had made, and therefore was not a complete contract."

[4] We have no hesitancy in holding in the present case that, certainly up to the date of the shipment of the goods on the order of Evans, cashier, to Warrenton, there was no complete contract for their sale and purchase between the plaintiff and defendant. And we are equally clear that the act of shipping to the bank at Warrenton, upon the order of another agent of the bank than Benton, would not give binding effect to the inchoate contract between Benton and the plaintiff, so as to render Benton liable. When the correspondence between Benton, whom the plaintiff is seeking to make liable as an individual, terminated, the plaintiff company was, as we have seen above, still insisting on a check being sent them in advance of a delivery of the goods, and Benton was refusing to send the check in advance, and asking that they explain such a demand. Benton stopped there in his negotiations for the purchase of the property. Pay in advance he would not; and his last advice from the plaintiff, until he was informed that upon the order of another the goods had been shipped, was that the plaintiff would go no further. Under these circumstances, we do not think that he became at any time individually liable for the purchase price of the goods in question, and the court below did not err in so deciding.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 426)

COOK v. STATE.

(Supreme Court of Georgia. Jan. 22, 1912.)

*(Syllabus by the Court.)***1. STATUTES (§ 124*)—SUBJECTS AND TITLES—COURTS.**

The act approved August 15, 1910 (Acts 1910, p. 201), entitled "An act to abolish the city court of Newton, to provide for the disposition of business pending in said court, and for other purposes," is not violative of paragraph 8, § 7, art. 3, of the Constitution of this state, on the ground that it contains matter different from that which is expressed in the title thereof, because it provides that such act shall not become operative until an election shall be held and a majority of the qualified voters of the county of Baker (in which Newton is located) shall vote in favor of the abolition of the court.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 133, 184-186; Dec. Dig. § 124.*]

2. STATUTES (§ 154*)—REPEAL—REFERENCE TO ACT REPEALED.

The act mentioned in the preceding head-note is not violative of article 3, § 7, par. 17, of the state Constitution, which provides, "No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," on the ground that it abolishes the city court of Newton without distinctly describing the act which created that court.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 221; Dec. Dig. § 154.*]

3. STATUTES (§ 47*)—VALIDITY—INDEFINITENESS—ABOLITION OF COURT.

The act above mentioned is nugatory and ineffectual to abolish the city court of Newton, on the ground that it fails to provide "how the election therein mentioned shall be held, who shall hold it, and to whom the returns of the election shall be made, and whose duty it shall be to declare the result of the election."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

Lumpkin and Hill, JJ., dissenting in part.

Certified Questions from Court of Appeals.

Leroy Cook was convicted of crime, and brings error. Heard on questions certified by the Court of Appeals. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

(1) "Is the act approved August 15, 1910 (Acts 1910, p. 201), entitled 'An act to abolish the city court of Newton, to provide for the disposition of business pending in said court, and for other purposes,' violative of paragraph 8, § 7, art. 3, of the Constitution of Georgia, in that it refers to matter different from that which is expressed in the title thereof, for the alleged reason that the following matter is contained in the body of the act: 'Provided, the provisions of this act shall become of full force and effect only when ratified by a majority of the votes cast by the qualified voters of Baker county at an election to be held for the purpose of submitting the provisions of this act to the

qualified voters of Baker county for their approval, which said election shall be held on the same date as the general election of state officers of Georgia is held; and those who wish to cast ballots for the provisions of this bill shall do so by casting ballots having written or printed upon them the words 'Against the city court of Newton,' and those who wish to cast ballots in favor of the city court of Newton and against the provisions of this bill shall do so by casting ballots having written or printed on them the words 'For the city court of Newton'? It is contended by the plaintiff in error that this matter is different from what is expressed in the title."

(2) "Is said act violative of article 3, par. 17, of the Constitution of this state, which provides, 'No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made,' because it undertakes to repeal the act creating the city court of Newton without distinctly describing that act?"

3. "The instruction of the Supreme Court is also desired as to the following question of law involved in the decision of said case: Is said act nugatory and ineffectual to abolish the city court of Newton, because it fails to provide how the election therein mentioned 'shall be held, who shall hold it, and to whom the returns of the election shall be made, and whose duty it shall be to declare the result of said election,' or because no returns of said election were made to the ordinary of Baker county, or because the ordinary of Baker county has not declared the result of said election?"

W. I. Geer, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

FISH, C. J. [1] 1. The extent to which the title must go in describing or outlining the act, and the fact that mere incidents or details forming a part of the general purpose of the act are not required to be mentioned in the title, has been the subject of frequent discussions by this court. *Nolan v. Cent. Ga. Power Co.*, 134 Ga. 201, 205, 87 S. E. 656; *Dollar v. Wind*, 135 Ga. 760, 765, 70 S. E. 335; *Stanley v. State*, 135 Ga. 859, 864, 70 S. E. 591, and citations in those cases. It only remains to apply the principle of those decisions to the case now in hand. This is practically controlled by the ruling in *McGruder v. State*, 83 Ga. 616, 10 S. E. 281. We therefore answer the first question propounded by the Court of Appeals in the negative.

[2] 2. While in one or two opinions ren-

dered shortly after the adoption of the Constitution of 1877 some doubt was expressed as to whether, under the terms of that instrument, there could be a repeal of a law or a part of a law by implication arising from the passage of another law inconsistent with it (*Cent. Railroad v. Hamilton*, 71 Ga. 461; *Montgomery v. Board of Education of Richmond County*, 74 Ga. 41), it has since been determined that article 3, par. 17, of the Constitution, does not prohibit such repeals by implication, although it has been declared that, to work that result, the inconsistency must be plain. *Swift v. Van Dyke*, 98 Ga. 725, 26 S. E. 59; *Collins v. Russell*, 107 Ga. 428, 33 S. E. 444; *Verdery v. Walton*, 137 Ga. —, 73 S. E. 390. The second question, therefore, is also answered in the negative.

[3] 3. The act in question declares, in the first section thereof, "that on and after, the first day of January, 1911, the city court of Newton, in the county of Baker, be and the same is hereby abolished." In the beginning of the second section of the act it is declared that all records, papers, books, etc., of such court, and all cases both civil and criminal that may be pending therein at the time the act goes into effect, shall be transferred to the superior court of Baker county. Then follows this language: "Provided, the provisions of this act shall become of full force and effect only when ratified by a majority of the votes cast by the qualified voters of Baker county at an election to be held for the purpose of submitting the provisions of this act to the qualified voters of Baker county for their approval, which said election shall be held on the same date as the general election of state officers of Georgia is held; and those who wish to cast ballots for the provisions of this bill shall do so by casting ballots having written or printed upon them the words 'Against the city court of Newton,' and those who wish to cast ballots in favor of the city court of Newton and against the provisions of this bill shall do so by casting ballots having written or printed on them the words 'For the city court of Newton.'" Is this act, in the language of the third question propounded to this court by the Court of Appeals, "nugatory and ineffectual to abolish the city court of Newton, because it fails to provide how an election therein mentioned 'shall be held, who shall hold it, and to whom the returns of the election shall be made, and whose duty it shall be to declare the result of said election?'" As will be seen, the act fixes the date for the election and the qualification of the voters thereat, as well as the forms of the ballots to be cast, and declares that the act shall become a law if ratified by a majority of the votes cast at the election. There are, however, no provisions whatever in the act as to how the election shall be held, or who shall hold it, or to whom the returns shall be made, or who shall declare the result. Was it the in-

tention of the General Assembly, in passing the act, that the election should be held in connection with, and as a part of, the general election for state officers, and by the managers of such election, and that the returns should be canvassed and the result of the election be declared in accordance with the law relating to general elections? Or was the intention that the election referred to in the act, though to be held on the same date as the general election for state officers, should be held by other persons than the managers of such general election, and at different polling places, and that the canvass of the returns should be made and the result declared in a way different from the provisions relating to such matters in the general election for state officers? There is absolutely nothing in the act which enables us to satisfactorily answer either of these questions.

We cannot believe that the first inquiry we have just stated should be answered in the affirmative, as the holding of the two elections by the same managers, at the same time, would necessarily bring about serious confusion and complication, and the fate of the court might be materially affected by the candidacy of one or more of those running for office, or, on the other hand, the fate of a candidate might depend on his stand for or against the court. If, on the other hand, the purpose of the act was that a separate election should be held as to the abolishment of the court, we are at a loss to say who should appoint the managers, how the returns should be canvassed, and by whom the result should be declared. There is nothing in the act to indicate that the returns should be made to the ordinary of the county, or that he should declare the result; nor is there anything tending to show that the returns should be made to the board of commissioners of the county, and that they should declare the result. Nor are we aware of any general law authorizing the returns of such special election to be made either to the ordinary or to the board of commissioners, and giving either the power of declaring the result of such election. It is true that the act establishing the board of commissioners for Baker county (*Acts 1908*, p. 270) gives the power to the board to establish and change election precincts and militia districts, to supply by appointment all vacancies in county offices, and to order elections to fill them, and to supervise county matters. None of these powers, however, is broad enough to authorize the board to appoint managers for the special election referred to in the act under discussion, nor to declare the result of such election, nor to prescribe rules as to whom the returns shall be made, and who shall declare the result.

In *Jacoby v. Dallis*, 115 Ga. 272, 41 S. E. 611, the question was raised as to the validity of an act to establish a dispensary in

the city of La Grange. The act provided that: "Within twenty days after the passage of this act the mayor of the city of La Grange shall order an election, at which shall be submitted the question of 'Dispensary' or 'No Dispensary.' Those voting for dispensary shall have written or printed upon their ballots 'For Dispensary,' and those voting against dispensary shall have printed or written upon their ballots, 'No Dispensary.' Should the result be in favor of having a dispensary, then said dispensary shall be established in accordance with the provisions of this act." Acts 1901, p. 509, § 14. The act was attacked because it failed to specifically prescribe the "way for holding" the election, and because it "makes no provision for the necessary rules and regulations" with respect thereto. In passing upon these points this court said: "It is true that the act does not undertake to declare how notice of the election therein provided for shall be given, or to prescribe the precise manner in which it shall be held; but we do not think it was indispensably necessary that the General Assembly should have specifically dealt with these matters of mere detail. On the contrary, the act can, in our opinion, be upheld and given effect by construing its provisions, as to the holding of an election, to mean that the mayor of the city, who was expressly authorized to fix the time for the holding thereof, should also have power to make his order effectual by making the necessary provisions for the holding of the election in the usual and proper way in which such elections as that contemplated by the General Assembly are conducted in this state." The act there under construction, as will be seen, expressly authorized the mayor to fix a time for the holding of the election; and it was held that he therefore had authority to make his order effective by making the necessary provisions for the holding of an election in the usual and proper way in which such elections as that contemplated by the General Assembly are conducted in this state. If the act providing for the election as to whether the city court of Newton should be abolished had conferred upon the ordinary, or the board of county commissioners, the power of ordering the election and fixing the time within which it should be held, it would then have come more nearly under the ruling made in the case cited. But this act conferred no power whatever, as to the election therein referred to, upon the ordinary, or upon the board of commissioners.

The ruling in *Brooks v. Town of Loganville*, 134 Ga. 358, 67 S. E. 940, is somewhat in point. It was there held that: "A general power contained in the charter of a town to establish and maintain a public school system by taxation, without any provision for the submission of the question to a vote of the qualified voters of the town before it should become effective, is not a compliance

with the Constitution (article 8, § 4, par. 1, as amended by the proposal of 1903 [Acts 1903, p. 23]), and does not authorize the levy and collection of a special tax, although an election may have been held, and two-thirds of the persons voting therein voted for the special tax." Such election was held prior to the passage of the general statute on the subject. While mindful of the rule that courts will not, if it can be avoided, hold that the Legislature has done a vain thing, yet we are constrained, in view of what we have said, to hold that in our opinion the act under consideration is "nugatory and ineffectual to abolish the city court of Newton, because it fails to provide how the election therein mentioned 'shall be held, who shall hold it, and to whom the returns of the election shall be made, and whose duty it shall be to declare the result of said election.'" The facts that an election may have been held on the date fixed by the statute under consideration, and that a majority of the votes cast may have been in favor of the abolishment of the city court of Newton, and the result so declared, can throw no light on the question as to the validity of the statute.

It is unnecessary to deal with that portion of the third question in reference to the fact that the ordinary had not declared the result of the election. All the Justices concur.

LUMPKIN, J. (dissenting as to the last point decided by the majority of the court). There can be no doubt that the act under consideration is vague, meager, and unsatisfactory. The rule is, however, that courts will not declare that the Legislature has done a vain, foolish, or meaningless thing, unless in case of necessity. *Park v. Candler*, 113 Ga. 647, 688, 39 S. E. 89; *Southern Ry. Co. v. Atlanta Sand & Supply Co.*, 135 Ga. 35 (5), 68 S. E. 807; *A. C. L. R. Co. v. State*, 135 Ga. 545, 561, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

It seems, both from the record and the question propounded, that an election was held, and there is no intimation that it was not held at the time fixed by the act, or that the majority of the votes cast thereat were not in favor of abolishing the city court. The record transmitted to this court shows that the plaintiff in error was placed on trial in the superior court under an indictment which was sent to that court from the city court. On his trial he set up that the superior court was without jurisdiction, because the act abolishing the city court, and providing for the transfer of its records to the superior court, was ineffectual on account of vagueness and lack of specification. In view of what is said above, and of the terms of the act, and of the general powers conferred upon the county commissioners of Baker county by the act creating the board

(Acts 1908, p. 270), I am not prepared to hold that the act of the Legislature under consideration was nugatory, and that nothing was accomplished by it, or by an election held under it. Nor can I concur in an answer to the question propounded by the Court of Appeals which amounts to a ruling that, though the city court of Newton has been officially buried for more than a year, like the ruler's daughter, it "is not dead, but sleepeth." *Jacoby v. Dallis*, 115 Ga. 272, 41 S. E. 611; *People v. Dutcher*, 56 Ill. 144; *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255; *McCrary on Elections*, § 196.

I am authorized to state that Mr. Justice HILL concurs with me in this dissent.

(137 Ga. 417)

TALIAFERRO et al. v. CALHOUN et al.
(Supreme Court of Georgia. Jan. 12, 1912.)

(Syllabus by the Court.)

1. INFANTS (§ 112*)—ACTIONS—JUDGMENT—SERVICE OF PROCESS.

An equitable petition was brought against a minor and his guardian to quiet title and to enjoin the minor and those acting for him from setting up any claim to the land involved. An entry of service on the guardian appeared. An order was taken which recited that the minor and his guardian had each been duly and legally served, and which appointed a guardian ad litem for the minor. There was no entry of service by the sheriff on the minor. He and his guardian ad litem acknowledged service, and agreed for the case to be tried at a stated time. On the trial the jury found for the plaintiffs, and a decree was entered enjoining the minor and all persons acting for him from setting up any claim to the land. The final decree recited that the minor by counsel, the guardian, the guardian ad litem, and the father of the minor were present defending the case. After becoming of age, the defendant employed counsel and brought suit to recover the land involved in the former decree. In response to a rule to show cause why he and his attorneys should not be attached for contempt for violating the injunction, they set up that the decree was void, because it appeared on the face of the record that the minor was not served as required by the statute. *Held*, that it did not appear from the face of the record that the decree was void, so as to authorize it to be regarded as a nullity.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 112.*]

2. INFANTS (§ 89*)—ACTIONS—JUDGMENT—SERVICE OF PROCESS.

Under the facts recited in the preceding headnote, the injunction against the minor was not void, because his general guardian was made a party with him, and was served and appeared, but the process omitted to describe him as guardian.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 89.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Proceedings by H. M. Calhoun and others to attach Ben Taliaferro, Jr., and others for contempt for violating an injunction. To a judgment holding the defendants to be in contempt and fining them, they except. Affirmed.

In 1904 H. C. Sheffield et al. brought an equitable petition against Ben Taliaferro, Jr., et al., for the purpose of quieting title to certain land. Process was prayed against Ben Taliaferro, Jr., and his guardian, G. W. Harrison. The process, which was issued and attached to the petition, required Ben Taliaferro, Jr., and G. W. Harrison (not describing him as guardian) to be and appear at court. There was an entry of service by the sheriff on G. W. Harrison, guardian. At the return term of the superior court an order was passed reciting, "It appearing to the court that Ben Taliaferro, Jr., and his guardian, G. W. Harrison, have each been served with copy and process duly and legally," it was ordered that J. T. Freeman, Esq., be appointed guardian ad litem to represent the interest of the minor in the litigation, and to employ counsel to represent him in matters connected therewith. The person so appointed accepted the trust. On the record there was the following entry: "Due and legal service acknowledged. Copy, process, and further notice waived. I request the court to try this case at April term, 1904, of Early superior court, so far as H. C. Sheffield is concerned." This was signed by Ben Taliaferro, Jr., and J. T. Freeman, guardian ad litem. An answer was filed in the name of the minor defendant. The jury found in favor of the plaintiffs. The decree recited, "This case having come on to be tried at the present term of the court, and there being present in court plaintiffs personally and by counsel, and the defendant by counsel, and his guardian ad litem, J. T. Freeman, being present, and his guardian, G. W. Harrison, being present, and his father, Ben Taliaferro, being present, and all of them defending this suit," and decreed that Ben Taliaferro, Jr., had no interest or title whatever in the described land as against any of the plaintiffs or persons holding under them, and that he, his guardian, and all persons acting for him should be enjoined from claiming any of such land, or disparaging the plaintiffs' title by any claim of title thereto.

It appeared that Taliaferro was a minor over 14 years of age, and approaching the age of 21 years. After he reached his majority, he took counsel with certain attorneys, and, being advised that the injunction against him was a nullity, he proceeded to bring suit for an undivided interest in the described land involved in the former suit. Proceedings were taken to attach Taliaferro and his attorneys for contempt for violating the injunction. In response they set up that the decree was void, because the minor had not been served as required by the statute, and because the process did not describe his guardian as such, but mentioned him as an individual. Upon the hearing the foregoing facts appeared, and certain affidavits were

introduced on behalf of the respondents. In these occurred the expression that, the minor "having never been served with a copy of the petition in said case or with process attached to such copy by the sheriff, as required by law, the said Talliaferro was not before the court"; but in the bill of exceptions it is stated that "it was admitted by the respondents, upon the trial of said case," that the affidavits mentioned "were not offered to prove any fact dehors the record" in the former case. The presiding judge held the defendants to be in contempt, and fined each of them \$25, from which they might be relieved upon the dismissal of the suits brought by them in violation of the injunction, referred to in the petition. The respondents excepted.

Askew & Holcomb, Chas. D. Russell, and Cobb & Erwin, for plaintiffs in error. Calhoun & Rambo, for defendants in error.

LUMPKIN, J. (after stating the facts as above). In an equitable action a final decree was rendered, declaring certain land to belong to the complainants and enjoining the defendant, his guardian, and all persons acting for him, from claiming any of it, or disparaging the plaintiffs' title by any claim of title to the land. The defendant thus enjoined was a minor over 14 years of age, and approaching his majority. His guardian was made a party with him, and a guardian ad litem appointed. After becoming 21 years of age, he brought suit to recover an undivided interest in the land involved in the former suit. Proceedings were instituted to attach him and his attorneys for contempt in violating the injunction. The only response was that the former decree was a nullity for want of proper service, and that the process against his general guardian did not describe him as such.

[1] 1. A void judgment may be attacked collaterally. "In all other cases judgments cannot be impeached collaterally, but must be set aside by the court rendering them." Civil Code 1910, § 5968. If the final decree enjoining the defendant and those acting for him, rendered in the former suit, was a mere nullity, a violation of it would not be ground for attaching the respondents. If it was not void, they could be punished for disobeying it. When one sits in judgment on a decree of a superior court, and intentionally violates an injunction as being a nullity, instead of seeking to set it aside, he takes the risk of the correctness of his own judgment on the subject. Does it appear that the former decision was a nullity? An entry of service is the usual evidence that service has been perfected. An adult may acknowledge service or waive it. A minor defendant cannot bind himself by an acknowledgment of service. In the absence of any statutory provision as to service on a minor, there is no little conflict of authority as to what is void

and what is voidable. Many authorities hold that a judgment or decree against a minor is voidable, but not void. *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153, 159, note; 10 Enc. Pl. & Pr. 600, 641, et seq.

Where a statute requires personal service on a minor, it must be followed. In this state, prior to 1876, it was the practice in equity cases to appoint a guardian ad litem for a minor defendant without service on such minor personally, and service on such guardian ad litem was treated as sufficient. *Adams v. Franklin*, 82 Ga. 168, 176, 8 S. E. 44. In that year an act was passed in which provision was made as to the mode of service of writs, petitions, citations, and other legal proceedings on minors. After prescribing the method of service upon minors under 14 years of age, it declared as follows: "If the minor is over fourteen years of age, service may be made by delivering to him personally such copy. When the returns of such service are made to the proper court, and order taken to appoint said minor a guardian ad litem, and such guardian ad litem agrees to serve, all of which must be shown in the proceedings of the court, then said minor shall be considered a party to said proceedings." Civil Code 1910, § 5565. Some of the members of this court are of the opinion that, under the language of this law, it is necessary for the return of service, the appointment of a guardian ad litem, and his agreement to serve to be shown in the proceedings of the court, in order for the minor to be considered a party defendant and for the case to be ready to proceed to final decree. They think that, under such express provisions, where the proceedings do not show the service, the judgment is at least prima facie void, and that an absence of evidence of service thus expressly required by the statute cannot be cured by the general presumption in favor of judgments of courts of competent jurisdiction in cases not governed by such a statute. See concurring opinion of Evans, Lumpkin, and Atkinson, JJ., in *Peavy v. Dure*, 131 Ga. 104, 115, 62 S. E. 47. But it has been held by a decision of the entire bench that the general presumption does apply to such a case, and that a decree of a court of equity affecting minors will not be treated as void because the record of the proceedings upon which it was based does not affirmatively show that service upon all parties at interest was duly made. *Wagnon v. Pease*, 104 Ga. 417, 30 S. E. 895. This decision cannot be modified or reversed save by the concurrence of all of the Justices, and some of them adhere to the ruling. *Peavy v. Dure*, supra. It was not held, however, that such presumption was conclusive. In this connection, see *Moore v. Starks*, 1 Ohio St. 369, 372, 373. If the record shows affirmatively that no service has been made as required by the statute, a

judgment dependent upon such service having been made is void on its face. *Jones v. Bibb Brick Co.*, 120 Ga. 821, 48 S. E. 25. In *Maryland Casualty Co. v. Lanham*, 124 Ga. 859, 53 S. E. 395, where a suit was brought against a minor for a tort, and personal service was made upon him, but no guardian ad litem was appointed in accordance with the act of 1878, a judgment rendered against the minor by default was held to have been properly set aside on motion therefor. *Douglas v. Johnson*, 130 Ga. 472, 60 S. E. 863; *Miller v. Lucky*, 132 Ga. 581, 64 S. E. 658. There is no doubt that the entry of service on a minor defendant ought to be made to appear properly of record, and that a judge ought not to allow a case to proceed to judgment against a minor without this having been done. But it is not every error or failure to correct practice which will render a judgment void on its face. *Jones v. Bibb Brick Co.*, supra.

Tested by these principles, how stands the case under consideration? Process was prayed both against the minor and his guardian. There was an entry of service by the sheriff on the guardian. No entry by the officer appeared in the record as to service on the minor. If the record were entirely silent on this subject, under the decisions above cited, after the rendition of the decree a presumption of service on the minor would arise, though it would not be conclusive. But the record is not wholly silent on the subject of service upon the minor. It was recited in an order that it appeared to the court that the minor and his guardian had each been served with copy and process "duly and legally," and thereupon a guardian ad litem was appointed to represent the minor and accepted the trust. It is true that, after such appointment, both the minor and the guardian ad litem signed an acknowledgment of service and waiver of process and further notice, and a request that the court try the case at a certain term of the superior court; but this does not necessarily prove that the prior recital of service on the minor was untrue. The final decree recited that the minor defendant by counsel, his guardian ad litem, his general guardian, and his father were all present defending the suit, and that, after the submission of evidence, the argument of counsel and the charge of the court, the jury rendered a verdict in favor of the plaintiffs. It cannot be declared that the verdict and decree thereon were mere nullities on their face.

On the hearing of the attachment proceedings the respondents introduced certain affidavits, in which the affiants declared the former proceedings to be void for want of proper service on the minor, and used the expression that, the minor "having never been served with a copy of the petition in said

case, or with process attached to such copy, by the sheriff, as required by law, the said Talliaferro was not before the court at the time the said decree is said by petitioners, and appears, to have issued." But in connection with these affidavits the bill of exceptions states that "it was admitted by respondents, upon the trial of said case, that [such affidavits] were not offered to prove any fact dehors the record" in the former case. They apparently amounted to no more than a contention of the respondents that the record of the former case showed on its face that the decree was void. From what has been said above, it will be seen that the former decree does not appear to be a nullity; and the presiding judge did not err in holding that the respondents failed to show that they were justified in disregarding it.

It must be borne in mind that what is said as to serving a minor and bringing him before the court before rendering judgment against him has reference to judgment following service. It does not affect the power of a judge to issue a temporary restraining order, or authorize a minor to knowingly disobey it on the ground that formal service has not been made, any more than it would authorize an adult to do the same thing. Minority may be used to protect the minor, but it furnishes no license to him to commit irreparable injury upon another.

[2] 2. The contention that the judgment was void as against the minor, because of inaccuracy in failing to describe his general guardian as such in the process annexed to the declaration, is without merit. The minor was over 14 years of age. In order to serve him, under the statute above quoted, service on his general guardian was not essential. If for any reason the guardian was a necessary or proper additional party, irregularity in describing him in the process would not make the entire proceeding void as against the minor. Moreover, the entry of the sheriff shows that the guardian was served, and a recital in the final decree shows that he was present and took part in the defense of the case, and there is nothing to show that any objection was made to the form of the process.

Judgment affirmed. All the Justices concur, except EVANS, P. J., disqualified, and HILL, J., not presiding.

(10 Ga. App. 367)

BOWERS v. SOUTHERN RY. CO.

(No. 3,572.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—STATUTORY PROVISIONS.

Under the act of Congress prescribing the liability of carriers by railroad for injuries to

their employes, the servant may assume the risk as in other employments, except as to such things as are violative of statutes enacted for the securing of the servant's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

2. MASTER AND SERVANT (§§ 129, 139*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where a passenger train running at somewhat more than the schedule rate of speed is wrecked by reason of the fact that a trespasser turned the switch between the main line and a siding, whereby the train was caused to leave the main line and run into a siding, and was there derailed at a safety switch situated in the side track at a point some 100 feet from the main line, and injury to the fireman was caused by the wreck, neither the alleged excessive speed at which the train was running nor the situation of the safety switch is to be regarded as the proximate cause of the plaintiff's injury, especially where it appears, from the allegations of the petition and the proof on the trial, that the same result probably would have ensued if the train had been running at a normal rate of speed. The proximate cause of the injury is the act of the trespasser.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 129, 139.*]

3. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE—INTERVENING EFFICIENT CAUSE.

In a suit for damages, if it appears that there intervened between the alleged negligence of the defendant and the damage sustained by the plaintiff the independent criminal act of a third person, which was the direct and proximate cause of the damage, the plaintiff cannot recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

4. MASTER AND SERVANT (§ 96*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

As to one to whom the railroad company does not owe a higher degree of care than the standard of ordinary care and diligence imposes, and owes no affirmative duty of protection such as it owes passengers, the negligence of the railroad company in leaving a switch unlocked is not to be regarded as the proximate cause of an injury which ensues because a willful and conscious trespasser by a criminal act turns the switch, whereby the train is wrecked and a person is injured. The intervening independent act of the trespasser renders remote the negligence of the railroad company in leaving the switch unlocked.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 96.*]

5. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—RULINGS ON EVIDENCE.

Since the defendant's liability in the present case turns solely upon the question as to whether the switch, through the turning of which the train had been wrecked, was turned by the criminal act of a trespasser, alleged evidence relating to other and independent matters will not be considered, since, even if error were found, it should be treated as harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

6. APPEAL AND ERROR (§ 204*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—EVIDENCE.

Where evidence is objected to, and the court in response to the objection states that he does not admit it generally, but admits it for a special purpose, and counsel for the objecting party, upon ascertaining the purpose for which it is to be admitted, make no further

objection to it, no valid assignment of error can be based on the court's act in admitting it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 204.*]

7. WITNESSES (§ 48*)—COMPETENCY—WHAT LAW GOVERNS—CONVICTION OF FELONY.

A witness in this state is not rendered incompetent by conviction of a felony, or other crime, irrespective of whether the conviction be had in this state or in another state, and irrespective of whether the conviction in the state in which it was had carries with it incompetency to testify or not. The competency of witnesses is regulated by the law of the forum.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 100-115; Dec. Dig. § 48.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Hattie Bowers, administratrix, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff's husband (on whose estate she was administratrix) was killed on an interstate train. He was a fireman of defendant, engaged in interstate commerce. The plaintiff originally brought suit in two counts under the South Carolina statute and two counts under the federal statute; but the court excluded the two counts under the South Carolina statute, upon the ground that the federal statute applied. The death of the intestate while working as a fireman on an interstate train, administration, earning capacity, number of children, contribution, and other formal parts of the case were proved. It was shown that, at what is known as "Gross' Siding," where the decedent met his death, there is a switch and side track running to a factory about a mile and a half away. The track approaches this point on a steep downgrade, through a deep cut, and on a curve. The train on which the decedent was engaged at the time of his death approached this point running at the rate of about 35 miles per hour (which was slightly above its ordinary speed under the schedule, but not greater than the speed allowed by the rules of the company), and at the switch left the main line, dashed into the side track, and at what is known as the safety or derailing switch (i. e., a device placed in a side track whereby, if cars left on the side track are put in motion, they will not run out upon the main line, but will be thrown from the track before the main line is reached) the engine was derailed and turned over, producing the fatality for which the suit is brought.

The plaintiff made the following specifications of negligence: (1) Defendant was negligent, in that its track was so constructed that the approach to the switch was around a curve and through a deep cut, preventing the engineer and fireman from seeing the lights on the switch stand and detecting its condition in time to slow up and avoid run-

ning into the same. (2) Defendant was negligent, in that it had in the siding, right close to the main line switch, what is called a "safety switch." The effect of a safety switch at this place is that when the switch is thrown, unless the safety is also thrown, the train entering the switch will, instead of going down the side track, run off, as was done in the present case. (3) Defendant was negligent, in that the switch was left unlocked by its employes, leaving it where any passer-by could throw the same to the side track. (4) Defendant was negligent, in that its employes working upon its road threw said switch to the side track, instead of the main line. (5) Defendant was negligent, in that the engineer was running at an excessive rate of speed. (6) Ordinary care required the defendant to have and maintain a switch target and switch lights, constructed as follows: A post placed around the curve from the switch, so that the same could be seen at a long distance from the switch; the signals on this post to be connected by wires, so that when the switch was thrown the wires would throw the lights by night and the boards by day, indicating to an approaching train whether the switch was thrown to the side track or the main line, and giving such indication in time for the train to stop. Defendant failed to have any such target or signals. Such failure on the part of the defendant was negligence. (7) Defendant was negligent, in that the rails of the side track, where the wreck occurred, were small and light, and not sufficiently strong to hold the engine which was wrecked, the same being a very large engine, and the cross-ties were rotten and defective. (8) Defendant was negligent, in that the light on the switch target was not lighted.

The defendant pleaded that as to the acts of negligence alleged the plaintiff's intestate had assumed the risk, and in this connection showed that he had been running for over two years over this same track at this place in the condition it was at the time of the injury (except, of course, in so far as the switch was on this occasion turned to the side track). Defendant further pleaded that the proximate cause of the injury was an act for which it was in no wise responsible, namely, the act of a trespasser in breaking the lock on the switch and turning it so as to throw the train to the side track. On this phase of the case the defendant showed by the evidence of one Clarence Agnew himself that he had thrown the switch from the main line to the siding shortly before the wreck occurred; that he had pulled the chain and the lock came open; that he broke the lock up and threw it away; that he afterwards found the broken pieces of the lock and the piece of iron with which he broke it; that he confessed to his crime; that he was tried for the murder of the engineer, was convicted, and is now in the penitentiary. The defendant then proved by a woman that she

saw Agnew at the switch shortly before the wreck, knocking at it. The sheriff of Spartanburg county, S. C., testified that Agnew confessed that he broke the lock on the switch, and went with him and found the broken pieces of the lock, and the implements with which he said he broke it. The broken lock, showing indentation marks, and the bar with which the lock was broken, were introduced. The defendant showed by the crew of the train which last used the siding that the switch was properly set to the main line and was locked after it was used, and by the crew of the last train which passed the siding shortly before 6:30 in the afternoon that the switch was set right to the main line.

The court in his charge to the jury limited the plaintiff's right of recovery to two grounds: (1) Negligence on the part of the defendant's employes in leaving the switch unlocked where any passer-by could throw it to the side track; and (2) negligence on the part of the defendant's employes in themselves throwing the switch to the side track, instead of to the main line. The important question in the case is whether the court erred in thus limiting the plaintiff's case.

Burton Smith, for plaintiff in error. McDaniel & Black, for defendant in error.

POWELL, J. (after stating the fact as above). [1] The case, as has been said already, arises under the act of Congress fixing the liability of interstate railroads for injuries to their employes, and is determinable by its provisions. Under that act the doctrine of respondeat superior applies in favor of an injured servant, and what is known as the "fellow-servant doctrine" is practically abolished. Contributory negligence on the part of the injured servant diminishes, but does not defeat, a recovery. The defense of assumption of risk was not abolished, however, except in cases where the servant was injured through the violations by the master of some "statute enacted for the safety of employes." The questions of negligence and of proximate cause are still to be determined according to the general existing rules on that subject. Taking up, now, the allegations of negligence which the court eliminated from the consideration of the jury, for the purpose of seeing whether the court properly eliminated them: The first is that the defendant was negligent, in that it had so constructed its track that the approach to the switch was around a curve and through a deep cut, which prevented the engineer and fireman from seeing the lights on the switch stand, in order to detect that the switch was turned, and slow up and keep from running into the side track. The decedent had been running over this same track for more than two years. It seems plain to us that as to this he had assumed the risk.

[2] The second allegation of negligence is

that the derailing switch, or safety switch, as it is called, on the side track, was located so close to the main line that when the train left the main line track it was thrown off, whereas otherwise it would have continued down the side track. If it cannot be said that this was also an assumed risk, still we think that under all the facts disclosed there was no negligence on the carrier's part. The location of this derailing switch was a condition and not a cause of the injury. It was certainly proper for the company to have this derailing switch in the side track in order to protect its main line from cars left on the side track. It was not located so close to the main line as to interfere in any wise with the operation of trains thereon, unless some act of wrong on the railroad company's part or on an outsider's part had changed the switch. But for some such thing, the train on which the plaintiff's husband was working would never have entered this side track at all, so as to be in range of this derailing switch, and therefore, when we come to consider its part in bringing about the death of the decedent, we are first confronted with the question as to what was the cause of the decedent's being in range of this switch at the time he was killed; and, on looking to the cause, we find that it was the wrongful act of some one in turning that switch. As we attempted to point out in *A. C. L. v. Daniels*, 8 Ga. App. 775, 70 S. E. 203, the law regards as the proximate cause that thing or combination of things in which, or through which, the normal course of prudently conducted affairs is violated. In a remote sense, the location of this derailing switch, even if its location could have been in any sense regarded as wrongful, may be regarded as a cause of the injury; but the proximate cause was the wrongful turning of the switch between the main line and the side track. The court submitted to the jury the question as to whether the defendant was guilty of any wrong or neglect as to this switch between the main line and the side track being turned, and the jury, having found that it was guilty of no wrong or negligence in this respect, could not have found that it was guilty of actionable wrong merely because this derailing switch was situated at the particular point at which it was rather than at some other point in the side track. There may be concurrent proximate causes, of course; but the distinction must always be kept in mind between concurrent causes and mere conditions upon which the proximate cause operates.

The speed at which the train was running was likewise either a condition or a remote cause. There was nothing inherently wrongful in this rate of speed. It was ineffectual to produce any injury. The real cause of the train's speed becoming dangerous was the turning of the switch (as the jury has

found) by the trespasser. According to every rule of human experience, the wreck would have resulted just as it did if the train had been running at the schedule speed of 30 miles an hour, instead of 35 or 40, as it was running. It is impossible to see how it can be seriously contended that the injury was brought about in any wise through any excess of speed over the normal, even if we regard the absolute schedule of the train as the normal and regard 35 or 40 miles an hour as an abnormal rate. We are not to be understood as holding that any excessive rate of speed was shown in this case, but are merely attempting to show that, if an excessive rate of speed was shown, the wreck and the injury did not result from that cause.

As to the allegation of negligence to the effect that the defendant did not equip its switches at this point with what are known as "distance signals" (a description of the operation of which is set forth in the excerpt quoted above from the plaintiff's petition), it was shown that nowhere on the defendant's lines were any such switches, and that the plaintiff's husband had been working on that road as a fireman and going over the very track in question for more than two years. The court properly held that, even if this were a negligent deficiency, the decedent had assumed the risk.

[3,4] The allegation of negligence as to the condition of the rails and ties on the side track was probably sufficiently rebutted by the proof as not to make it a jury question; but, irrespective of that, these things stand on the same footing juridically as does the situation of the derailing switch, which has already been discussed in detail. We conclude that the court did not err in submitting to the jury only the two questions—the first as to whether some employé of the company left this switch open, or whether it was opened by a trespasser; and, secondly, whether the company's employées were negligent in leaving it unlocked so that a trespasser might open it. As to the submitting of the second question to the jury (that is, as to the company's negligence in leaving the switch unlocked), it may be remarked that the court probably gave the plaintiff a benefit to which he was not entitled. As to persons to whom the railroad company owes the duty of extraordinary care and diligence, or the duty of affirmative protection (such as passengers), it may be and probably is true that a railroad company could be held liable for leaving a switch unlocked, whereby a trespasser was enabled to throw a switch and wreck a train; but, as to other persons, we doubt if in such a case liability can be upheld. "The defendant's negligence may put temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured; and yet the defendant's neg-

ligence may be in no sense a cause of the injury." 1 Shearman & Redfield on Negligence (5th Ed.) § 25, quoted approvingly in *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25.

[5] The general doctrine is laid down in the course of the opinion in this case (*Andrews v. Kinsel*, *supra*) that, where there has intervened between the alleged negligence of the defendant and the damages sustained by the plaintiff an independent illegal act of a third person producing the injury, and without which it would not have happened, and which is the direct proximate cause of the damages, no liability exists. We have adverted to this doctrine more especially as the basis for saying that in this case the one fact upon which the whole question of liability turns is whether this train was wrecked through the criminal act of a willful, conscious trespasser, who turned the switch, or from some other cause. This question was squarely submitted to the jury without any error in the charge as to it; and the only exception as to testimony bearing on this point of the case is, as we shall presently show, not well taken. If this point was correctly presented to the jury and decided by them, the judgment refusing a new trial should not be reversed, irrespective of whether the numerous exceptions to rulings on evidence relating to other phases of the case are well taken or not. For, if error as to any of these matters be established, it would at once fall into the category of harmless error.

[8] Two rulings on evidence as to the issue of fact as to whether the alleged trespasser, Clarence Agnew, threw this switch or not, are complained of. The first is that the court, on the direct examination of John M. Nichols, the sheriff of the county where the wreck occurred, was allowed to answer that, when he arrested the defendant, he carried him up to the scene of the wreck and "went up to the switch where he claimed to have broken the lock loose." Upon objecting generally to this testimony, the court made the following statement: "I think anything he stated which caused the sheriff to make the search is admissible. I will leave it in for the present—anything that was said to him about finding those things. I understand you are objecting to all of it. This evidence don't go in as evidence of the truth of the statement he made that he did this thing. It goes in connection with the conduct of these people in finding those things." Thereupon Mr. Smith, of counsel for the plaintiff, replied, "Your honor does not admit it to show he broke the lock on the switch?" The court answered, "No," whereupon no further objection to the testimony was interposed. This, of course, presents no ground for assign-

ment of error in this court, even if the ruling of the court were incorrect; but the court's ruling was not incorrect.

[7] The other assignment of error is that the court erred in admitting the testimony of Clarence Agnew; it appearing to the court that Agnew was at the time a convict for life, and that under the laws of South Carolina, where he was convicted, he was incompetent to testify as a witness. Able counsel for the plaintiff in error frankly concedes in his brief that personally he does not regard this exception as being well taken, but adds, "But as counsel frequently make mistakes, if we are mistaken, we wish the benefit of it." The opinion of counsel as to this matter is eminently correct. His objection was not well taken. Under the law of this state a person convicted of a felony is a competent witness. The fact of his conviction only goes to his credit. Civil Code 1910, § 5858. Of course, the competency is determined by the law of the forum.

Judgment affirmed.

(10 Ga. App. 464)

RICKERSON v. STATE. (No. 3,899.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 255*)—MANSLAUGHTER—EVIDENCE.

The evidence, taken in connection with the prisoner's statement, fully authorized a conviction of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 255.*]

2. HOMICIDE (§ 250*)—MURDER—EVIDENCE.

When the state proves that the accused killed the person named in the indictment, in the county and in the manner therein described, a prima facie case of murder is made out. The evidence in the present case warranted an instruction to this effect.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 250.*]

3. CRIMINAL LAW (§ 564*)—EVIDENCE—VENUE.

The evidence authorized a finding that the homicide was committed in Jasper county.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 564.*]

4. HOMICIDE (§ 340*)—INSTRUCTIONS—HARMLESS ERROR.

The charge was full and fair. Any inaccuracies in reference to the law of murder were harmless. The requests to charge, so far as legal and pertinent, were covered by the general charge, which was free from prejudicial error. The evidence warranted the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

Russell, J., dissenting.

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Ed Rickerson was convicted of manslaughter, and brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

W. S. Florence, for plaintiff in error.
Jos. E. Pottle, Sol. Gen., for the State.

POTTLE, J. Rickerson was indicted for the murder of Moseley, and convicted of voluntary manslaughter. His motion for a new trial was overruled, and he sued out a writ of error to this court. He contends that neither under the evidence nor the statement of the accused can a verdict of manslaughter be justified; that he is guilty of murder, or not guilty of any offense.

[1] It would serve no good purpose to enter into a long discussion of the evidence. Suffice it to say that the jury could have found that both men were drunk and ready to fight; that Moseley indicated a willingness to fight, and threatened to kill the accused unless he took another drink; that Rickerson left Moseley, went to a nearby buggy, got a pistol, returned to Moseley, who was sitting in his buggy, and then both began shooting at about the same time. This theory brings the case squarely within the ruling made in *Gann v. State*, 30 Ga. 67, and cases of kindred nature. The judge fairly presented this theory of the case, and there was no prejudicial error in his instructions on the subject.

[2] 2. The court charged in effect that, when the state shows the killing, the burden is shifted to the accused to mitigate or justify it. This is unquestionably the law, and the charge was warranted by the evidence. The state relied partly upon proof of incriminating admissions by the accused. While some of the witnesses testified that exculpatory statements were coupled with the admissions, one witness testified to a bald confession, without any attempt at justification. It makes no difference how a killing be shown. When once proved, a prima facie case of murder is made for the state, unless, of course, it is made to appear at the same time that the killing is justifiable, or a lower grade of homicide has been committed. Whenever such a prima facie case is made, the burden is on the accused to set up his defense. This is what the trial judge charged, and his language was so guarded as not to prejudice the accused.

[3] 3. Complaint is made in the motion for a new trial that the venue of the offense was not proved. Kelly and Farrar are two railroad stations, about two miles apart, in the northern part of Jasper county; Kelly being south of Farrar. There is also a public road between these two villages. The accused lived on this public road, and a witness named Spearman also lived on it, about 400 yards from the accused. Spearman testified: "My house and the house where Rickerson lived is on the same road, but on different sides of the road. It is level from Rickerson's house for about 50 or 100 yards, then you go down grade, a hill, and then up a pretty good hill, and down a long hill, to my house." Newborn is a town about on

the line between Newton and Jasper counties. Cranford, who was jointly indicted with Rickerson, lived northeast of Farrar. On the day of the homicide the deceased went in his buggy to the home of the accused, and persuaded the accused to go with him to arrest a negro. Before going to make the arrest, they drove northward to Newborn, where the accused had some business to transact. Remaining there awhile, they got in the buggy and started back southward to go to the negro's house. They remained at this house about three hours, and effected a settlement with the negro. After leaving the negro's house they made several stops along the way, and finally, in the language of the accused, "we trotted on and got next to Guy Spearman's. We struck another trot to the other slant, and just as we got on top of the rise, there near the cotton patch, he said: 'Let's take another drink.'" It was at this point the shooting took place. Cranford came up just before the shooting, and left shortly afterwards. Guy Spearman testified that, in going from Rickerson's house to where Cranford lives, you would travel north and northwest and go through Farrar. "This is the way you would travel if you went from the scene of the homicide to Cranford's." He further testified that he and his wife were at their home on the night of the homicide, and heard four or five pistol shots; that after a little while he saw a buggy come over the hill, and in about a minute or two a man came running over the hill and got into the buggy, nearly in front of his house, and drove on towards Farrar. The circumstances indicate that this man was Cranford. The witness said that he heard "hollering" in the direction of Kelly, seemingly in the same direction as the firing of the pistol. The man who got in the buggy came from towards Kelly and Rickerson's home. "This I have just told the jury was in this county and state." Also: "I will state that the point that I heard the pistol shots fired was in Jasper county, Ga." Mrs. Spearman testified that "it was in the direction towards Kelly that I heard hollering, and the pistol shots were in the same direction." Another witness for the state testified that he heard the pistol shots, and shortly afterwards saw Cranford coming from towards Kelly, "from the direction in which I heard the pistol shots." We are clear that, taking all this evidence together, in connection with the statement of the accused, the jury were authorized to find that the homicide occurred in Jasper county.

[4] 4. There are numerous assignments of error upon the court's charge. Many of them complain of instructions in reference to the law of murder. None of the assignments are meritorious. The instructions seem to be free from error; but, even if they contain inaccurate statements, the accused was convicted of voluntary manslaughter, and was

not prejudiced in any way by the charges upon the law of murder. The requests, in so far as they were legal and pertinent, were fully covered by the general charge, which was free from substantial error. The accused had a fair and impartial trial, and we find nothing in the record which would authorize interference by this court.

Judgment affirmed.

RUSSELL, J., dissents.

(10 Ga. App. 487)

WOODWARD v. STATE. (No. 3,884.)
(Court of Appeals of Georgia. Jan. 30, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and the evidence fully supports the verdict.

Error from Superior Court, Decatur County; Frank Park, Judge.

Bob Woodward was convicted of crime, and brings error. Affirmed.

G. G. Bower, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 397)

COTTON v. CITY OF ATLANTA.
(No. 3,823.)

(Court of Appeals of Georgia. Jan. 15, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 592*)—POLICE REGULATIONS—VALIDITY.

Though there are circumstances under which the same physical act may render the actor guilty of two offenses, one of which may be a municipal offense and the other a state offense, still the municipality cannot punish for state offenses. Where a municipal penal ordinance and a public criminal statute operate upon the same set of physical acts, the municipal ordinance is invalid, unless the offense created by it contains some characterizing ingredient not contained in the offense under the state law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

2. MUNICIPAL CORPORATIONS (§ 592*)—POLICE REGULATIONS—VALIDITY.

Section 1837 of the City Code of Atlanta, in so far as it makes it punishable for any person to allow a house or a portion of a house to be occupied as a house of ill fame, creates no different offense from that created by Pen. Code 1910, § 382, and is therefore invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

3. DISORDERLY HOUSE (§ 2*)—"HOUSE OF ILL FAME"—"LEWD HOUSE."

There is no difference in meaning between the two expressions "house of ill fame" and

"lewd house or place for the practice of fornication or adultery."

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 1, 2, 9; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 4, p. 3359; vol. 5, p. 4109.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

L. E. Cotton was convicted of a violation of city ordinance, and brings error. Reversed.

John A. Boykin, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

POWELL, J. Cotton was convicted in the police court of Atlanta for violating section 1837 of the code of that city, which reads as follows: "Any person or persons, who shall occupy, or allow to be occupied, any house, or portion of a house, to be used as a house of ill fame in the city of Atlanta, shall, upon conviction thereof, pay a fine of not exceeding five hundred dollars, or be imprisoned not exceeding thirty days, or both, in the discretion of the recorder's court." The specific charge against him was that he, being the proprietor of a hotel, allowed a man and a woman to resort to a room in it for the purpose of fornication. He sought certiorari from the conviction, and to the overruling of the certiorari brings error.

[1] The point is that, so far as the ordinance in question applies to the case at bar, it is invalid, because it penalizes an act made criminal by a public statute of the state, namely, section 382 of the Penal Code of 1910, which provides: "If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor." No two propositions are better settled in this state than these: (1) That a municipal corporation cannot punish for an offense against the criminal laws of the state; (2) that the same physical act, by reason of the circumstances surrounding its commission, or by reason of the intent with which it is done or by reason of something else specially characterizing it, may draw to the person committing it such twofold guilt as to make him responsible for two separate offenses, one of which may be a municipal offense, and the other a crime under the public laws of the state. See *Calloway v. Mims*, 5 Ga. App. 9, 62 S. E. 654, and *Athens v. Atlanta*, 6 Ga. App. 244, 64 S. E. 711, in which both questions are lengthily discussed, with an extensive citation of authorities.

These cases just cited will illustrate the two doctrines and show how they work together consistently. The physical act in each of these two cases was that the accused kept intoxicating liquor at his place of business for the purpose of unlawful sale. The

state law made it penal for a person to keep liquors on hand at his place of business, irrespective of the intent or purpose with which they were kept; the municipal ordinance made it unlawful for a person to keep liquors on hand for the purpose of illegal sale, irrespective of the place of the keeping. The accused, who kept the liquors at his place of business and thereby violated the state law, also violated the municipal law because of the intent and purpose which characterized his keeping. But, narrow as the line of demarcation between single and twofold guilt may be, there is a line; and it must be observed. If the thing punished by the municipal ordinance and the thing punished by the state law are one and the same, whether viewed as a physical transaction, or whether looked upon with an eye to the ascertainment of the respective legislative objects—if, when viewed in both aspects, nothing to differentiate the municipal violation from the state offense appears—the municipality must give way to the state, and the latter has the exclusive jurisdiction to punish.

[2] For a person to allow any house or portion of a house over which he has control or possession to be used as a house of ill fame is a violation of Penal Code 1910, § 382. *Kinard v. State*, 10 Ga. App. —, 72 S. E. 715. Specifically, it has been held in the recent case of *Fitzgerald v. State*, 72 S. E. 541, that for an innkeeper to rent a room in his hotel that it may be used for the practice of fornication is a violation of this law. So far as the ordinance in question makes it punishable for a person to allow a house or a portion of a house to be occupied as a house of ill fame, it ordains no more or no less, as to the particular offense, than the state law prescribes on the same subject.

[3] It is true that the ordinance speaks of "a house of ill fame," while the Criminal Code speaks of "a lewd house or place for the practice of fornication or adultery"; but this is a distinction without a difference. "A house of ill fame," as used in contexts such as the present, means a lewd house, a bawdry, a place maintained for the practice of fornication and adultery, or for "the convenience and shelter of persons desiring unlawful sexual intercourse." *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126; *State v. Nichols*, 83 Ind. 228, 43 Am. Rep. 66; *Henson v. State*, 62 Md. 232, 50 Am. Rep. 204. "Both at common law and in common parlance the words 'house of ill fame' mean a house resorted to for the purposes of prostitution." *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821.

It is unnecessary for us to say whether the rest of the ordinance—that part of it which makes it an offense for a person to occupy a house of ill fame or a portion of such a

house—is valid or not. It is sufficient to the decision of the present case for us to say that, so far as the ordinance relates to the present transaction, it is invalid, and that the recorder's court's only jurisdiction in the matter was to bind the alleged offender over to the state court for trial. We recognize that expediency might be subserved by allowing the police courts to deal summarily with matters of this nature; but the law is otherwise, and law must be the law, even among its friends.

Judgment reversed.

(10 Ga. App. 471)

DANNIE v. CITY OF ATLANTA.

(No. 3,911.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

POLICE REGULATIONS.

This case is controlled by the decision of this court in the case of *Cotton v. City of Atlanta*, 73 S. E. 683, No. 3,823, decided January 15, 1912.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

E. Dannie was convicted of violating a city ordinance, and brings error. Reversed.

Walter A. Sims, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 471)

DANNIE v. CITY OF ATLANTA.

(No. 3,912.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(*Syllabus by the Court.*)

1. STARE DECISIS.

This case is fully controlled by the decision of this court in *Cotton v. City of Atlanta*, 73 S. E. 683, No. 3,823, decided January 15, 1912.

2. DISORDERLY HOUSE (§ 7*)—ELEMENTS OF OFFENSE—OCCUPATION OF ROOM—"OCCUPY."

An ordinance which makes it unlawful to "occupy" or allow to be occupied any portion of a house to be used as a house of ill fame or disorderly house in the city of Atlanta means that occupancy which contributes in some manner to the unlawful character of the house, and does not preclude an innocent and lawful occupancy of a room or a portion of a house which may in other parts thereof be used for disorderly and immoral purposes.

[Ed. Note.—For other cases, see *Disorderly House*, Dec. Dig. § 7.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 4909, 4910.]

(*Additional Syllabus by Editorial Staff.*)

3. MUNICIPAL CORPORATIONS (§ 592*)—POLICE REGULATIONS—VALIDITY.

An ordinance making it punishable for any person to occupy or allow a house or a part of the house to be occupied as a house of ill fame creates no offense different from that covered

by Pen. Code 1910, § 382, making it punishable to keep a lewd house or place for the practice of fornication or adultery, and is therefore invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mrs. C. L. Dannie was convicted of violating an ordinance of the City of Atlanta, and brings error. Reversed.

Walter A. Sims, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

HILL, C. J. [1, 3] An ordinance of the city of Atlanta, enacted under charter authority, makes it punishable for any person to occupy or allow a house or a portion of the house to be occupied as a house of ill fame. Section 1837, City Code of Atlanta. In *Cotton v. City of Atlanta*, 73 S. E. 683, decided by this court January 15, 1912, it is held that this ordinance created no offense different from that covered by section 382 of the Penal Code of 1910, and that it was therefore invalid under the rule that a municipal corporation cannot punish for an offense against the criminal laws of the state.

[2] It is insisted on the part of the city that the ordinance creates a different offense from that created by the penal statute of the state, in that it makes it unlawful for any person to occupy any portion of the house used as a house of ill fame in the city of Atlanta. We do not agree with this view. The purpose of the ordinance is to suppress disorderly houses and to maintain the peace, health, order, and good government of the city, and the occupancy of any portion of a house of this character contemplated that the occupancy was of such character as to maintain or contribute to the maintenance of a house of the kind prohibited. We do not think that it was intended to make it unlawful for a person to occupy a room in a house of ill fame or disorderly house, unless such person, while occupying a room therein, was in some way contributing to the unlawful character of the house. If the occupant of the room had no notice that the other portion of the house was being conducted as a house of ill fame, or possibly if he did know that fact and in no way contributed to its unlawful character he would not violate this ordinance, and we think the meaning of the words "occupy any portion of a disorderly house" necessarily carries with it the meaning that the occupancy must be for unlawful purposes. In other words, we think that one could innocently occupy a portion of a disorderly house without having anything whatever to do with the maintaining and keeping of such house, and it is

only the element of maintaining and keeping a house of this character that both the ordinance and the statute are intended to punish. We therefore think that the ordinance is fully covered by the state statute, and for that reason is invalid.

Judgment reversed.

(10 Ga. App. 463)

BUTLER v. STATE. (No. 3,897.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. EVIDENCE SUFFICIENT.

No error of law was committed, and the evidence warranted the verdict.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 338*)—EVIDENCE—RELEVANCY.

In a prosecution for assault with intent to murder, it was not error to exclude testimony that no case had been made against the accused in the mayor's court for disorderly conduct growing out of his behavior immediately prior to the shooting.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 338.*]

Error from Superior Court, Grady County; Frank Park, Judge.

H. H. Butler was convicted of shooting at another, and brings error. Affirmed.

W. M. Harrell, R. R. Terrell, and M. L. Ledford, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

POTTLE, J. [1] The accused was indicted for assault with intent to murder one Knight, and was convicted of the statutory offense of shooting at another. The charge was full and fair—in fact, rather more favorable to the accused than he had any right to demand—and did not contain any expression or intimation of opinion as to what had been proved. In the motion for a new trial complaint is made of several instructions upon the theory of the right of the accused to resist an unlawful arrest. The testimony of the prosecutor made a clear case of assault with intent to murder. The statement of the accused set up self-defense. It is doubtful if, under the evidence, the accused was entitled to an instruction upon the theory of his right to resist an illegal arrest, and it is certain that there was no error in the charge of which he can justly complain, nor in the failure of the judge to elaborate more fully this theory of defense.

[2] It was not error to repel testimony that no case had been made against the accused in the mayor's court for disorderly conduct, growing out of his behavior immediately prior to the shooting. Such evidence would have been irrelevant to any issue in the case. The mere fact that officers charg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed with that duty failed to prosecute for the offense does not prove that the offense was not committed. Especially is this true where, in a case like the present, the offense for which there was a failure to prosecute was for disorderly conduct which culminated in an attempt to take human life, and the person guilty of the disorderly conduct was awaiting trial for the more serious offense. As well might it be said that failure to indict a murderer for carrying a pistol without a license would be evidence that he was not guilty of the latter offense.

The accused was fortunate in escaping punishment for the more serious crime of assault with intent to murder. In their humanity the jury gave him the benefit of the doubt, and convicted him of the lower grade of crime. There were some facts and circumstances to warrant such a finding, and this court will not interfere.

Judgment affirmed.

(40 Ga. App. 455)

MARTIN v. STATE. (No. 3,885.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 618*)—TRIAL—TERMINATION.

In a criminal case the trial is not completed until a verdict has been rendered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 618.*]

2. CRIMINAL LAW (§ 634*)—TRIAL—ABSENCE OF JUDGE.

Where the judge presiding in a criminal trial leaves the county of the trial while the jury is still deliberating upon its verdict, and goes to an adjoining county, the pending trial is vitiated, and a verdict thereafter returned by the jury is a nullity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461-1464; Dec. Dig. § 634.*]

3. OTHER ASSIGNMENTS OVERRULED.

Other than as above stated, the assignments of error are without merit.

Error from Superior Court, Decatur County; Frank Park, Judge.

Amos Martin was convicted of crime, and brings error. Reversed.

G. G. Bower, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

RUSSELL, J. It appears, from the evidence, that in the trial of the plaintiff in error "the jury retired about 7 o'clock in the evening to consider their verdict, and that the presiding judge thereupon left the jurisdiction of Decatur county and went to Grady county to grant a charter in a county other than that which the defendant was being tried in." In the motion for new trial the facts are stated as we have quoted them, and the complaint is made that the verdict is contrary to law by reason thereof. The

question presented by the record, therefore, is whether the fact that the judge left the county where the trial was being conducted and the jury were deliberating upon their verdict, and went to a different county to perform another official duty, so vitiates the trial as to avoid the finding of the jury.

[2] It must be admitted that any absence of the presiding judge while the trial is going on is an irregularity, and if the question were an open one we should hold that any absence of the judge, no matter how brief, necessarily suspends a pending judicial proceeding. But under rulings of the Supreme Court there are occasions when a temporary absence of the judge, even though the trial is in active progress and the jury has not retired, cannot be said to be harmful to either party. *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426; *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536. The Supreme Court in *Horne v. Rogers*, 110 Ga. 362, 370, 35 S. E. 715, 49 L. R. A. 176, held that a mere temporary absence of the judge, where he was within the call of the jury, was not such an irregularity as would necessitate a new trial. It has also held that a temporary absence out of sight, though within hearing, of what was going on in the courtroom, did not affect the trial, when this temporary withdrawal of the judge occurred during the argument of counsel. It is to be noted, however, that in deciding the *Horne Case*, supra, the rulings in the *O'Shields* and *Pritchett Cases* were criticised and disapproved, and these earlier rulings were followed only in the absence of an application to review them. In the present instance, however, the judge went beyond the jurisdiction of the court in which the trial was pending. The jurors could not be said to have been even constructively in his presence, and the presence of the judge was indispensable to the legality of the court. If there is no judge, there is no court.

It is not apparent that the defendant in the present case was hurt by the absence of the judge. The testimony adduced on the trial fully authorized the conviction of the defendant, and there is no evidence that the verdict was affected by any improper influence or contract on the part of bystanders or others, or that they knew that the judge was absent from the county, or that their finding was in any way affected by that fact. It is naturally suggested that the trial had progressed so far that the presence of the judge was no longer necessary until the jury might return into court, and that, as it was not necessary that the judge should remain at the courthouse until he was notified that the jury desired to return a verdict, it could not matter if, in the judge's desire to perform other duties of importance in an adjoining county, he should go there, instead of remaining at his hotel or some other house, within reach of the jury. It was no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

doubt upon the latter theory that the learned trial judge acted, and the recital of the assignment of error evidences his diligence in the discharge of his judicial duties.

[1] However, as a criminal trial is not completed until the verdict has been rendered, the question which really arises is whether it is not necessary, in order to preserve unimpaired the right of trial by jury, that injury be presumed from the violation of any of those orderly rules which safeguard the right. It seems to us that injury is to be presumed, in so important a matter as trial by jury, even in the absence of proof to that effect, where injury is likely to result from an infraction of a general rule, and especially such an important one as that which looks to the present personal supervision and control of the presiding judge as an essential *sine qua non* of a legal trial. There can be no trial without a judge. The case must be tried in Decatur county. Naturally we conclude that when the judge left Decatur county, and went to Grady county to open a special court to grant a charter in that county, the court ceased, for the time being at least, to exist in Decatur county, and that all that was done during the absence of the judge was nugatory and void. A temporary absence of the judge, such as has been referred to in the cases cited above, involved his presence at a point where he was easily accessible to the parties, counsel, officers of court, and the jury. Where the judge is within call of the jury and physically absent, but at a place so near by that he can easily return, if needed, he may be presumed to be constructively present at the courthouse; but this presumption cannot be indulged when the judge goes to a place beyond the jurisdiction of the court in which the trial is being had. Where the judge is not only physically out of the presence of the jury, but also absent in a legal sense, and at such a point as to be beyond the reach of the other essential component, but subordinate, parts of the court, which should be subjected to his supervision, the court is necessarily dissolved *pro tempore*, at least so far as the trial first pending is concerned.

Judgment reversed.

(10 Ga. App. 467)

CLARKE v. TRIPPE. (No. 3,901.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

HABEAS CORPUS (§ 96*)—MUNICIPAL CORPORATIONS (§ 643*)—POLICE REGULATIONS—PROSECUTIONS—SENTENCE—HEARING OF APPLICATION FOR DISCHARGE.

Where a municipal ordinance authorized the mayor to impose sentence in the alternative of a fine or work on the public streets of the city, and the mayor sentenced a person in the following language: "Fine \$50, or 60 days at hard labor on,"—the sentence was not void for uncertainty because it was not dated

and the place where the alternative part of the sentence was to be executed was not stated. Under the ordinance the only place where that part of the sentence imposing hard labor could have been executed was "upon the public streets" of the municipality. It was not erroneous for the judge, hearing an application for discharge on habeas corpus on account of the alleged uncertainty of the sentence, to permit the mayor who heard the case and imposed the sentence to insert therein the date, and to add thereto the words "the public streets of Blakely," although the amendment was not necessary.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 96;* Municipal Corporations, Dec. Dig. § 643.*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Application by H. D. Clarke for habeas corpus to W. H. Trippe. To the allowance of an amendment to the relator's sentence and a refusal of the application for habeas corpus, the applicant excepts. Affirmed.

The plaintiff in error was convicted in the municipal court in the city of Blakely for a violation of an ordinance by keeping intoxicating liquors in his possession for unlawful sale, and the following sentence was imposed: "Fine \$50, or 60 days at hard labor on." He sought, by habeas corpus, to obtain release from custody under this sentence, which he alleged was void because not dated, and because it did not indicate where the labor was to be performed. At the hearing of the application for habeas corpus the mayor, who passed the sentence, testified that the labor referred to was to be performed on the public streets of Blakely, and that the clerk who wrote out the sentence failed to add the words "the public streets of Blakely"; that the sentence as actually passed was a fine of \$50, or hard labor on the public streets of Blakely for 60 days. He testified that he was still mayor of Blakely. Thereupon the judge directed the witness to insert the date of the sentence, August 12, 1911; it being agreed by both parties to the record that the trial in the municipal court took place on that date, and to add to the sentence "public streets of Blakely," and to sign his name thereto as mayor and ex officio recorder; and the docket entry as thus amended was introduced in evidence. It appeared that there had been no effort to have the judgment of the municipal court reviewed by certiorari, that no objection to its legality had been made otherwise than in habeas corpus proceedings, and that no part of the sentence had been satisfied. Exception is taken to the allowance of the amendment to the sentence and to the refusal of the application for habeas corpus.

Byron R. Collins, for plaintiff in error Hawes, Pottle & Wright, for defendant in error.

HILL, C. J. (after stating the facts as above). There was no error. It was admit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ted that the movant was tried for a violation of the city ordinance, and that he was found guilty by the mayor's court, and that he was in the custody of the respondent in pursuance of the sentence then rendered against him; and this custody was legal. It was immaterial that the sentence did not contain the words "on the public streets of Blakely." The ordinance authorized the mayor to punish those convicted under it by fine, or by requiring them to work on the public streets of the city. There was no other place where the sentence to perform labor could be carried out. It necessarily followed that the sentence, following the conviction, of a fine of \$50, or the alternative of "60 days at hard labor on," could only mean a fine of \$50, or the alternative sentence of 60 days hard labor on the public streets of the city of Blakely. We do not think that the sentence was in any sense doubtful. But, even if it was doubtful, it was clearly made certain by the testimony of the mayor, who had tried the movant and imposed the sentence; and in pursuance of the maxim "Id certum est quod certum reddi potest," it was competent to have the words "on the public streets of the city of Blakely" added to the sentence, as well as to insert the date of the sentence. The date, however, was immaterial, for that part of the sentence which required, as an alternative, labor upon the streets of the city would be computed, not from the date of the sentence, but from the date of the delivery of the accused to the authorities of the city in charge of working the streets with city convicts.

Judgment affirmed.

POTTLE, J., disqualified.

(10 Ga. App. 448)

CENTRAL GEORGIA POWER CO. v.
STATE. (No. 3,863.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

NUISANCE (§ 91*)—PUBLIC NUISANCES—PRESENTMENT—SUFFICIENCY.

The special presentment in this case was not subject to the demurrer filed by defendant, and the court did not err in overruling the same.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 91.*]

Error from City Court of Covington; W. H. Whaley, Judge.

The Central Georgia Power Company was convicted of maintaining a nuisance, and brings error. Affirmed.

Walter T. Johnson and Greene F. Johnson, for plaintiff in error. R. W. Milner, Sol., for the State.

POTTLE, J. A special presentment was returned by the grand jury of Newton coun-

ty against the Central Georgia Power Company, charging it with a violation of Penal Code 1910, § 681. The court overruled a demurrer to the presentment, and error is assigned upon this judgment.

The presentment alleged that the accused, on the 16th day of September, 1911, in the county of Newton, "with force and arms did erect, and did continue after notice to abate it, a nuisance which tends to annoy the community, and which tends to injure and which does injure the health of the citizens in general, by then and there creating and causing a pond of water to overflow and stand upon an area of land of 3,000 acres, which pond contains logs, stumps, limbs, and growing and decaying matter, and is producing malaria, large quantities of mosquitoes, and creating poisons in the air, and causing sickness and disease in the community surrounding said pond in said county." The demurrers were to the effect that the special presentment failed to set out any offense against the law; that it failed to describe the nature and character of the nuisance, or the location of the nuisance; that it failed to set out, either literally or in substance, the notice to abate, or the person to whom the notice was given, or when the notice was given, and further failed to set out the officer or agent of the defendant company to whom the notice was given; that it failed to describe the character of the poisons in the air, alleged to have been created, or the nature and character of the sickness and disease alleged to have been caused by the nuisance, or who were made sick, or when and where the sickness and disease ensued; that it failed to allege that the nuisance "damages all persons who come within the sphere of its operation"; that it failed to set out the manner in which the pond of water referred to in the presentment was created and caused to overflow; that it failed to describe the pond of water by boundaries, or other description, or to identify the particular stream, the obstruction of which caused the pond of water; that it failed to allege that the malaria and large quantities of mosquitoes in the air injured the health of the citizens in general, and failed to allege that the nuisance complained of is a public nuisance.

Section 681 of the Penal Code of 1910, under which the special presentment was returned, is in the following language: "Any person who shall erect, or continue after notice to abate, a nuisance which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor." We do not think any of the grounds of the demurrer are well taken. While the statute makes criminal the erection, or maintenance after notice to abate, of a public nuisance, it is aimed at the particular kind of a public

nuisance described in the statute, to wit, one which tends "to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals." The erection, or maintenance after notice, of a nuisance such as is described in this statute, is unlawful, without reference to whether it is such a public nuisance as is described in Civil Code 1910, § 4457. An indictment is sufficient which charges an offense in the language of the statute, and describes the acts alleged as constituting the offense with sufficient fullness to put the defendant on notice of the offense with which he is charged. *Glover v. State*, 126 Ga., 594 (1), 55 S. E. 592. It is not necessary that the evidence should be set out in the indictment. It is only necessary that the offense should be charged in the language of the Code, or so plainly that the nature of the charge can be easily understood by the jury. *Dowda v. State*, 71 Ga. 12 (2).

Tested by these rules, we think that the demurrer was properly overruled. The nuisance is described as being a pond located in the county in which the indictment was found, and it is sufficiently alleged how and in what manner this pond has become a nuisance. It was certainly not necessary to describe the particular kind of poisons in the air, or the particular disease or sickness which had been caused in the community surrounding the pond, nor who were made sick. It is earnestly insisted by able counsel for plaintiff in error that the indictment should have specified and described the particular notice to abate, alleged to have been given, the person by whom it was given, and the person to whom it was given. It is to be noted that the statute does not require any particular kind of notice. It means, of course, actual notice, either written or oral; but any such notice given to any person competent to receive it would be sufficient under the statute. In order to make out this case, it would be necessary for the state to prove notice to a person authorized to receive it on behalf of the defendant company, and such a notice as would be regarded a compliance with the provisions of the statute under which the indictment was framed.

It is argued by counsel for the plaintiff in error that the power company had a right, under the laws of this state, to build and maintain a pond and dam in connection with the operation of its business, and it is insisted that, having the right to do this, the state cannot indict and punish it for an act which it was authorized to perform. But manifestly no such question as this can arise upon demurrer to this indictment. If the point is well taken, it can be made in defense to the indictment when the defendant is put on trial. The defendant is sufficiently informed of the nature and character of the offense alleged against it, and in our

opinion the allegations of the presentment are sufficient as against the demurrer which was filed by the defendant.

Judgment affirmed.

(10 Ga. App. 480)

GRACE v. FINLEYSON et al. (No. 8,279.)
(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

1. EXECUTION (§ 154*)—LIABILITIES ON BONDS.

In order for a levying officer suing for the use of a plaintiff in *fi. fa.* upon a forthcoming bond to recover, he must show both breach and damage. There is a breach if at the time and place of sale the property is not delivered, or if it is delivered in a damaged condition. However, the obligor in the bond has the right to deliver the property, though it may have been damaged while in his possession, and if he redelivers it in this condition, and it is worth more than enough to bring the amount due on the *fi. fa.*, while there has been a breach of the bond, there is no damage; hence, no recovery can be had upon the bond.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 421-424; Dec. Dig. § 154.*]

2. EXECUTION (§§ 129, 154*)—SALE—LOCATION OF PROPERTY.

Where machinery or other cumbersome personalty of like nature is levied on, the levying officer need not move it, or cause it to be moved to the courthouse where it is to be cried off and sold, provided that he gives notice accordingly in his advertisement of the sale. Where the obligor in a bond given for the forthcoming of such property does not move it from the place where it is levied on, and the levying officer advertises that it is to be situated there at the time of the sale, and the claimant leaves it there, and it so remains until the time of sale, no breach of the bond can be claimed, though the obligor has made no actual tender of it to the levying officer.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 290, 421-424; Dec. Dig. §§ 129, 154.*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by J. L. Grace for use, etc., against L. F. Finleyson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

H. F. Lawson, for plaintiff in error. T. C. Taylor and H. E. Coates, for defendants in error.

POWELL, J. Grace, as county court bailiff of Pulaski county, levied on an engine, boiler, and other fixtures of a sawmill under an execution issued from the county court in favor of Mitchell and against the firm of Brown & Smith. Finleyson filed a claim. The claim having been withdrawn, the bailiff advertised the property for sale; the advertisement reciting that the property would be sold at public outcry at the courthouse within the legal hours of sale on the first Tuesday in April, but that, the "property being difficult and expensive to transport, it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

will not be carried to the place of sale, but may be seen and examined at the sawmill of the said J. L. Brown, which is located on the line of the Gulf Line Railway, a quarter of a mile south of Millerville, Ga." The property had never been moved from the place where the levy was made, and was still there at the place stated in the advertisement when the time of sale arrived. The bailiff on the day of the sale claimed a breach of the bond for a failure to redeliver the property in the condition in which it was when it was levied on, and filed suit in the city court of Pulaski county upon the bond for the use of the plaintiff in *fi. fa.* It appeared at the trial that the plaintiff did not actually tender the property to the bailiff, and that the bailiff took no steps to repossess himself of it, but that it was in fact at the place of sale as described in the advertisement at the time of sale, and that, while it had been injured by a fire which occurred while it was in the claimant's possession, it was still worth a great deal more than the amount of the *fi. fa.* against it, and that it would have brought more than that amount if offered for sale by the bailiff. The jury, under instructions from the judge of the city court, found for the defendant, and the bailiff brought certiorari. The judge of the superior court, on the hearing of the certiorari, sustained it and remanded the case to the city court for another trial, with instructions that, in order to constitute a performance of the conditions of the bond for a delivery of the property, actual tender must be made, and that notice of readiness to deliver, or the fact that the property was actually ready for delivery at the time and place of sale, is not a satisfaction of the condition; and unless defendants can show an actual tender of the property, or that the levying officer waived an actual tender or repossessed himself of the property, that a verdict be directed for the plaintiff. To this judgment the plaintiff (that is, the constable suing for use) has excepted, alleging as error that the judge of the superior court should have rendered final judgment in his favor and should not have remanded the case for a new trial.

[1] To our minds there is error in the court's judgment, but not against the excepting party. We think that the judgment rendered in the city court was the correct determination of the case. In order to recover on a forthcoming bond, two things must be shown—breach and damage. Breach is shown wherever it appears that at the time and place of sale the obligor in the bond failed to deliver according to his contract all of the property in as good condition as he received it in; and in this case a breach of the bond was shown when it appeared that the property had been damaged while in the claimant's possession. But if, as we shall directly attempt to show, there was a compliance with the bond save only in respect to the condition of the property, the plaintiff cannot recover in this case, because there

was no damage, since the property even in its depreciated condition was worth considerably more than enough to satisfy the plaintiff's demand. All this is provided for in the Civil Code of 1910, § 6043. Under that section the obligor in the forthcoming bond may deliver the property, notwithstanding it is not in as good condition as it was in when he received it, and is liable upon his bond for damages for deterioration, provided that in no case can damages be obtained upon the bond beyond what is necessary to satisfy the execution.

[2] 2. In our judgment the judge of the superior court was in error in holding, under the particular facts of this case, that there was a total breach of the bond, because the claimant made no actual tender of the property, though the bailiff did not agree to waive tender and did not repossess himself of the property. It must be remembered that the bailiff's seizure of the property was constructive only. He did not take it and carry it away from where it was situated. When the claimant gave bond, he did not move it. If he had moved it, all that would have been necessary on his part would have been for him to bring it and put it where the bailiff said for him to put it, according to the advertisement of the sale. The bailiff's advertisement was public notice to him, as well as to the world, that, while the actual selling or crying off of the property would take place at the courthouse, the property would not be brought there, but was to remain and to be delivered to the purchaser at the mill site where it was situated. When the day and hour of sale arrived, the claimant had the property at the very place at which he ought to have had it. Just what more he could have done we do not see. Counsel for the plaintiff in error say that he should have tendered it to the bailiff at that hour. Does he mean that he should have put this heavy machinery upon vehicles and have brought it to where the bailiff was and have offered it to him at the courthouse? We think not. The bailiff had, following the express provisions of the law, advertised that the property should be situated at the time of the sale at the mill site. He could not have moved the property there, for it was already there. Should the claimant then have gone to the courthouse and have taken the bailiff and carried him to the property? We think not. The bailiff was needed at the courthouse door to cry off the property there. Was it necessary for the claimant to say to the bailiff, "I tender you the property." We think not, for a tender of property cannot be constituted by mere words; and, if the property had not been at the place where it should have been, such words would have been wholly ineffectual for any purpose. By advertising the property for sale at the very place where the claimant had it, we think that the bailiff had waived any further act on

the defendant's part. If the claimant had been in any wise resisting the bailiff's control or right of control over the property, a different question might be presented; but nothing of that kind appears. A similar proposition to the one here involved was decided in the case of Willis v. Chowning, 18 Tex. Civ. App. 625, 46 S. W. 45, where it was held that if a sheriff made what is known as a range levy—that is, a levy upon animals running on the range—by mere constructive seizure, actual redelivery was not necessary in order to satisfy a forthcoming bond, provided that at the time of sale the animals were upon the range where the constructive levy had been previously made.

As the defendants in the forthcoming bond have filed no exceptions to the granting of a new trial, we shall not reverse the judgment on that ground; but we refuse to reverse it on the exceptions filed by the plaintiff in the bond.

Judgment affirmed.

(10 Ga. App. 506)

McMICHEN v. BROWN et al. (No. 3,676.)
(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 101*)—AUTHORITY OF AGENT—REPAIRS BY TENANT.

An agent to rent has no implied power to bind the landlord by a contract to pay a stipulated sum for improvements to be made by the tenant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 255, 256, 346; Dec. Dig. § 101.*]

2. ATTORNEY AND CLIENT (§ 81*)—AUTHORITY—POWER TO BIND CLIENT.

One employed as attorney at law to collect a claim for rent cannot bind the landlord by a contract to pay for improvements made on the rented premises.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 141-146; Dec. Dig. § 81.*]

3. PRINCIPAL AND AGENT (§ 175*)—RATIFICATION OF UNAUTHORIZED ACTS—BINDING EFFECT.

A parol ratification by an owner of land of an unauthorized written contract, made by an agent, to pay a stipulated price for improvements to be made on the land, will not be effective to bind the principal, when the improvements were made before the ratification took place, and the tenant has not acted on such ratification to his injury. *McCalla v. American Freehold Co.*, 90 Ga. 113, 15 S. E. 687; *Palmer v. McNatt*, 97 Ga. 435 (1), 437, 25 S. E. 406.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 662-668; Dec. Dig. § 175.*]

4. DIRECTING VERDICT.

Applying the foregoing principals to the facts of the present case, the court did not err in directing a verdict in favor of the plaintiffs in the distress warrant proceedings.

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action between J. G. McMichen and Mol-

lie Brown and others. From the judgment, McMichen brings error. Affirmed.

J. J. Northcutt, for plaintiff in error. F. M. Richards, for defendants in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 458)

BROADWATER v. STATE. (No. 3,892.)
(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. PERJURY (§ 23*)—INDICTMENT—FORM OF OATH ADMINISTERED.

It is not necessary in an indictment for perjury to set out in full, either literally or in substance, the form of the oath alleged to have been administered to the defendant as a witness in the judicial investigation in which the perjury is alleged to have been committed. The jury can plainly understand this ingredient of the offense, if it is alleged in the indictment that the oath administered to the defendant was a lawful oath, and the time, place, and nature of the investigation, as well as the authority of the tribunal in which the alleged perjury is said to have been committed, are so distinctly stated as to exclude every other inference than that the oath in fact administered was in substance that prescribed by law, and that it was consciously taken by the accused when he testified as a witness. Generally the form of oath administered to a witness is immaterial, and that the oath was a lawful oath may sufficiently appear from other allegations of the accusation.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 23.*]

2. WITNESSES (§ 227*)—AUTHORITY TO ADMINISTER OATH—MUNICIPAL COURT.

An act of the General Assembly conferring power upon the municipal authorities of a town to try all violators of the ordinances of the town, and to sentence those adjudged to be guilty, and to fine them, imprison them, or compel them to work in a chain gang upon the public streets, creates, by charter, a court. Every court has power "to administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary, in the exercise of its powers and duties." Civil Code 1910, § 4644 (5).

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 227.*]

3. WITNESSES (§ 227*)—AUTHORITY TO ADMINISTER OATH—MUNICIPAL COURT.

In a trial before a municipal court composed of a board of commissioners, any member of the board may administer an oath to a witness.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 227.*]

4. INDICTMENT AND INFORMATION (§ 183*)—VARIANCE.

Proof that an ordinance was passed by the town council of a municipal corporation will support an allegation that the ordinance in question was passed by the general council of the same corporation. In view of the fact that the charter of Kingston provides for only one municipal body, the variance between the term "town council," as used in the charter, and the term "general council," as used in the presentment, in reference to this municipal body, is not material.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 183.*]

5. PERJURY (§ 25*)—INDICTMENT AND INFORMATION (§ 87*)—MATERIALITY OF TESTIMONY—DATE OF OFFENSE.

It is essential that the materiality of the testimony alleged to have been false should be made to appear in the indictment, and a day certain upon which the alleged perjury was committed must be stated. In the case at bar the allegations of the indictment sufficiently conform to these requirements.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 25;* Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

6. DEMURRER OVERRULED—NO ERROR.

There was no error in overruling the demurrer.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

L. S. Broadwater was convicted of perjury, and brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. T. C. Milner, Sol. Gen., and Geo. W. Stevens, for defendant in error.

RUSSELL, J. Exception is taken to a judgment overruling a demurrer filed to a presentment against the plaintiff in error for the offense of perjury. Without insisting too strongly upon the maxim, "Demurrer, being a critic, must itself be free from imperfections" (Douglas, *Augusta & Gulf Ry. Co. v. Swindle*, 2 Ga. App. 550, 556, 59 S. E. 600, 602), which might be applied to at least one of the special demurrers, we have fully considered each of the objections sought to be presented.

[1] 1. It is insisted, in the first place, that the alleged lawful oath is not set out in the body of the indictment, and that the facts alleged do not show that the oath was a lawful oath, or that the defendant was sworn as a witness in any case. It is plain, from the allegation of the indictment, that the board of commissioners of the town of Kingston were sitting as such to try one Charles Davenport for a violation of Ordinance No. 39, which is quoted in the presentment. This is a sufficient statement of the case. It is as ample as if the case had been described as Board of Commissioners of the Town of Kingston v. Charles Davenport, or Town Council of Kingston v. Charles Davenport, charged with a violation of Ordinance No. 39. It is not seriously insisted that it is necessary to set out in totidem verbis the oath actually administered upon the trial. Of course, it is necessary that it should be properly alleged that the oath administered to the witness Broadwater on the trial of Davenport was a lawful oath, and it may be that this statement, without more, in the indictment, could be treated as a mere conclusion of the pleader, though we are inclined to doubt this. But certain it is that the allegations in reference to the administration of the oath and the proceeding in which it was administered set forth sufficient facts to enable the jury and the de-

fendant to understand that the accused in the investigation referred to obligated himself to speak truly in regard to the material matter in relation to which he is alleged to have testified knowingly, willfully, and absolutely falsely. It is not necessary in an indictment for perjury to set out in full, either literally or in substance, the form of the oath alleged to have been administered to the defendant as a witness in the judicial investigation in which the perjury is alleged to have been committed. The jury can plainly understand this ingredient of the offense if it is alleged in the indictment that the oath administered to the defendant was a lawful oath, and the time, place, and nature of the investigation, as well as the authority of the tribunal in which the alleged perjury is said to have been committed, are so distinctly stated as to exclude every other inference than that the oath in fact administered was in substance that prescribed by law, and that it was consciously taken by the accused when he testified as a witness. Generally the form of oath administered to a witness is immaterial, and that the oath was a lawful oath may sufficiently appear from other allegations of the accusation.

There are some specific exceptions, such as the form of oath prescribed before the grand jury, which vary slightly from the usual form of oath prescribed for a witness upon the trial of the case. But, where perjury is assigned upon testimony falsely delivered before a grand jury, it will be assumed that the lawful oath charged by the indictment to have been administered was that prescribed to be administered to witnesses before the grand jury; and if, upon the trial, it appears that the required oath was not administered, the defendant will be entitled to the advantage to be derived from a variance between the allegations and the proof. We hardly think, however, that the indictment would be demurrable; if it be alleged that the witness was sworn before the grand jury, and that the oath administered to him was a lawful oath. And so in this case, it being stated in the indictment that the accused appeared as a witness on a certain day, in a case in the municipal court of Kingston, in the trial of one accused of a violation of a city ordinance, and that a lawful oath was administered to him as such witness, it is easily to be understood that the charge of the indictment upon this part of the case is that a form of oath legally suitable to the nature of the investigation then pending was administered to him; in other words, that he swore to tell the truth in the case which was actually on trial, and which he understood to be on trial. As to all matters material to the issue with reference to which he testified, the solemn assumption of an obligation to speak the truth,

consciously assumed by the witness in the investigation pending, is more important than the form of the words in which the oath is administered to him. It would seem to us that if the witness had sworn that his testimony in this case would be the truth, the whole truth, and nothing but the truth, the oath administered to him would have been a lawful oath. Clark's Cr. L. 385; Whart. Cr. L. p. 1287; Bishop's Cr. Pr. §§ 902, 912, par. 2.

[2] 2. The third ground of the demurrer challenges the authority of Griffin (who is alleged to have administered it) to administer, as one of the board of commissioners of the town of Kingston and as president of the board, the oath alleged; and in the eighth ground it is insisted that the board of commissioners of the town of Kingston was not a court, and had no jurisdiction as a court, nor any authority to summon, swear, or hear witnesses. In the original charter granted to the town of Kingston (Acts 1869, p. 81), the board of commissioners was given power to pass such rules and ordinances for the good government and order of said town, the collection of town taxes, the punishment of disorderly conduct, the preservation of peace and quiet, and the protection of the citizens of, and persons visiting, said town, as it might think necessary and proper, and to assess fines, in its discretion, not exceeding \$100, for the violation of any of such rules or ordinances; but there was no express grant of power to try the offenders. By the act of 1895 (Acts 1895, p. 242, § 2), the charter was amended, and it was provided that "any person or persons violating any of the laws or ordinances of said town shall be tried therefor by said board of commissioners, and on conviction thereof" shall be punished as prescribed in this section. An act of the General Assembly conferring power upon the municipal authorities to try all violators of the ordinances of the town, and to sentence those adjudged to be guilty, and to fine them, imprison them, or compel them to work in a chain gang upon the public streets, creates, by charter, a court. *Swafford v. Berrong*, 84 Ga. 65, 10 S. E. 593. Every court has power to administer oaths in an action or proceeding pending therein, and in all other cases when it may be necessary, in the exercise of its powers and duties. Civil Code 1910, § 4644 (5).

[3-5] 3-5. The rulings in the third, fourth, and fifth headnotes require no elaboration. It is only necessary to say, in explanation of the fifth headnote, that the ordinance for a violation of which Davenport was being tried in the municipal court was one forbidding any person to be drunk or disorderly on the streets of the town of Kingston, and it is alleged that the accused, as a witness, swore on the trial of Davenport that the latter "was not drunk on the day and date afore-

said, and that he had been with Charles Davenport from 1 o'clock to about 4:30 o'clock p. m., and that Charles Davenport had not drunk a drop." Clearly this testimony was material to the issue before the court. As to the matter of the date, nothing can be said, except that the indictment alleges distinctly that the day on which the perjury was committed, and the day with relation to which the witness testified, were the same day. As such a state of facts is not impossible, the demurrer fails to present any point for consideration. If upon the trial it should appear that the day with reference to which the defendant testified was a different day from the one on which Davenport was accused of being drunk, even then, perhaps, no question would be presented; for the state is not compelled to prove that the perjury was committed on the exact date alleged in the presentment.

[6] 6. There was no error in overruling the demurrer.

Judgment affirmed.

(10 Ga. App. 495)

E. E. PRINCE & SONS v. J. W. COCHRAN & SONS. (No. 3,856.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 725*)—EXCEPTIONS—SCOPE AND SUFFICIENCY.

Where suit is brought on a promissory note, and the defendant's plea is stricken and judgment entered up against him for the full amount sued for, a bill of exceptions containing a general exception to the final judgment, and an exception to and a specific assignment of error upon the ruling striking the plea, sufficiently brings into question the correctness of the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 725.*]

2. PLEADING (§ 354*)—MOTIONS—SUFFICIENCY OF ANSWER.

As against an oral motion to dismiss made at the trial term a plea to a suit upon a promissory note, distinctly alleging that the defendants have paid to the plaintiffs either in cash or its equivalent more than the amount sued for, and that the overpayments were made through mistake and in ignorance of the sum really due on the note at the time the overpayments were made, is good, both as a plea of payment and as a cross-action to recover the overpayments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 854.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by J. W. Cochran & Sons against E. E. Prince & Sons. Judgment for plaintiffs, and defendants bring error. Reversed.

J. Q. Smith, for plaintiffs in error. Roscoe Luke, R. C. Bell, and Ira Carlisle, for defendants in error.

POTTLE, J. This was a suit upon two promissory notes. The defendants filed a

plea setting up that they had paid the plaintiffs more than the amount due on the notes by \$210.75. It was alleged that the different amounts had been paid to the plaintiffs from time to time upon designated dates, but that the plaintiffs had failed to credit these payments on the notes sued on. It was further averred that the overpayments had been made through mistake and in ignorance of the amount really due. The defendants prayed that they might recover from the plaintiffs the amount thus overpaid. On oral motion at the trial the judge struck the defendants' pleas and entered up judgment for the full amount sued for. The defendants have sued out their writ of error to this court.

The bill of exceptions contains a general assignment of error on the judgment striking the defendants' pleas. Error is also assigned upon the refusal of the court to allow the pleas to be amended "in any respect whatever," but it is not alleged that any amendment was offered, and no copy of the amendment is set out in the bill of exceptions or attached thereto as an exhibit. The bill of exceptions then recites that after striking the defendants' pleas the court rendered a judgment for the full amount sued for "to which judgment defendants then and there excepted and now except and assign same as error."

[1] 1. A motion to dismiss the writ of error has been made upon the ground that the assignments of error in the bill of exceptions are not sufficiently specific. There is no merit in this motion. The proper practice in such cases was laid down by the Supreme Court in the case of *Lyndon v. Georgia Ry. & Elec. Co.*, 129 Ga. 353, 58 S. E. 1047, to the effect that, where there is an exception to a final judgment, exception may also be taken to any antecedent ruling of the court during the progress of the trial. Of course, a judgment for the full amount sued for was the inevitable result of the antecedent ruling of the court in striking the defendants' pleas, and the real complaint of the plaintiffs in error is not that final judgment was entered up, but that their pleas were stricken. As we understand the ruling of the Supreme Court in the *Lyndon Case*, the assignments of error in the present bill of exceptions are sufficient to bring before this court the judgment striking the defendants' pleas. The exception to the refusal of the court to allow the defendants to amend will not be considered, because no amendment is set out in the bill of exceptions or attached thereto as an exhibit.

[2] 2. Upon special demurrer, a plea of payment is bad, unless it allege when, how, and to whom payment is made. *Kahrs v. Kahrs*, 115 Ga. 288, 41 S. E. 649. But there was no special demurrer in this case. As against a general demurrer or an oral motion to dismiss made at the trial term, upon the ground that no defense is set forth, a plea of

payment is good which alleges in distinct terms that the defendant has paid to the plaintiff in cash or its equivalent the full amount of the note sued on. The plea in the present case was certainly good as a plea of payment. We are also of the opinion that as against an oral motion to dismiss, the plea and prayer, in so far as a recovery is sought for overpayments, is good. The defendants allege that the money was paid through mistake, that they did not have access to their notes, and, the proper credits not having been made by the plaintiffs from time to time, they were unable to tell just what amount was due on the notes. This plea was subject to special demurrer, but we do not think that it should have been dismissed upon oral motion made at the trial term.

Judgment reversed.

(10 Ga. App. 546)

HEARD v. STATE. (No. 3,860.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 169*)—KEEPING AT PLACE OF BUSINESS—EVIDENCE.

One occupying the relation of employé to the owner of a livery stable cannot, although he works in the stable, be convicted, either of keeping intoxicating liquors at a public place, or of keeping such liquors on hand at his place of business, when the uncontradicted evidence discloses affirmatively that the liquors were not his, and wholly fails to show that he aided or abetted the owner in storing the liquors in the stable, or had any knowledge that they were there.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 169.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Will Heard was convicted of selling intoxicating liquors, and brings error. Reversed.

M. U. Mooty and E. A. Jones, for plaintiff in error. Henry Reeves, Sol., for the State.

POTTLE, J. Heard was tried and convicted under an accusation charging him with keeping intoxicating liquors at a public place, and with keeping such liquors on hand at his place of business. Taken most favorably for the state, as it must be, the material evidence was as follows: The accused was a bookkeeper in a livery stable owned by one Scott. About two months before the warrant was issued, some six or eight casks of whisky and several barrels of beer were found in a cellar under the livery stable, and connected with the stable by means of a trapdoor. All of the casks, except one, were "marked to W. L. Heard at Standing Rock, Alabama." The key to the trapdoor was obtained from Scott by the officer who made the search. Heard could not unlock the trapdoor, because he was paralyzed and crippled in both arms. The whisky was the property of Scott, and the accused had no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interest in it. The whisky was ordered by Scott in Heard's name, and with his consent, to be sent to Standing Rock, Ala., to be conveyed thence to Dadeville, in Alabama, where Scott had some negroes doing grading for a railroad company. The whisky came to Standing Rock, and Scott instructed Beall, one of his employes, to take the whisky from Standing Rock to Dadeville, and did not know that Beall had brought it to his place of business in West Point until it was found there by the officer who made the search. It does not appear how or by what agency the beer reached the cellar of Scott's stable, nor who owned it. There is no evidence from which it could be inferred that the accused had any knowledge that either the whisky or the beer was in the stable, or that he was connected in any way, directly or indirectly, with having it brought there.

Manifestly the conviction cannot stand. Granting that Scott knew the liquor was there, guilty knowledge of the employer cannot be imputed to the employe. If the evidence had shown that the accused had confederated with Scott or abetted him in the illegal act, he would be guilty. In this case, proof of knowledge by Heard that Scott was keeping the whisky in his place of business, coupled with the fact that the accused allowed the use of his name to bring the liquors to a nearby town in Alabama, might authorize a finding that he was so connected with the illegal act as to make him guilty. But mere consent, without more, to have the liquors shipped in his name to another state does not make the accused guilty. The conviction rests wholly upon suspicion, and must be set aside.

This case upon its facts differs from *Toles v. State*, 73 S. E. 597, in that, in the latter case, there were circumstances authorizing a finding that Toles aided and abetted the employer in the illegal act.

Judgment reversed.

(10 Ga. App. 650)

MUSGROVE v. D. E. LUTHER PUB. CO.
(No. 3,659.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. PARTIES (§ 59*)—AMENDMENT—SUBSTITUTION OF PARTY PLAINTIFF.

When it becomes necessary for the purpose of enforcing his rights, a party plaintiff may amend by substituting the name of another person in his stead, suing for his use.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90, 94; Dec. Dig. § 59.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence demanded the verdict rendered, and there was no error in overruling the motion for a new trial.

Error from City Court of Miller County; M. C. Edwards, Judge.

Action by the D. E. Luther Publishing Company, for the use of the Phillips-Boyd Publishing Company, against L. L. Musgrove. Judgment for plaintiff, and defendant brings error. Affirmed.

W. I. Geer, for plaintiff in error. Bush & Stapleton, for defendant in error.

POTTLE, J. During the March term of the city court of Miller county, a suit upon an open account sounding, "Phillips-Boyd Publishing Company v. L. L. Musgrove," was called for trial. Over objection of the defendant the plaintiff was allowed to amend his petition by striking the name of the Phillips-Boyd Publishing Company as plaintiff, and substituting in lieu thereof the name of D. E. Luther Publishing Company, suing for the use of the Phillips-Boyd Publishing Company. Exceptions pendente lite were duly filed to the order of the court allowing this amendment, and error has been assigned in this court upon such exceptions.

[1] It appears that the Luther Publishing Company had been adjudicated a bankrupt and that its assets, including the account sued on, had been sold to the Phillips-Boyd Publishing Company. Under the provisions of Civil Code 1910, § 5689, the plaintiff had the right to amend his petition by substituting the name of the D. E. Luther Publishing Company, suing for the plaintiff's use. It was argued in the brief of counsel for both sides, and the record transmitted to this court shows, that the case was originally filed in the name of the D. E. Luther Publishing Company as plaintiff; that at a previous term of the court, over objection of defendant's counsel, the plaintiff was allowed to amend by striking the name of this plaintiff and substituting that of the Phillips-Boyd Publishing Company in its stead, and that exceptions pendente lite were duly filed by the defendant to this ruling. Counsel for the plaintiff in error insists in his brief that, this original ruling being wrong, the court had no power at a subsequent term to correct the error by restoring the name of the original plaintiff as a party suing for the use of the Phillips-Boyd Publishing Company. This position of counsel for plaintiff in error is very probably correct; but there is no assignment of error in the present bill of exceptions which authorizes this court to pass upon such a question. As to this point the only complaint made in the bill of exceptions is that the court permitted the Phillips-Boyd Publishing Company to substitute the name of the D. E. Luther Publishing Company as plaintiff suing for its use. We are compelled to deal with the case as if it had been originally brought in the name of the Phillips-Boyd Publishing Company. There is no merit in this assignment of error, and we cannot look to the record for the purpose of ascertaining that an antecedent error

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was committed by the court, of which no complaint is made in the bill of exceptions.

[2] The evidence demanded the verdict rendered, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

(10 Ga. App. 474)

O'NEAL v. STATE. (No. 3,861.)

(Court of Appeals of Georgia. Jan. 30, 1912.)

(Syllabus by the Court.)

1. FALSE PRETENSES (§§ 28, 32, 38*)—INDICTMENT—VARIANCE.

In an indictment for the offense of cheating and swindling by obtaining money through false and fraudulent statements and representations, the ownership of the money thus obtained and the name of the person cheated and defrauded should be stated; and the proof in support of these essential allegations must be in strict conformity therewith; otherwise the variance will be fatal. 2 Bishop's New Criminal Procedure, § 184.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 33, 42-44, 50-53; Dec. Dig. §§ 28, 32, 38; Indictment and Information, Cent. Dig. §§ 42-44.]

2. FALSE PRETENSES (§ 38*)—INDICTMENT—VARIANCE.

An allegation in an indictment for cheating and swindling that the person "cheated and defrauded" was Robert Hutchinson is not supported by proof that the bank of which Robert Hutchinson was assistant cashier was in fact cheated and defrauded by the presentation of a check to Hutchinson as such assistant cashier, accompanied by certain false and fraudulent representations relating to the check, which induced Hutchinson as cashier to cash the check out of the funds of the bank. Under these facts, the bank, and not Hutchinson as an individual, was cheated and defrauded. The fact that Hutchinson subsequently discovered that the bank check cashed by him for the accused out of the money of the bank of which he was cashier was worthless and that he had been deceived by the false representations made to him in reference thereto, and paid the loss thus incurred by the bank, did not change the character of the transaction. The offense was complete when Hutchinson as cashier paid out the money of the bank for the worthless check induced to do so by the false and fraudulent representations then made to him by the accused; and the subsequent act of Hutchinson in making good the loss to the bank did not have the legal effect of relating back to the time when the act of cheating and swindling was fully accomplished and of making him the person cheated and defrauded.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*]

Error from City Court of La Grange; Frank Harwell, Judge.

W. R. O'Neal was convicted of cheating and swindling, and brings error. Reversed.

The indictment alleged, in substance, that W. R. O'Neal "did defraud and cheat Robert Hutchinson in the sum and out of thirty dollars in money, of the value of thirty dollars, by using the following deceitful means and artful practice, to wit: On said day and date O'Neal presented to said Robert Hutch-

inson, assistant cashier of the La Grange National Bank, a corporation, a check on the Third National Bank of Atlanta, for thirty dollars, and payable to order of said W. R. O'Neal, and purporting to be signed by W. J. O'Neal, for the purpose of having the same cashed, and the same was cashed at the said La Grange National Bank by said Hutchinson, the said Hutchinson relying upon representation made by said W. R. O'Neal that said check was good and would be paid upon presentation; and, said Hutchinson believing that said check was good and would be paid when presented to said Third National Bank of Atlanta, he, said Hutchinson, said assistant cashier, paid to said W. R. O'Neal said sum of thirty dollars in money of value of thirty dollars on and for said check which was worthless, and said W. R. O'Neal knew was worthless, and payment of said check was refused by said Third National Bank, no funds being in said Third National Bank subject to said check, all of which said W. R. O'Neal knew, and knowing his said representation to be false, which was false and intended to be false, and by reason of said false representation said Hutchinson was defrauded and cheated as aforesaid in the sum of thirty dollars."

It is admitted that the evidence proved all the allegations of the indictment except the allegation as to the person who was defrauded and cheated, and as to the ownership of the \$30. The evidence illustrating these two allegations was that Robert Hutchinson as assistant cashier paid the check presented to him by the accused "with the funds of the La Grange National Bank," and that the \$30 so paid out by Hutchinson as assistant cashier was not his property, but was the property of the La Grange National Bank. The assistant cashier testified that after the check which he had cashed out of the funds of the bank had been returned to the bank it remained in the cash drawer of the bank as a cash item against him for about two days, and that then he took the \$30 out of his pocket and "made it good to the bank," that this was in accordance with the custom of the bank that, where any loss accrued to the bank through his work, it was to be sustained by him. There was no printed rule on the subject, but the bank required him to make the loss good where it occurred by his negligence or fault.

It is alleged that the court erred in refusing a timely written request of the defendant that the jury be instructed as follows: "If you find that the defendant defrauded the La Grange National Bank by presenting to its officers this check in evidence, and you find that R. E. Hutchinson did not sustain a loss until after he had ascertained and knew the check was worthless, if it was worthless, and R. E. Hutchinson paid the check, know-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ing it was worthless at the time he paid it, then the defendant would not be guilty in this case."

M. U. Mooty, for plaintiff in error. Henry Reeves, Sol., for the State.

HILL, C. J. Judgment reversed.

(10 Ga. App. 544)

BUSH v. STATE. (No. 3,775.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 136*)—PLEA IN ABATEMENT—APPOINTMENT OF SOLICITOR.

The right of one whom the court judicially knows to have been legally appointed and commissioned as solicitor of a city court cannot be brought in question by plea in abatement to an accusation drawn by him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 309-311; Dec. Dig. § 136.*]

2. OFFICERS (§ 63*)—REMOVAL FROM COUNTY—VACATION OF OFFICE.

The removal of an officer from the county for which he was elected or appointed to another county in this state does not vacate the office until the fact has been judicially ascertained.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 94; Dec. Dig. § 63.*]

Error from City Court of Miller County; C. C. Bush, Judge.

Dick Bush was convicted of crime, and brings error. Affirmed.

W. I. Geer, for plaintiff in error. P. D. Rich, Sol., for the State.

RUSSELL, J. Before the arraignment of the plaintiff in error, he filed a plea in abatement, which the court struck, and this ruling is the ground of exception presented by the writ of error.

[1] The plea in abatement conforms to the requirements laid down in *McRae v. State*, 71 Ga. 99, *Mize v. State*, 135 Ga. 295, 69 S. E. 173, *Folds v. State*, 123 Ga. 167, 51 S. E. 305, and *Wall v. State*, 128 Ga. 549, 55 S. E. 484, in that it was filed at the proper time; for, this being an accusation, of course there had been no opportunity for the defendant to sooner object. However, in our opinion the court properly struck the plea in abatement, for the reason that the title of the acting solicitor of the city court could not be brought in question by this plea. The court judicially knew that Mr. Rich was the duly commissioned solicitor of the city court of Miller county, and, taking all of the allegations of the plea to be true, he was at least the de facto officer of the court.

[2] Furthermore, the plea was defective, in that there was no statement that the office of the solicitor of the city court had been

judicially ascertained to be vacant in a legal sense by reason of the fact that it had been judicially ascertained that Mr. Rich had moved his residence from the county of Miller to the county of Decatur. The exact point was decided by the Supreme Court in the case of *Channell v. State*, 109 Ga. 152, 34 S. E. 354, in which Justice Lewis, delivering the opinion of the court, holds: "Section 229 of the Political Code [1895] prescribes how offices in this state may be vacated, and one of the methods (see subdivision 5) for vacation is: 'By the incumbent ceasing to be a resident of the county, circuit, or district for which he was elected. In the first case the office shall be vacated immediately; in the latter cases, from the time the fact is judicially ascertained.' It is manifest from this provision that, when an incumbent of an office has moved from the county for which he was elected to another county in this state, the office is not thereby immediately vacated, and does not become so until the fact has been judicially ascertained." It can readily be seen that the court was not called upon to try two issues at once. The validity of Mr. Rich's title to the office, and the guilt of the accused, are not one and the same proceeding.

The proper method of testing the validity of Mr. Rich's title was by quo warranto, brought by any one interested in the office, and, as ruled by the Supreme Court, any citizen may file the writ, because all are interested in the proper discharge of the duties of the office and the proper qualifications of the incumbent. *Whitehurst v. Jones*, 117 Ga. 803, 45 S. E. 49, and cases cited. However, loss of citizenship does not result from a change of residence not intended to be permanent. By demurring to the plea in abatement the solicitor of the city court admitted, for the purposes of that particular hearing, that he had changed his residence; but it is not altogether clear from the allegations of the plea that, if the plea had not been demurred to the evidence would have sustained the proposition that the office had become vacant by the removal of Mr. Rich from the county of Miller to the county of Decatur. There must be either the tacit or the explicit intention of an expression to change one's domicile before there is a change of legal residence. While it is provided in Civil Code, § 2181, that the domicile of a married man shall be the place where his family resides, the wife (if there be only a wife) or the wife and family, may, for purposes of temporary convenience, or recuperation from ill health, or for the purpose of educating the children, reside for a long time at a place not intended as a permanent abode, without affecting any change of legal residence; this for the reason that, while there is a physical removal, there was

never, at any time, an intention on the part of those who moved to abandon the former domicile.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 517)

WALLACE v. METROPOLITAN LIFE INS. CO. (No. 3,679.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(*Syllabus by the Court.*)

1. INSURANCE (§ 360*)—PREMIUMS—PAYMENT AFTER MATURITY.

A custom on the part of a life insurance company, under which its policy holders are allowed 30 days after the maturity of the premiums within which to pay them, does not require the company to accept a premium after the expiration of such period.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 916-924; Dec. Dig. § 860.*]

2. INSURANCE (§ 353*)—LIFE INSURANCE—PAYMENT OF PREMIUM.

Where, under the terms of a policy of life insurance, premiums are made payable at the home office of the insurance company, it may, upon notice to a policy holder, discontinue a custom of sending an agent to the place of business of the insured to collect the premiums.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 353.*]

3. INSURANCE (§ 665*)—PAYMENT OF PREMIUM—WAIVER.

The facts of this case are held insufficient to have authorized a finding that the forfeiture of the plaintiff's policy, on account of nonpayment of premium, was waived by the insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

Russell, J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by T. B. Wallace against the Metropolitan Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John A. Boykin and Dorsey & Shelton, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

POTTLE, J. Wallace brought suit against the Metropolitan Life Insurance Company to recover the sum of \$167.82, which the plaintiff had paid to the company in premiums on a certain life insurance policy, and which, he alleged, he was entitled to recover on account of the wrongful and illegal cancellation of his policy by the defendant company. At the conclusion of the evidence, the trial judge directed a verdict in favor of the defendant, and this is the error assigned.

1, 2. The policy of insurance was issued on March 31, 1904, and provided for the payment of annual premiums of \$40 on March 31st of each year, beginning with the date of the issuance of the policy. One

of the conditions of the policy was that "premiums are payable at the home office in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipts signed by the secretary, and countersigned by the persons receiving the payments. The plaintiff was allowed, some time after the issuance of the policy, to change the manner of payment of his premiums to quarterly installments of \$10.64 each. It appears from the evidence that up to the fall of 1907 the plaintiff was an employé of the defendant company at its branch office in Atlanta; and that he paid his premiums at the office where he was employed. In the fall of 1907, he left the service of the company, and from that time until March, 1908, he paid two quarterly premiums to a collector of the company, who called at the plaintiff's office in the Candler building for this purpose. It was a custom of the company in Atlanta to send out agents to collect the premiums due from its policy holders, and these agents would call, either at the residence, or the business office, of the policy holder, as the latter might prefer. It was also a custom of the company to allow a period of 30 days after the premium became due, under the terms of the policy, within which the same might be paid.

A quarterly premium was due by the plaintiff on March 31, 1908, and under this custom could have been paid at any time up to and including April 30, 1908. This premium was not paid within the grace period; but on May 1, 1908, the plaintiff wrote a letter to the president of the company, addressed to its home office in New York, inclosing a draft for the quarterly premium and also the amount of a premium due by his wife, and asking that the same be accepted. In this letter the plaintiff stated that on April 30th a young lady stenographer at the office of the company in Atlanta called him up on the telephone, and notified him that his premium was due. In this letter the plaintiff also complains at great length of the conduct of certain officers of the company in Atlanta, and of his discharge from the service of the company in 1907, and also because the company's collector failed to call upon him to collect the quarterly premium which he inclosed in the letter.

On May 14, 1908, one of the vice presidents of the company in New York wrote to the company's superintendent in Atlanta, inclosing the plaintiff's draft, and suggesting to the superintendent that there was no reason why a representative of the company might not call at the plaintiff's office to collect his premiums. The superintendent was advised by the vice president that "you can

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

do as you please about making any arrangement such as he desires." The letter further stated: "We are willing to accept the premiums, notwithstanding the grace period has expired under both policies, and although Wallace tells us in his letter that his wife is an uninsurable risk, but if you decide that it will not be convenient to have calls made at his office for collection of these premiums at the time he elects, he should be plainly told that this is the last time we will accept premiums not tendered within the grace period." The last paragraph of this letter was as follows: "We omitted to tell you that Wallace deducted from his remittance ten cents to cover the cost of draft and four cents to cover postage. He, of course, had no right to do this, but we would rather allow it to him than to have a squabble, if you decide that it is best for the company to accept the premiums and reinstate the business." On May 19th Wright, the superintendent, wrote to the plaintiff that if he would come to the office he would assist him in straightening out "these matters which have been referred to me."

On May 26th, no reply having been received from the plaintiff to the last letter, the superintendent again wrote that, unless plaintiff would come to the office within the next day or two, the papers would be returned to the New York office, and he could settle with the officials there. On June 1st the plaintiff wrote the superintendent, stating that he could be found at his office in the afternoon, between certain hours; and that if the superintendent would call on the plaintiff at his office the plaintiff would take the matter up with him. On June 9, 1908, the New York office returned the plaintiff his draft. On the lapsed policy register for the week commencing June 14, 1908, a notation was made that the plaintiff's policy had been canceled.

Upon these facts, the plaintiff insists that the judge erred in directing a verdict in favor of the defendant. In our opinion, the trial judge was clearly right in his construction of the evidence. The plaintiff relied upon a course of dealing varying the express terms of his contract, and also upon a waiver by the defendant company of the forfeiture of his policy, after it had taken place, on account of the nonpayment of his premiums.

[1] In the first place, there was no course of dealing shown under which policy holders had been permitted to pay their premiums after the expiration of 30 days of grace allowed. It does appear that there was a custom of the company allowing this 30 days grace, and also that the company sent out agents for the purpose of collecting the premiums; but there is no suggestion in the evidence that the company had any custom, or that it had, by any previous course of dealing, led the plaintiff to believe that

he could pay his premium after the expiration of the 30-day period. But, even if such a custom existed, the company had a right to discontinue it, upon notice to a policy holder who had theretofore been receiving the benefit of such a custom.

[2] It distinctly appears from the letter of the plaintiff to the president of the company that on April 30th, the last day upon which the premium could have been paid, one of the employees of the defendant company called the plaintiff up over the telephone, and reminded him that his premium was due. The plaintiff testified that he had talked with the stenographer at the Atlanta office, but could not remember whether it was in April, or when; but the fair inference from all of his testimony is that his conversation with the stenographer is the one referred to in his letter. This conversation with an employee of the company over the telephone was sufficient to have put the plaintiff on notice that his premium receipt was at the office of the company, ready to be delivered to him upon payment of his premium, and was in effect notice to the plaintiff that the company expected him to call at the office and pay his premium. We think that there is nothing in the evidence which would have authorized the jury to find that there was a custom or course of dealing on the part of the defendant company which authorized the plaintiff to withhold his premium beyond the 30-day period, which had theretofore been allowed to him purely as a matter of grace.

[3] 3. Nor was there anything in the evidence which would have authorized the jury to find that the company had waived the forfeiture, which took place at midnight on April 30th, by reason of the plaintiff's failure to pay his premium before that time. It is earnestly insisted by counsel for the plaintiff in error that the letter of the vice president to the superintendent at the Atlanta office had this effect; but we do not think this is a fair construction of that letter. The substance of the letter was that, while the writer representing the company was perfectly willing to accept the premium and reinstate the plaintiff's policy, yet, at the same time, this was a matter under the direct jurisdiction of the Atlanta office; and it was left to the local superintendent to decide whether it was for the best interests of the company to accept the premium and reinstate the policy. It is true that the letters from the superintendent to the plaintiff indicate that in all probability, if the plaintiff had called at the office of the company in Atlanta, as he was invited to do, the superintendent would have adjusted the matter satisfactorily to the plaintiff. But in none of these letters was there any agreement to do this; and, besides, it appears that the plaintiff did not accept the invitation and call at the office to arrange the matter, as he was requested to do.

Some stress is laid by counsel upon the fact that the company failed to note any cancellation of the policy on its register until the week beginning June 15, 1908, and counsel argue from this that the forfeiture of the plaintiff's policy was in abeyance until that time. But we cannot agree to this proposition. The forfeiture took place, under the terms of the policy, as modified by the custom, about which plaintiff testified, at midnight on April 30, 1908. In order to reinstate the policy, some affirmative act upon the part of the officials of the company amounting to a waiver of the forfeiture was necessary. Mere omission to record it upon the lapsed register until June 15th, or after, could not in any way affect this question.

Retention by the company of the plaintiff's draft, under the circumstances, would not amount to a waiver. A draft is not payment until it is paid. The company did not collect the draft, and ultimately returned it to the plaintiff, who accepted it. In addition to this, the evidence shows that all during the time the company held this draft its officials were making an effort to arrange matters to the satisfaction of the plaintiff. The failure to have his policy reinstated was not due to any lack of diligence or fair dealing on the part of the officials of the defendant company, but was directly due to the plaintiff's own conduct in failing to respond to a very reasonable request on the part of the defendant company's officials that he meet them at their office for the purpose of discussing the matter. There was no error in directing a verdict in favor of the defendant.

Judgment affirmed.

RUSSELL, J. (dissenting). I do not think the evidence with reference to the waiver or nonwaiver of the forfeiture on the part of the insurance company is so clear as to have demanded the verdict directed by the court. It is perfectly plain to my mind that the insurer had the right to insist upon the forfeiture at midnight of April 30th; but it requires an absolutely plain case to authorize the court to do more than to define to a jury the meaning of the word "waiver." The proof of waiver is derived from evidence of intention, as developed by the acts and declarations of the parties concerned, and is a question of fact to be determined by a jury. In my opinion, the evidence would have authorized a jury to reach a different conclusion, upon the issue as to whether there was a waiver of the forfeiture, from that implied by the direction of the verdict. Especially is this true when it is the duty of the courts to be "prompt to seize hold of any circumstance that indicates an election to waive a forfeiture, or an agreement to do so." *Insurance Company v. Eggleston*, 98

U. S. 577, 24 L. Ed. 841; *Knickerbocker Insurance Co. v. Norton*, 98 U. S. 234, 24 L. Ed. 689.

(10 Ga. App. 437)

ALEXANDER & SONS v. W. E. MORRIS & CO. (No. 3,657.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. **ESTOPPEL (§ 18*) — FORTHCOMING BOND — ESTOPPEL TO DENY VALIDITY.**

The bond upon which suit was brought, while not good as a statutory bond, was good as a common-law obligation. Besides, the defendant, having secured possession of the property levied upon by giving the bond to the levying officer, was estopped from attacking it as invalid. *Wall v. Mount*, 121 Ga. 331, 49 S. E. 778; *Awtrey v. Campbell*, 118 Ga. 464, 45 S. E. 301.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 24; Dec. Dig. § 18.*]

2. **DEMURRER.**

The petition as amended set forth a good cause of action against the defendant, and was not subject to demurrer on any of the grounds alleged. The court properly overruled the demurrer.

Error from City Court of Nashville; W. C. Lankford, Judge.

Action by W. E. Morris & Co. against Alexander & Sons. Judgment for plaintiffs, and defendants bring error. Affirmed.

Hendricks & Christian, for plaintiffs in error. W. G. Harrison, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 438)

DOUGLAS v. ROGERS. (No. 3,570.)

(Court of Appeals of Georgia. Jan. 15, 1912. Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

1. **CUSTOMS AND USAGES (§ 10*)—ADMISSIBILITY OF EVIDENCE.**

Where an architect sued on quantum meruit, in the absence of contract, to recover for his services in drawing plans and preparing specifications for the erection of a house, and the main issue of fact was as to the cost of the building to be erected in accordance with the plans and specifications prepared by him, it was not error to admit testimony of a general custom among architects not to guarantee the exact cost of buildings to be constructed on the plans and specifications furnished, but only to make an approximate estimate of the cost.

[Ed. Note.—For other cases, see *Customs and Usages*, Dec. Dig. § 10.*]

2. **WORK AND LABOR (§ 29*)—NATURE OF LIABILITY.**

Where an architect is employed by the owner of land to prepare plans and specifications for the construction of a building thereon, and does so, and the owner decides not to have the building erected, because of the estimated cost, but nevertheless retains the plans and specifications, in the absence of any guaranty as to the cost of the building, or agreement as to his compensation for preparing the plans and specifications, the architect would be enti-

tled to recover the reasonable value of his services in preparing and furnishing the plans and specifications.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 56-58; Dec. Dig. § 29.*]

3. DAMAGES (§ 228*)—EXCESSIVE DAMAGES—REMITTITUR.

Where the plaintiff voluntarily reduced the amount of a money verdict in his favor by writing off a part thereof, an exception that the verdict as rendered, and before its reduction by the voluntary act of plaintiff, was excessive, is without merit, unless the verdict as reduced was excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228.*]

4. NO ERROR—EVIDENCE SUFFICIENT.

No error appears, and the verdict is amply supported by the evidence.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by S. W. Rogers against Peyton Douglas. Judgment for plaintiff, and defendant brings error. Affirmed.

Alex W. Stephens, for plaintiff in error.
L. R. Ray, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 485)

J. R. BARNES COAL CO. v. SOUTHLAND KNITTING MILLS. (No. 3,551.)

(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)

(Syllabus by the Court.)

1. SALES (§ 81*)—CONSTRUCTION OF CONTRACT—SUBJECT-MATTER.

A contract contained the following clause: "The J. R. Barnes Coal Company agrees to sell and ship to the Southland Knitting Mills 40 cars straight run of mine coal from Brushy Mountain coal mines, to be delivered at the rate of 3 or 4 cars per month." The trial judge construed this clause as follows: "A contract of delivery of 40 cars of coal, to be delivered at the rate of 3 or 4 cars per month, would imply that there would be required from 10 to 12 months in delivery at the rate of 3 or 4 cars per month; it being the evident intention of the parties that the shipments should be at intervals comparatively regular." Held a reasonable and proper interpretation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

2. SUFFICIENCY OF EVIDENCE—RESCISSION OF CONTRACT.

Irrespective of the foregoing clause of the contract, there was evidence upon which the jury could have found that the contract had been rescinded by mutual consent, so far as the 2 cars of coal were concerned.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between the J. R. Barnes Coal Company and the Southland Knitting Mills.

From the judgment, the Coal Company brings error. Affirmed.

R. S. Wimberly and Mallary & Wimberly, for plaintiff in error. Hardeman, Jones, Cal-laway & Johnston, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 544)

BARWICK v. SLAUGHTER. (No. 3,767.) (Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

COSTS (§ 260*)—DELAY IN WRIT OF ERROR—DAMAGES.

Where no question of law is raised, and the evidence on the trial was in conflict, the judgment of the superior court overruling the certiorari will be affirmed, with 10 per cent. damages on the amount of the judgment obtained in the city court, for delay in suing out and prosecuting the writ of error.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 260.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action between L. Barwick and H. B. Slaughter. From a judgment of the superior court, overruling certiorari to the city court, Barwick brings error. Affirmed.

M. L. Ledford, for plaintiff in error. J. Q. Smith, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(10 Ga. App. 544)

MCCRANIE v. SHIPP. (No. 3,710.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 66*)—REVIEW—BILL OF EXCEPTIONS.

There being in the bill of exceptions no exception to any final judgment, but only an exception to a judgment striking the defendant's pleas, no question is presented which this court has jurisdiction to decide. This is true, even though there is a recital in the bill of exceptions that the case was finally terminated by a judgment in favor of the plaintiff. *Simmons v. Peagler*, 7 Ga. App. 252, 66 S. E. 629; *Whidden v. Merry*, 8 Ga. App. 564, 69 S. E. 1085.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 66.*]

Error from City Court of Nashville; J. G. Crawford, Judge.

Action between E. W. McCranie, guardian, and R. S. Shipp, administrator. From the judgment, McCranie brings error. Dismissed.

Alexander & Gary, for plaintiff in error. J. P. Knight, J. A. Wilkes, and Shipp & Kline, for defendant in error.

POTTLE, J. Writ of error dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(10 Ga. App. 493)

CENTRAL OF GEORGIA RY. CO. v. MCGUIRE. (No. 3,444.)(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 12, 1912.)*(Syllabus by the Court.)***1. TRIAL (§ 237*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

The first ground of the amended motion challenges the correctness of the charge "that moral and reasonable certainty is all that can be expected in legal investigations," as applicable to a civil case. This is a general principle codified in section 5730 of the Civil Code of 1910, defining the amount of mental conviction required in all cases; and when this instruction was followed by the statement, contained in the same section, "that in all civil cases a preponderance of the testimony is considered sufficient to produce such mental conviction," it was not injuriously inapplicable to the civil case on trial. 7 Michie's Enc. Digest of Georgia Reports, §§ 654, 655, par. 6.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.*]

2. TRIAL (§ 234*)—INSTRUCTIONS—REQUISITES AND SUFFICIENCY—BURDEN OF PROOF.

The following excerpt from the charge is excepted to in the second ground of the amended motion: "The burden of proof in this case is upon the plaintiff. It is incumbent upon him to establish by proof the material allegations of his petition that are not admitted by the defendant. After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the defendant company was to blame; or, if he will show, on the other hand, that the defendant company was to blame, the law presumes, until the contrary appears, that the plaintiff was not to blame. So that to make a prima facie case and change the burden of proof the plaintiff need not go further than to show by evidence one or the other of these two propositions—either that the plaintiff was not to blame, or that the defendant was to blame. The defendant company, taking at this stage the burden of proof, can defend successfully by disproving either proposition. The disproof of both is not necessary; but until one or the other shall be overcome, the defense is not complete." Held no error for any reason assigned, or for any other reason. Civil Code 1910, §§ 2780, 5746; Georgia Railroad Co. v. Kenney, 58 Ga. 489; Hopkins on Personal Injuries, §§ 39, 67, and cases cited.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.*]

3. TRIAL (§ 187*)—INSTRUCTIONS—REQUISITES AND SUFFICIENCY—CREDIBILITY OF WITNESSES.

The instructions excepted to in the third and fourth grounds of the amended motion for a new trial, to the effect that the jury were the exclusive judges of the evidence and the credibility of the witnesses, and the rules there given for determining as to credibility, are substantially in the language of the Code, and, in the absence of any request for a more specific charge on the subject, were sufficient. Civil Code 1910, § 5883; Quiggle v. Vining, 125 Ga. 100, 54 S. E. 74; Greer v. State, 6 Ga. App. 785, 65 S. E. 802.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 187.*]

4. NEGLIGENCE (§ 11*)—NATURE AND ELEMENTS—LIABILITY.

The following excerpt from the charge of the court is excepted to in the fifth ground of

the amended motion for a new trial: "If a person is wrongfully placed in a position of peril, whereby he is led to make a reasonable and natural effort to escape the threatened danger, the party so placing him in such position is responsible for the consequences of such effort." Held: (1) Correct as an abstract principle of law; (2) applicable to the facts of the case sub judice; (3) not erroneous for any of the reasons assigned. Self v. Adel Lumber Co., 5 Ga. App. 846, 64 S. E. 112; Southwestern R. Co. v. Paulk, 24 Ga. 356; Georgia Ry. & Electric Co. v. Gilleland, 183 Ga. 629, 66 S. E. 944.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.*]

5. TRIAL (§ 259*)—INSTRUCTIONS—REQUESTS—NECESSITY.

In the absence of a timely written request, it is not error to fail to charge on the rules of law governing the impeachment of witnesses; and this is true, although the witness alleged to have been successfully impeached was the plaintiff, and his right to recover depended on the truth of his evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 648; Dec. Dig. § 259.*]

6. EXCEPTION TO CHARGE—ASSESSMENT OF DAMAGES.

The exception to the charge on the rule for estimating damages for pain and suffering, and the measure of damages in such cases, is without merit. The charge on this subject was substantially in accord with repeated rulings of the Supreme Court. Hopkins on Personal Injuries, pp. 658 and 662, inclusive, and cases cited.

7. EXCEPTION TO INSTRUCTIONS—NO ERROR.

The exceptions to the instructions contained in the eighth, ninth, tenth, eleventh, twelfth, and thirteenth grounds of the amended motion for new trial, when considered in connection with the general instructions, are without merit.

8. MASTER AND SERVANT (§ 143*)—INJURIES TO SERVANT—RULES—NOTICE.

On giving the following requested instruction, "If the plaintiff receipted for the rule book, and received a copy of it, then he was bound to know the rules," it was not error to qualify it by adding, "If he had time to read and study them before the accident." It is the duty of an employer, not only to give notice of the existence of rules, but so to promulgate them as to afford an employé a reasonable opportunity of ascertaining their terms. Port Royal & Western Carolina Ry. Co. v. Davis, 95 Ga. 292 (3), 22 S. E. 833.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 286; Dec. Dig. § 143.*]

9. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS.

The evidence in behalf of the plaintiff showing permanent injuries, there was no error in charging in the form suggested in the case of Florida Central R. R. Co. v. Burney, 98 Ga. 1, 26 S. E. 730, as to the method for estimating the damages and the use of the mortality and annuity tables. Savannah, Florida & W. Ry. Co. v. Austin, 104 Ga. 614, 30 S. E. 770.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 216.*]

10. APPEAL AND ERROR (§ 273*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—INSTRUCTIONS.

An exception to the charge as a whole raises no question for the decision of this court. The alleged errors specifically pointed out under this general exception are without any substantial merit; the instructions as a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

whole being fair, full and correct on all the issues made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273.*]

11. APPEAL AND ERROR (§ 1004*)—REVIEW—QUESTIONS OF FACT—AMOUNT OF RECOVERY.

The exceptions in this case are numerous, but without novelty or general interest. Considered in the light of the facts and the well-settled rules of law applicable thereto, we have not discovered any material error. The verdict (for \$7,000) is large and generous, but not so manifestly excessive as to show bias, prejudice, or mistake on the part of the jury. The evidence proves that the railroad company was liable in damages, that the plaintiff received serious and permanent injuries, and the amount of the verdict has been approved by the trial judge. No reason is shown for the interference of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by H. T. McGuire against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Branham and Maddox & Doyal, for plaintiff in error. J. M. Hunt, Dean & Dean, Lipscomb, Willingham & Wright, and Seaborn Wright, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 506)

PATRICK v. SHIELDS & SUDDETH
(No. 3,673.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 139*)—SALES OF PERSONALTY—PERFORMANCE.

Where suit was brought for the price of an engine sold under verbal contract, and the evidence for the plaintiffs showed that the engine had been delivered to the buyer, who accepted and used it for several months, the court did not err in charging that, if this was true, the contract was not within the statute of frauds. Civil Code 1910, § 3222, subsec. 7.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334-341; Dec. Dig. § 139.*]

2. APPEAL AND ERROR (§ 303*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.

Grounds in the motion for a new trial, not verified, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1756; Dec. Dig. § 303.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

The evidence was in conflict on the only issue of fact, to wit, whether the contract was one of sale or rental, and the law applicable to this issue was correctly charged. The verdict will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Jefferson; W. Stark, Judge.

Action by Shields & Suddeth against J. C. Patrick. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. A. B. Mahaffey and Jno. J. Strickland, for plaintiff in error. P. Cooley, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 605)

GRAY & DUDLEY HARDWARE CO. v. CORNELIA FURNITURE CO.
(No. 3,697.)†

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 117*)—ACTION BY PARTNERSHIP—APPEAL BY ONE PARTNER TO JURY—DISMISSAL.

Under the ruling of this court in *Brown v. Pickett*, 3 Ga. App. 554, 60 S. E. 293, the court erred in refusing to sustain the certiorari.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 117.*]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action between the Gray & Dudley Hardware Company and the Cornelia Furniture Company. From a judgment, the Hardware Company brings error. Reversed.

McMillan & Erwin and W. S. Paris, for plaintiff in error. J. C. Edwards and R. C. Ramey, for defendant in error.

POTTLE, J. Judgment reversed.

(10 Ga. App. 523)

SOUTHERN RY. CO. v. CARTLEDGE
(No. 3,684.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 277*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

Where a railway company fails to stop its train and permit a passenger to alight at a flag station to which the company has sold him a ticket, he has a right of action for the recovery of such damages as are legally traceable to the wrongful act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

2. CARRIERS (§ 277*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

Where, however, the act of the carrier is a mere negligent omission of duty, and the passenger's injury consists wholly of the inconvenience occasioned by having to walk a short distance back to the station, the carrier is liable for nominal damages only.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

3. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

In the trial of a suit by a passenger, where, under the rule laid down in the pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† Rehearing denied March 2, 1912.

ceding headnote, nominal damages only are recoverable, and there are no aggravating circumstances connected with the mere negligent omission of duty, it is error to instruct the jury that punitive damages may be recovered.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 278.*]

4. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

In such a case it is also error to charge the provisions of Civil Code 1910, § 4504, in reference to vindictive damages, especially that portion of the section which provides: "The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 278.*]

5. CARRIERS (§ 276*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—PRESUMPTIONS.

Where, in the trial of such a case, the carrier admits the negligence alleged, the provisions of Civil Code 1910, § 2780, relating to the presumption of negligence against a carrier, have no application.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 276.*]

6. DAMAGES (§ 34*)—BREACH OF CONTRACT—DISEASE.

Damages traceable to the wrongful act, but not its legal or natural consequence, are too remote and contingent to be the basis of a recovery. Applying this rule to the facts of the present case, the plaintiff was not entitled to recover damages alleged to have resulted from an illness caused by a rain which suddenly descended upon him.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 43; Dec. Dig. § 34.*]

Error from City Court of Elberton; D. W. Meadow, Judge.

Action by W. T. Cartledge against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff bought a ticket from Cannon, in Franklin county, to Hardcash, in Elbert county, a flag station on the line of the defendant's railway. The conductor carried him beyond his station. Upon observing that the train was not slowing down at the flag station, the plaintiff immediately went to the conductor and called his attention to the fact that he was being carried beyond his station. Thereupon the conductor proposed to carry him on to Dewy Rose, a station about two miles further on, or to stop at the place where the train then was and permit him to disembark. He accepted the latter proposition and got off the train about a mile beyond Hardcash. The night was dark and cloudy. He was on his way to see his grandmother, who was seriously ill. She lived about two miles from Hardcash and about a mile and a quarter from the place where he got off the train. Plaintiff walked back to Hardcash, a distance of about a mile, and then walked from Hardcash to his grandmother's home, arriving there late at night. While on his way from Hardcash to his grandmother's, a sudden rain came up,

and he walked along for some time in the rain without seeking shelter at any of the nearby residences. As a result of the wetting which he thus received, he claimed that he was made sick, suffered pain, and lost several weeks from his business.

At the trial the defendant admitted liability for nominal damages. The plaintiff insisted that there were aggravating circumstances connected with the tort, growing out of the conduct of the conductor at the time the train was stopped and the plaintiff disembarked therefrom. He testified: "The conductor ordered me to get off. He said that I would have to get off, or he would take me on. When I told him that I did not have any business at Dewy Rose, he told me to get off. He spoke to me in a rather loud tone of voice. You know the train was making a lot of noise, and we had to talk loud. When I approached the conductor on the train, he talked pretty glum and tolerably loud. He talked pretty harsh to me, and said, if I wasn't going to get off, he would carry me to Dewy Rose, or he would put me off right there." The jury returned a verdict in favor of the plaintiff for \$200, and the defendant's motion for a new trial was overruled.

Thos. J. Brown, and A. G. & Julian McCurry, for plaintiff in error. Worley & Nall, for defendant in error.

POTTLE, J. [1-3] The defendant, having carried the plaintiff beyond the point of his destination, was liable to him in damages. But as the evidence showed a mere negligent omission, unaccompanied by any aggravating circumstances, punitive damages were not recoverable. The conduct of the conductor as set forth in the statement of facts was not such as to authorize the jury to find this character of damages against the defendant. Ga. R. Co. v. Benton, 117 Ga. 785, 45 S. E. 70. In the case just cited, the plaintiff testified that the conductor spoke to him roughly, telling him that he would have to get off or pay more money immediately. The trial judge instructed the jury that they might find punitive damages, and the Supreme Court set aside a verdict of \$150, on account of this error in the charge, and because the court charged the law now in Civil Code 1910, § 4504. See, also, Sappington v. A. & W. P. R. Co., 127 Ga. 178, 56 S. E. 311. The case differs from those where a passenger is unlawfully expelled from a train under circumstances of more or less aggravation. In such cases punitive damages are recoverable. Savannah El. Co. v. Badenhop, 6 Ga. App. 371, 65 S. E. 50. The case was one for nominal damages only.

[8] It is true the plaintiff claimed that he had been made sick on account of having been caught in the rain while on his way

from Hardcash to his grandmother's; but any such damages sustained by him were not the legal and natural consequence of the act of the defendant in carrying him beyond his station. Indeed, it appears from the evidence that he unnecessarily walked back to Hardcash and from thence to his grandmother's home, when he could have gotten there by a much shorter route. The company was under the duty of putting the plaintiff off at Hardcash. It had assumed no obligation to take him to his grandmother's residence, two miles in the country, and any injury which he sustained, resulting from the fact that he voluntarily walked from Hardcash to his grandmother's home, would be entirely too remote to be the basis of a recovery. See Civil Code 1910, § 4510; *Sappington v. A. & W. P. R. Co.*, supra; *Central of Ga. R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024. The case differs from that of *Georgia Ry. & El. Co. v. McAllister*, 128 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177, for in that case the plaintiff was put off in a rainstorm, and therefore any injury which she received was the direct consequence of the illegal act.

[4] It was clearly error for the trial judge to charge the jury the provisions of section 4504 of the Civil Code of 1910, and especially that portion of the section which provides that "the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." It has been expressly held by the Supreme Court that the provisions of this section of the Code have no application in a case like the present. *Ga. R. Co. v. Benton*, supra.

[5] The case was tried upon an erroneous theory. The only question which should have been submitted to the jury was as to what amount they should find for the plaintiff as nominal damages for the defendant's negligent act in failing to stop its train at the station. The defendant admitted the technical breach of duty and its consequent liability for nominal damages. There was, therefore, no issue in the case as to the defendant's negligence. For this reason the provisions of Civil Code 1910, § 2780, relating to the presumption of negligence against the carrier where a person is injured by the running of cars, trains, or other machinery, were wholly inapplicable. *Ga. Ry. & El. Co. v. McAllister*, 128 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177. Indeed, it is difficult to see how the provisions of this section of the Code could be applicable in any case where the sole claim of negligence is that the plaintiff was carried beyond his station. Under some circumstances, a verdict of \$200 might be considered as for a nominal amount; but it cannot be said in this case, as matter of law, that the jury intended to find only a

nominal verdict. The case having been submitted to them on the theory that they might find punitive damages, and might find damages on account of illness which the plaintiff claimed to have suffered, it is very probably true that the jury intended the verdict of \$200 to be compensation for these damages which the plaintiff claimed to have sustained. At any rate this court cannot say that this is not true, and the case must be sent back for another trial, in the light of the views expressed in this opinion.

Judgment reversed.

RUSSELL, J. (specially concurring). I concur in the decision in this case solely for the reason it is probable that the jury were influenced by the instructions of the court to which reference has been made by Judge POTTLE. We are all agreed that the plaintiff's right to recover nominal damages is undoubted. If the jury had seen proper to return \$200 as merely nominal damages, I should be in favor of affirming the judgment refusing a new trial.

While I do not personally assent to the doctrine of some of the rulings cited by my Brother POTTLE, I am judicially bound by them. In my opinion it should be left to the jury in this case to say whether there were any such circumstances of aggravation in the manner of the conductor as would have entitled the plaintiff to have recovered punitive damages, under the ruling in *Savannah Electric Co. v. Badenhop*, 6 Ga. App. 371, 65 S. E. 50, and cases therein cited. However, I am compelled to concur in the judgment of reversal, because the case was submitted to the jury on the theory that they might find punitive damages, as well as damages on account of illness, which are clearly too remote for recovery. As it cannot be said with certainty that these errors did not contribute to the amount of the verdict, the error must be presumed to have been injurious to the defendant in the court below, and another trial should have been granted.

(10 Ga. App. 548)

DICKSON v. MATTHEWS. (No. 3,706.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

SALES (§ 17*)—PARTIES (§ 59*)—ACTION FOR PRICE—CONTRACTUAL RELATION—PLEADING—AMENDMENT.

Where A. sells goods to B., A. cannot recover the purchase price from C., although C. had contracted with B. to pay him for the goods. Nor can A. use the name of B., suing for his use, for the purpose of recovering against C.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 26-30; Dec. Dig. § 17.* Parties, Cent. Dig. §§ 90-94; Dec. Dig. § 59.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes
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Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by T. R. Matthews, for use, against J. D. Dickson. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. Westmoreland and Mark Bolding, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

POTTLE, J. Dickson employed Matthews to do photographic work of a specified nature. The written contract between them provided, amongst other things, that Dickson would "pay the actual invoice cost of all material used in making the negatives." Matthews bought from the Glenn Photo Company certain material to be used in the work described in his contract with Dickson, and instructed the photo company to charge the account to Dickson, exhibiting to the company's salesman the contract above referred to. The photo company sued Dickson on the account, and the case went to the superior court on appeal from the justice court. On the trial of the appeal, at the conclusion of the plaintiff's evidence, the court intimated that a nonsuit would be granted, whereupon the plaintiff, over the defendant's objection, was allowed to amend by substituting the name of Matthews, suing for the use of the plaintiff. The case then proceeded, and resulted in a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and exception has been taken to this ruling.

The points made here are that the amendment introduced a new party plaintiff and a new cause of action, and that, even if the amendment was properly allowed, the verdict was not authorized by the evidence. Since, under Civil Code 1910, § 5689, a plaintiff may amend by substituting another person in his stead, suing for his use, "whensoever it becomes necessary for the purpose of enforcing the rights of such plaintiff," a general objection to the allowance of such an amendment would not be well taken. The amendment is allowable, and, when made, it will be determined, upon a consideration of the evidence, whether the case can proceed as amended and a recovery be had in favor of the plaintiff. This is true, even where the amendment is offered after the introduction of evidence under which the amendment appears to be improper, because new evidence may be thereafter admitted making the amendment proper. The real question is, with the amendment allowed and the evidence all in, has such a case been made as would authorize a recovery by the nominal or substituted plaintiff, for the benefit of the usee, the original plaintiff? So dealing with the present case, we are clear that

the verdict against the defendant cannot stand.

Under the admitted facts there was no contractual relation between the defendant and the real plaintiff, the Glenn Photo Company. Dickson did not buy the goods from that company, nor promise to pay it for them, nor did he authorize Matthews to do so for him. It is true he contracted with Matthews to pay for material such as that delivered by the company to Matthews; but this was a contract with Matthews, upon which he alone could sue. The company could not sue Dickson for a breach of his contract with Matthews, and cannot use Matthews' name to accomplish by indirection what it could not do directly. From the plaintiff's standpoint the case is this: Matthews owes the plaintiff; Dickson owes Matthews. Ordinarily an action upon a contract, either express or implied, must be brought in the name of the party in whom the legal interest is vested. Civil Code 1910, § 5516. The exception is where the legal or nominal interest is in one person and the real interest in another. In such case the latter can proceed by using the name of the former as nominal plaintiff. The case here presented is not such a case. The Glenn Photo Company has neither the legal nor the equitable right to use a claim of Matthews against Dickson as the basis for recovery against Dickson of a claim of the company against Matthews. What we hold does not offend the just rule that, where one appropriates the property of another, the law implies a promise to pay for it. Nor is any question of agency involved. There was no evidence that Dickson authorized the purchase of the material on his account. The case rests on the contract between Matthews and Dickson, and, as such, cannot stand.

Judgment reversed.

(70 W. Va. 267)

KEATLEY et al. v. SUMMERS COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. May 2, 1911. On Rehearing, Feb. 6, 1912.)

(Syllabus by the Court.)

1. COUNTIES (§ 108*)—GOVERNMENT—POWERS OF COUNTY COURT.

The county court is the sole judge of how much land is necessary for courthouse purposes; and, if it has acquired more than is requisite or desirable for that purpose, it may dispose of the surplus.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 170-173; Dec. Dig. § 108.*]

2. COUNTIES (§ 110*)—GOVERNMENT—POWERS OF COUNTY COURT.

The county court has the discretion to dispose of such surplus ground to the United States government, for the purpose of a government building, at a less price than could be

realized by a sale thereof to individuals for private use.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 110.*]

3. COUNTIES (§ 108*)—PROPERTY—RESTRICTION ON POWER OF ALIENATION.

A deed conveying land to a county court for courthouse purposes, which provides that the judicial proceedings for the county shall be held upon the premises, but which does not expressly provide that the title shall revert in case the land should cease to be so used, does not amount to a restriction upon the right of alienation by the county court.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 108.*]

Brannon and Robinson, JJ., dissenting.

Appeal from Circuit Court, Summers County.

Bill by A. J. Keatley and others against the County Court of Summers County and others. Decree for defendants, and plaintiffs appeal. Affirmed.

R. F. Dunlap, for appellants. T. N. Read, for appellees.

WILLIAMS, P. The county court of Summers county was about to sell and convey to the United States government a portion of its courthouse square in the city of Hinton for the purpose of erecting thereon a government building, and plaintiffs, who sue on behalf of themselves and all other taxpayers of Summers county, seek to enjoin it from so doing. Application for injunction was made to the judge of the circuit court of Summers county, and he denied it; later an injunction was awarded by one of the judges of this court. Thereafter the injunction was dissolved and plaintiffs' bill dismissed by the circuit court of Summers county in term, on the 18th of October, 1909, and from that decree plaintiffs have obtained this appeal. The sole question presented is, Has the county court power to dispose of a portion of the public square on which the courthouse of the county is located?

On the 24th of November, 1874, the Chesapeake & Ohio Railway Company, in order to secure the location of the courthouse for Summers county in the town of Hinton, which had then but recently been laid out as a town, conveyed a certain square of ground to the county court, in consideration that, within a reasonable time thereafter, a courthouse should be erected thereon, and the judiciary proceedings of Summers county should be held upon said premises. Shortly after the conveyance was made, it was ascertained that there was a mistake in the description of the land, and that the title to the land really intended to be conveyed had been conveyed to the Central Land Company of West Virginia, and an exchange was made between the county court and the said Central Land Company, whereby the county court obtained title to the square of ground which the county court and the rail-

road company both thought had been conveyed to it by its deed.

[3] The deed from the Central Land Company of West Virginia to the county court, which was made on the 19th of October, 1876, for the square of ground which the county court now owns, refers to the aforesaid deed made by the railroad company, and makes the covenants and conditions therein contained a part of this deed, the same as if they had been expressly set out in the deed itself. There is no express provision in this deed for a reversion of title in case the land should cease to be used for courthouse purposes; and hence the terms of the deed do not amount to a restriction upon the power of alienation. Section 16 of chapter 39, Code 1906, expressly provides that words in a devise or conveyance of land to the county court, expressing the purpose for which it shall be used, shall not limit or impair the power of the county court to dispose of the same absolutely.

The courthouse lot is a square of 300 feet; it is bounded on all four sides by streets, and is inclosed with an iron fence; it is situate near the business portion of the city of Hinton, and is embellished with shade trees and walks, and a fountain near the center of it. The portion which the county court proposes to convey to the United States government is 120x130 feet off the northeast corner of the square.

[4] It must be admitted that the county court is a municipal corporation created solely for governmental purposes, and is invested with only such power and authority as is conferred upon it by statute. But authority may be conferred as well by intentment as by express language. If a statute expressly confers power to do a certain thing, and omits to mention authority to do other things which are necessary to the proper and complete exercise of the power expressly given, such additional power as may be necessary and reasonable for the accomplishment of the purpose expressed is clearly to be implied. This is a familiar rule of construction. And does not section 14 of chapter 39, Code 1906, which invests the county courts with certain power and authority in relation to courthouses and jails, clerks' offices, etc., in their respective counties, by implication and by reasonable intentment, confer upon county courts the power and right to dispose of such portions of the ground which they may have acquired for courthouse purposes as may not be necessary for the public use? County courts are expressly authorized to provide, at the county seats of their respective counties, a suitable courthouse and jail; they are also authorized to acquire, by purchase or otherwise, so much land as may be requisite or desirable for county purposes. The statute does not prescribe the quantity which a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

county court may so acquire; what tribunal, then, is to be the judge of how much is "requisite or desirable"? The county court, of course. Its discretion in this matter is without limitation, and its judgment thereon is not subject to review. In the very nature of things, and for the certain and convenient administration of the municipal government of the county, it was necessary for the Legislature to vest such discretionary power as relates to the selection of a location and quantity of ground requisite for courthouse purposes in some one person or tribunal; and the Legislature has seen fit to vest it in the county court.

The statute reads, in part, as follows: "The said court may, from time to time, as may seem to them proper, provide, at the expense of the county, new or other building or buildings, at the county seat of their county, to be used for the courthouse and jail or for either, together with convenient offices, as aforesaid, for the clerks of the circuit and county courts; and for that purpose may acquire, by purchase or otherwise, and hold any lands, or land and buildings, at the county seat of their county, which may be necessary, and may inclose, improve and embellish the same; when such new or other building or buildings shall be ready for occupancy, the said county court shall make an order declaring that on a day to be therein named, the said new or other building or buildings, shall become the courthouse or the courthouse and jail of their county, and shall cause copies of the order to be posted at the front door of the new as well as of the old courthouse, at least twenty days before the day named in the order; and on and after the day named in said order the said new or other building or buildings shall be and become respectively the courthouse and jail, or the courthouse or jail, of said county in all respects and for all purposes. After such change shall have been made the said county court may sell or otherwise dispose of, as may seem to them proper, the building, or buildings, previously used as a courthouse and jail, or either, and the land on which the same are, or either, is situated, and of the interest of the said county therein."

It is insisted that, inasmuch as the statute above quoted expressly authorizes the county court to sell or otherwise dispose of the old courthouse grounds after it has provided a new courthouse, it cannot dispose of any part of the grounds once acquired for courthouse purposes, unless and except in case of a relocation of the courthouse, and the acquisition of new grounds for that purpose; that, having once acquired ground for a courthouse, the county court is thereafter bound to retain the whole of it for all time to come, notwithstanding it may later determine that it is neither necessary, requisite, nor desirable to do so. This, in our opinion, is entirely too narrow and too re-

stricted a view to take of the purpose of the statute. Such an interpretation would constitute the county court a veritable court of Persia, having no power or authority to correct its mistakes of judgment, and no power given to any higher tribunal to review its action. Such a construction of the law is not reasonable. The county court is not limited to any definite quantity of land which it may acquire for courthouse purposes, and it therefore necessarily follows that it must be the judge of how much is requisite or desirable. The amount requisite or desirable at one time, and under certain conditions, might not be requisite or desirable at another time and under different conditions. The county court is the sole judge of that question; it acts ministerially in providing a courthouse and grounds for its county, and is vested with legislative discretion in the matter. The authority to acquire so much land as is requisite or desirable for a certain purpose clearly implies the power to dispose of the surplus, if more than is requisite has been acquired. We do not mean to intimate that the county court is authorized, or would be justified under the statute, to enter into land speculations with the public moneys. It could not buy more land than, in its judgment, is requisite or desirable for the public purpose, simply with a view of making a profit by a resale of a portion thereof; but circumstances may easily arise where it is necessary for a county court to acquire more land than it needs for courthouse purposes, in order to secure a good location; and in such event we clearly think it would have the right to do so, and then to dispose of such portion as is not desirable for the public use.

In the present case the land was granted to the county court by the railroad company shortly after the formation of Summers county, and when the city of Hinton was in its infancy; the purpose of the grant was to secure the location of the courthouse at that place; and the quantity of land conveyed is more than two acres. Must we say that the county court cannot dispose of any part of this large square, but is compelled to hold on to every foot of it, even though it may not think it requisite for public purposes, and thereby obstruct and prevent the growth of the community? We do not say so. We think county courts are given a larger discretion than this by the statute. If the county court should acquire more land than is requisite for courthouse purposes, and is compelled to hold on to it, there is no law to compel it to expend the public money, in order to embellish and beautify it. Consequently it might happen in some cases—we do not intimate that it would so happen in this case—that the county court would suffer the ground to grow up in briars and brambles, and thereby to become a very undesirable public asset; and such a condition

could be remedied only by act of the Legislature.

The power of county courts depends upon the construction of our own statute; consequently the decisions by the courts of other states in cases involving the powers of county courts in general furnish us with little light on the question with which we are dealing. Some of the cases cited in brief of counsel relate to the leasing of public property by county courts to private individuals. Such cases are not in point; they involve the misuse of public property. The want of power to let public property to private uses does not imply a want of power to dispose of so much of the public property as may not be requisite for the public use, especially when the tribunal which claims the right to make the absolute disposition is invested with the right and power to acquire, and is also the sole judge of the amount that is requisite for the public use. *Allegheny Co. v. Parrish*, 93 Va. 615, 25 S. E. 882, to which we are cited in brief of appellants, was decided under a Virginia statute very different from ours, and therefore that decision does not aid us in ascertaining the powers of county courts in this state under our present statute.

[2] It is insisted that the county court is proposing to sell this lot to the government at a very much less price than its real value; that the county court refused a bona fide offer of \$12,000, made by private individuals, for the same lot. But it is not shown for what purpose the property would be used by the private individuals, if sold to them; and we think the county court has the discretion to limit the use which is to be made of the ground which it proposes to sell. It does not appear that, if they were limited in the use of the property, they would give even as much as the United States government proposes to give. They might want it for a livery stable, a canning establishment, a manufactory, or some other purpose equally as injurious, or detrimental to the enjoyment, by the public, of the remaining portion of the square. The government wants the lot for the purpose of erecting a government building thereon, and the use made of such buildings is well known. It may very properly be assumed that the government will erect a building on the lot that will be an ornament to it; and the county court may have been influenced by these considerations to sell it to the government at \$5,000, rather than sell to private individuals at a much larger price. The county court clearly has the discretion to do so.

We find no error in the decree appealed from, and it will be affirmed.

On Rehearing.

After a careful reconsideration of this case, and an examination of the authorities to which we have been cited, we see no reason for changing our former decision. Al-

legheny County v. Parrish, 93 Va. 615, 25 S. E. 882, is not in point. That case was controlled by a very different statute from the one which we are now considering. The Virginia statute authorized the county court to acquire as much as two acres for courthouse purposes, and gave express direction as to how that portion of the ground not occupied by courthouse, clerk's office, and jail should be used. This, of course, affected as much as two acres with a public use, and negatived the authority of the county court to dispose of any part of it. In that case the county court of Allegheny county had less than two acres and attempted to dispose of a part of it. If it had had more than two acres, and had attempted to dispose of the excess above two acres, the case would have been more analogous to the present one. But, in view of the Virginia statute, the case is not in point. Our statute vests discretion in the county court to determine the quantity of land "requisite or desirable," and such discretion necessarily implies power to add to what land it may already have, or to dispose of the surplus, if it has too much. Suppose, for instance, the county court should accept a conveyance for more land than it should think requisite or desirable for courthouse purposes, say ten acres; is it compelled to retain it all for the public use? Is it forever bound, by accepting the deed, to hold it all for the public use, even though it may not think it requisite or desirable? Certainly not. Such a view is wholly inconsistent with the power, the discretion, expressly given, which is a continuous one. Whenever the county court may determine that it holds more land than is requisite or desirable, such determination, at once, relieves the surplus of the public trust, and it may be disposed of. The county court is, as it were, a trustee, with power to determine how much land shall be requisite or desirable for the trust purposes.

We find very little authority directly in point, because the powers of county courts depend upon statutes which are different in nearly every state of the Union. Under a statute of Illinois, which vests no greater power in the board of supervisors of the county than is given to county courts by the statute of our own state, the Supreme Court of that state, in *Board of Supervisors, etc., v. Patterson*, 56 Ill. 111, held: "The proper constituted authorities of a county have the power, under the statute, to sell and convey real estate owned by the county, although such real estate may have been purchased for the purpose of erecting thereon a courthouse and other county buildings." See, also, *Lyman v. Gedney*, 114 Ill. 383, 29 N. E. 282, 55 Am. Rep. 871; 11 Cyc. 462; *Reynold's Heirs v. Commissioners, etc.*, 5 Ohio, 204.

We admit the proposition, so ably discussed by counsel for appellants, that the county court has only such powers as are expressly conferred upon it by the Legislature, and such as are necessarily implied in the full

and proper exercise of those powers expressly given. But the point is, as we see it, that the power of the county court to dispose of whatever land it may determine is not requisite or desirable for the public use, is clearly and necessarily implied from the express grant of power to determine without restriction or limitation, not once for all, but as changing conditions may make it necessary, how much is requisite or desirable. Of course, the court would have no right to retain the ground and let it for private uses. Such would be a misuse of it, and a violation of the trust, for to retain the property would be, in effect, to say that it is requisite or desirable for public purposes, and it would continue to be affected with a public use, a public trust, and it could not be held for one purpose, and the use, at the same time, diverted to another.

Nearly all the cases cited by counsel, and by Judges BRANNON and ROBINSON in their dissenting opinion, involve the misuse of property, not the discretion of the county court to determine how much is requisite or desirable for the public use, and are, therefore, not in point. *Herold v. Board of Education*, 65 W. Va. 765, 65 S. E. 102, 31 L. R. A. (N. S.) 588, on which they rely, more especially, as controlling this case, we admit is more nearly in point than any other case to which our attention has been called. But, in our view, that case does not touch the point which we have herein decided. That case involved the misuse of public property. The board of education, still holding onto a schoolhouse lot for school purposes, had leased it for oil development, a clear case of misuse of public property.

The decree will be affirmed.

BRANNON, J. (dissenting). Judge ROBINSON and I dissent. We hold that a county cannot, without special legislation, sell land acquired for the site of a courthouse and occupied therefor. A county is a local organization, created by the state for limited purposes of government. The opinion by Judge Woods, in *Bank v. Lewis County*, 28 W. Va. at page 286, states the law thus: "The distinction between municipal corporations proper, such as cities and towns created by special charters or by general laws, and involuntary quasi corporations, such as counties, is this: The former are called into existence by the consent of the persons composing them for the formation of their own local, private advantage and convenience; while counties are at most local organizations, which for the purpose of civil administration are invested with a few functions of a corporate existence, created almost exclusively with a view to the policy of the state at large in the administration of justice, the support of the poor, and the establishment and repair of public highways. The public statutes confer on them all the powers they possess, prescribe all the duties they

own, and enforce all the liabilities to which they are subject. As corporate bodies of limited powers, they rank *very low* down in the grade of corporate existence, and hence they are often called 'quasi corporations.' 1 Dill. Mun. Corporations, §§ 18, 25. In the construction of the powers granted to them, the courts adopt a strict, rather than a liberal, construction; the rule being that, where any ambiguity or doubt exists, arising out of the terms used by the Legislature, it must be resolved in favor of the public."

The county is not a trading corporation. Such property is held by the county in trust for the public use, and is not invested in the county for bargain and sale. Such is the principle held in *Foley v. County Court*, 54 W. Va. 16, 46 S. E. 246. All the authorities say this. I insist that the case of *Herald v. Board of Education*, 65 W. Va. 765, 65 S. E. 102, is decisive of this case in principle. I appeal to the authorities there given as sustaining the position of Judge ROBINSON and myself. It holds that a board of education is a quasi public corporation, existing only by statute, having only the powers given by statute, and such implied powers as are absolutely necessary to execute express powers, and cannot engage in business, or make contracts outside of its function touching education. We held that it could not lease a schoolhouse lot for production of oil and gas. Speaking of property held by a county for public use, the Supreme Court of the United States said, in *Meriwether v. Jarrett*, on page 513 of 102 U. S. (26 L. Ed. 197): "It holds them for public use, and to no other use can they be appropriated without special legislation." In *County of Alleghany v. Parrish*, 93 Va. 615, 25 S. E. 882, it was held: "County courts had no authority, either under the Code of 1819 (1 Rev. Code, c. 71, § 16), or the Code of 1849, c. 50, § 1, to authorize or permit the use of lands acquired for a courthouse, jail, and other public buildings for any other purpose than those mentioned in the Codes. The power of acquisition was for a special purpose, and the use was confined to the purpose for which authority to acquire was given, and subject to the restrictions imposed; and it is immaterial whether the land was acquired by gift, or purchase, if held under the general law. The use to which the court was required to put the land exhausted the purposes for which it could be used. It had no authority to authorize the erection of a law office on the land upon payment of a ground rent." We find that 11 Cyc. 465, conceding the power of counties to sell property owned by it for private use, says: "This power, however, is subject to the limitation that a county cannot alienate or dispose of, for its own benefit, property dedicated to or held by it in trust for the public use."

This subject is reviewed in *Parrish v. Gaddis*, 34 La. Ann. 923, holding as follows: "Property donated to a parish in fee simple,

for its use and benefit, and upon which a courthouse was built and used, cannot be legally sold under a police jury ordinance, although the parish seat being changed the building was abandoned and threatened going to ruin. Such sale having been made without legislative authority is a nullity, and so conveyed no title. Real property thus dedicated to public use becomes extra commercium, and none but the sovereign can ever place it once more susceptible of private ownership." The court said it could never lose its public character without the action of the sovereign power. "A grant or dedication of land to use of the town removes it from commerce and individual appropriation." *Lewis v. San Antonio*, 7 Tex. 290. *Roberts v. City*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844, held that the city of Louisville could not alienate wharf land. "Jus disponendi is not incident to the ownership of property as a public trust." *Roper v. McWhorter*, 77 Va. 214. Municipal Corporations cannot sell public property. *Dillon, Munic. Corp.* §§ 575, 650. "A county is not a municipal corporation, proper, but only a quasi corporation, and as such has no power to sell land not applied to a public use." *Jefferson v. Grafton*, 74 Miss. 435, 21 South. 247, 38 L. R. A. 798, 60 Am. St. Rep. 516. The Mississippi court in that case denied the power even as to property not used for public purposes. In a note to that case are authorities showing that a county cannot sell property used for public purposes. These authorities, and many others, say that such property is held in public trust, and from that very fact cannot be sold, even not considering the limited power of a county, because it is for public purposes, which would be defeated by sale. But why quote more authority for this position? See the host of cases cited for the proposition supporting the text of *Tiedeman, Munic. Corp.* § 208.

But there is another consideration. It arises out of the nature of a county. It has not general powers. In 60 Am. St. Rep. 520, we find the law generally thus laid down: "Counties are municipal corporations created for the purpose of convenient local government, and possess only such powers as are conferred upon them by law. They must be called quasi municipal corporations, and their corporate powers are more limited than those of incorporated cities and towns. *Stevens v. St. Mary's Training School*, 144 Ill. 336 [32 N. E. 962, 18 L. R. A. 832], 38 Am. St. Rep. 438, and note. See monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 119." Judge Woods said, in *Bank v. County*, 28 W. Va. 286: "As corporate bodies of limited power, they rank *very low* in the grade of corporate existence." He there distinguished them from municipal corporations. They have not the powers of municipal corporations, and we have seen that municipal corporations cannot sell the public property. "A county acts wholly under a delegated au-

thority, and can exercise no power which is not in express terms or by fair implication conferred upon it." *Thompson v. Lee County*, 3 Wall. 327, 330, 18 L. Ed. 177. "The county court is a corporation created by statute, and can only do such things as are authorized by law, and in the mode prescribed." *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452. I have said that a county court is not a business, trading corporation. Its powers are derived from the Constitution and statute. It is not a trader in the real estate market. There is no power given it in the statute to sell the public property; it cannot be implied, first, because it is against public policy to sell the public property; and, second, because a county is only a kind of a corporation, of low degree as to power. In *Supervisors v. Gorrell*, 20 Grat. (Va.) 484, it was seriously questioned whether a county court could sell a courthouse lot, though no longer needed upon removal of the courthouse. It was so serious a question that the Legislature of our state provided a statute, now found in chapter 39, section 14, Code 1906, authorizing the county to sell the courthouse land upon a change of location of the courthouse. This impliedly forbids sale under any other circumstance. "The lands belonging to a county can be sold and conveyed only in the manner pointed out by statute." 7 Am. & Eng. Ency. L. 937. "Proceedings of Public Bodies. Counties. There is no principle more firmly established or resting on sounder reasons than the rule which requires public bodies, when acting under special powers, to act strictly within the conditions prescribed." *Douglas County v. Kellar*, 43 Neb. 635, 62 N. W. 60.

I would not give county courts this important power by mere implication. To do so would militate against public policy. There is a sentiment that should not be lost sight of, in addition to the practical. The courthouse land was acquired to be held for generation after generation. Because so much ground may not be needed just now, those who come after will surely need it. Lots are sold from it. High houses and noisy manufactories are built up against or close to the courthouse, shutting off light and air and producing noise. In the Virginias, as elsewhere, the court green is historic and sacred. Upon it generations gone have met from all parts of the county in social and friendly intercourse. A great place for the communion of the people. Upon its green grass, under the shade of its trees, our people have thus met time out of mind, and rested during the sessions of the courts. Suitors, jurors, witnesses, instead of being tied down to benches in the hot, crowded courtroom, repair there to await the crier's call. There, too, the children play. It is a park for the poor, who have not the rich man's lawn. And where shall be held, in the hot summer, those great meetings of the people in the political canvass to hear the ora-

tors? How valuable within the experience of all of us is the courthouse ground for this important purpose. Away goes the old court green. Commerce is taking even it away.

Later, I find *McIlhinny v. Trenton*, 148 Mich. 380, 111 N. W. 1083, 10 L. R. A. (N. S.) 623, 118 Am. St. Rep. 583, 12 Ann. Cas. 23, and *Peters v. City of St. Louis*, 226 Mo. 62, 125 S. W. 1134, 21 Ann. Cas. 1069, and notes, which will support this opinion.

(70 W. Va. 218)

SHEPHERD v. CRAIG.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

EQUITY (§ 22*)—SUIT AGAINST EXECUTOR—EQUITABLE JURISDICTION.

The bill by a general creditor against the administrator of a decedent's estate, alleging as the only grounds for equitable relief that decedent died leaving considerable personal estate, more than sufficient to pay plaintiff's debt, that the defendant, the sole heir, has appropriated all the estate of decedent to his own use; that he has sold and conveyed a part of the real estate of which the decedent died seized and possessed, and which prays simply, that provision be made for payment of plaintiff's debt out of said estate, for a reference to a commissioner, for a convention of creditors, and for general relief, is bad on demurrer, as showing no sufficient grounds for equity jurisdiction.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 51-62; Dec. Dig. § 22.*]

Appeal from Circuit Court, Nicholas County.

Bill by Nellie Shepherd against John H. Craig. Decree for complainant, and defendant appeals. Reversed and remanded.

G. G. Duff and W. G. Brown, for appellant. Alderson & Breckenridge, for appellee.

MILLER, J. On appeal from a final decree adjudicating the principles of the cause, Craig, administrator and appellant, first, challenges the correctness of the decree below overruling his demurrer to the bill.

The demurrer was a general one; but in the brief of counsel two points are made here: (1) Want of equity, and; (2) want of parties.

Plaintiff alleges that she is a creditor of the estate of George Craig, deceased, defendant's intestate, to the amount of two hundred and fifty dollars; that defendant, his administrator, who was duly appointed and qualified by giving bond, &c., is also decedent's sole heir. She further alleges that she is not otherwise advised as to the indebtedness of said estate.

The only other grounds for equitable relief alleged are, first, that decedent died leaving considerable personal estate, and more than sufficient to pay plaintiff's said debt, but that defendant has appropriated to his own use all the estate of which decedent died seized or possessed and refuses

to pay plaintiff; second, that said decedent, being also seized and possessed of three parcels of real estate or undivided interests therein, defendant since his death had conveyed two of said parcels to certain persons named, but not made parties to the bill.

And the prayer of the bill is that provision be made for payment to plaintiff of her said debts out of the estate of decedent; for a reference to a commissioner to settle the accounts of the administrator; for a convention of creditors, and for general relief.

Is the bill good on demurrer? We think it is not, and that the demurrer should have been sustained. Plaintiff was simply a general creditor, her debt not reduced to judgment, either against decedent in his life time, or against his administrator after his death. There is no allegation that there are other debts; or that defendant, administrator and sole heir, is insolvent; or that he has failed to make and return an inventory of the personal estate; or to settle his fiduciary accounts, or that he has neglected to perform any other duty devolved upon him by law; nor that by appropriating said estate to his own use he has misappropriated the same, except that he has refused to pay plaintiff's claim. If plaintiff has no valid debt it is not only his right but his duty to refuse to pay it. There is no allegation of concealment of assets, or the necessity for discovery, nor any prayer for such relief.

What are the rights of a creditor of a decedent's estate, and when and upon what grounds he may go into a court of equity, and what allegations are necessary to give a court of equity jurisdiction in such cases, have been the subject of numerous prior decisions of this court, and it is wholly unnecessary to reconsider the points adjudicated or to review those cases. We refer more particularly to *Poling v. Huffman*, 39 W. Va. 320, 19 S. E. 421, *Hale v. White*, 47 W. Va. 700, 35 S. E. 884, *McConaughy & Co. v. Bennett's Ex'r*, 50 W. Va. 172, 180, 40 S. E. 540, *Price v. Laing*, 67 W. Va. 373, 68 S. E. 24, and *Gooch v. Gooch*, 73 S. E. 56.

The principle controlling this case was distinctly decided in *Price v. Laing*, point 1 of the syllabus, viz.: "A general creditor of a deceased person cannot maintain a bill in equity against the personal representative, to charge, in his hands, the personal estate only, without showing some ground of equity jurisdiction, such as inadequacy of the legal remedies, inability to obtain satisfaction of his debt by pursuit thereof to judgment and execution, or necessity for discovery." In *Hale v. White*, supra, the third point of the syllabus is: "Where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative to

the injury of the plaintiff." Tested by these decisions the bill is clearly bad, to say nothing of the defect of want of parties already alluded to.

Our opinion, therefore, is to reverse the decree appealed from, sustain the demurrer to the bill, and to remand the cause to the circuit court, with leave to plaintiff to amend her bill if she can do so in accordance with the principles of the cases cited, in a reasonable time, and if so advised; otherwise to dismiss the bill without prejudice, and it will be so ordered.

(70 W. Va. 212)

HANGER et al. v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 415*)—OPERATION—INJURIES TO ANIMALS ON TRACK—CARE REQUIRED.

It is negligence per se for a railroad company, in the night time, to run an engine backwards over its main track without a proper headlight on the tender sufficient to enable the enginemen, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance, so as to avoid doing injury to dumb animals astray upon the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.*]

2. NEW TRIAL (§ 70*)—SUFFICIENCY OF EVIDENCE.

Where a railroad company in so operating an engine, in the night time, runs over and kills a horse astray upon its track, and the evidence is such that the jury may reasonably infer that had there been a proper headlight on the tender in front of the moving train the enginemen, in the exercise of due and reasonable care, would probably have discovered the horse on the track in time to avoid injuring him, the question of negligence is one of mixed law and fact for the jury, and the court should not for want of sufficient evidence to support it set aside a verdict in favor of the owner of the horse, and award defendant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error to Circuit Court, Fayette County.

Action by K. E. Hanger and others, partners under the firm name of Hanger Bros., against the Chesapeake & Ohio Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed and rendered.

Osenton & Horan, for plaintiffs in error.
Simms, Enslow, Fitzpatrick & Baker, for defendant in error.

MILLER, J. Plaintiffs seek reversal of the judgment below, on appeal from the judgment of a justice, setting aside the verdict of the jury in their favor, for one hundred and seventy five dollars, and awarding defendant a new trial.

The action begun before a justice was for damages for alleged negligence of defendant in killing plaintiffs' horse.

One of the questions presented in the court

below, on the evidence, and by instructions to the jury proposed by defendant, and in the petition filed in this court, is whether the alleged negligence, if any, in killing the horse was that of the defendant or of the White Oak Railway Company, operating the engine and cars that killed the horse.

The evidence shows that the railway track where the killing occurred, the engine, and at least one of the cars belonged to the defendant company, and that the movement of the train over said track was controlled by the train dispatcher of defendant company at Hinton. There is evidence that after the horse was killed servants of the defendant company took charge of its carcass and buried it, and that when other animals had been killed on the same branch the defendant settled the damages. The point does not seem to be relied on in argument here and we think we may properly regard it as having been abandoned.

[1] The main question presented is, whether it is negligence per se for a railroad company in the night time to run an engine backwards over its main track, as was done in this case, without a proper headlight on the tender sufficient to enable the enginemen, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance and to avoid doing injury to dumb animals astray upon the track? It is conceded that the horse was not killed at a public crossing, and that it was a trespasser on the defendant's right of way, and that defendant owed it no duty except to observe ordinary care to not wantonly and willfully run it down and kill it. That this measure of duty is imposed by law upon a railway company with respect to stock astray upon its private right of way is fully established by prior decisions of this court. *Layne v. Ohio River R. Co.*, 35 W. Va. 439, 14 S. E. 123, and the cases cited and reviewed therein.

This and other cases, with no less exactness, we think, require of a railroad company and its servants operating its trains, that they use like ordinary care in providing the means of discovering such stock on its track. Does this rule require of a railroad company operating trains at night, to equip its engines or cars with reasonably sufficient headlights and other appliances necessary to avoid doing injury to trespassing animals? It would clearly be negligence giving a passenger injured thereby right of action. But will it give right of action to the owner of animals killed by such negligence? By defendant's instruction number 3, given, the court below, in substance, told the jury that the railway company was not negligent in not having a headlight on the engine which ran over and killed plaintiffs' horse, unless the killing took place at a public crossing. As it was not killed at a public crossing the practical effect of the instruction, therefore, was to tell the jury that defendant was not

negligent, and not liable. The jury evidently did not regard the instruction, for they found a verdict for plaintiffs notwithstanding the instruction.

In discussing the rule requiring of a railway company ordinary care and precaution to discover animals on its track and right of way, 3 Elliott on Railroads, section 1205, supported by numerous decisions cited, says: "It is held to be the duty of the company to use care to equip its locomotives with such headlights as would render a lookout effective." And in section 1206 this writer says: "The company is bound to use ordinary care to prevent injuries to animals and where ordinary care requires the use of signals the company may be guilty of negligence in omitting them although they are not required by statute." In *Layne v. Railroad Co.*, supra, it is also held that the servants of a railway company are "equally bound to adopt the ordinary precaution to discover danger as to avoid its consequences after it becomes known." Our case of *Kirk v. N. & W. R. Co.*, 41 W. Va. 722, 24 S. E. 639, 32 L. R. A. 416, 56 Am. St. Rep. 899, says: "If the servants of a railroad company in charge of a train, by exercise of ordinary care, can see and save domestic animals which have wandered on the railroad, it is their duty to do so; but this duty must be exercised consistently with the paramount duties they owe to the passengers on the train under their charge." What rule of reason or policy then could excuse a railway company, operating trains at night, from equipping its engines with proper headlights to aid its servants in the performance of their duty? If it is the duty of its servants by the exercise of ordinary care, to see and endeavor to save such animals, astray upon its track, there must certainly be a corresponding duty on the part of a railway company to use ordinary care in providing its trains with sufficient headlights in aid thereof. The proposition seems so fundamental and self evident as not to require further elaboration. It is sustained not only by the authorities already referred to, but by 33 Cyc. 1218, and cases cited in note 57.

As opposed to this rule defendant's counsel cite and rely on *Melton v. Railroad Co.*, 64 W. Va. 168, 61 S. E. 39, point 2 of the syllabus, saying: "Signals or lights or watchmen are not required on a backing train elsewhere than at public crossings to warn trespassers using the track for their own convenience as a foot path." Does this rule, applicable to persons using the track, affirmed in this and in the prior decisions cited, apply also to dumb animals? In *Melton v. Railroad Co.*, the fact is emphasized that it was not claimed that the trainmen saw or could have seen Myers, the deceased, before hitting him with the backing engine. In *Huff v. C. & O. Ry. Co.*, 48 W. Va. 45, 35 S. E. 866, the same rule was applied to a trespasser in the yards of the defendant company. It is there held that unless guilty of wanton or gross neg-

ligence a railroad company can not be held liable in damages to persons so trespassing. In the present case the horse was not injured by a backing engine and tender, in the yards of the defendant, but outside, on the main track, and by an engine being operated in that way, in hauling a regular passenger train, and it was a dumb animal, not a live sentient person, of mature years, that was killed. Our decisions hold, with respect to dumb animals, as to helpless, insane or infant persons, that a railroad company owes a duty to the owner to keep a careful lookout ahead to discover them upon the track and to use ordinary care to avoid injuring them. Besides the cases already cited, see cases cited in 11 Cyc. Dig. Va. & W. Va. Reports, pp. 586-599.

With respect to persons of mature years, possessed of all their faculties, a railroad company and its trainmen have the right to assume unless circumstances indicate the contrary, that they will hear the approaching train and get out of the way in time to avoid injury. Not so with respect to dumb animals and helpless persons. And as we have already said this duty must also include the corresponding duty to provide and keep in order sufficient headlights.

Our conclusion, therefore, is that a railroad company, in operating its trains in the night time over its main tracks owes a duty to the owner of domestic animals to provide and keep installed and in order sufficient headlights to enable its trainmen, by the exercise of reasonable and ordinary care to see them on the track in time to avoid injuring them, and that it is negligence to omit this duty, for which an action will lie, if its omission be the proximate cause of the injury.

[2] If such be the law the remaining question is, did the court err in setting aside the verdict and awarding defendant a new trial? The evidence shows that there was a headlight on the tender of the backing engine, but that it had been broken, was out of repair, and that in place of having it repaired, the trainmen were using an ordinary train lantern hung out on the drawhead of the tender. The evidence is that this lantern did not enable the trainmen to see ahead for more than from twelve to fifteen feet, while with a proper headlight they could have seen about a hundred yards ahead, and that the track was straight for some four or five hundred yards back from where the horse was struck, with nothing intervening except the darkness of the night to obstruct their view, and that the distance from the point where the horse apparently went upon the track to the place where it was killed is about one hundred and seventy-five feet, a bridge or culvert intervening showing evidences of the horse's foot having slipped through the ties on the bridge. The trainmen say they were looking ahead but did not see the horse. At what rate the train

was traveling and within what distance it could have been stopped is not clearly shown by the evidence. Defendant's counsel claim in their brief that the train was moving at about the rate of twelve miles an hour. We know from the evidence that the train was moving backwards on a dark night with a light in front that would not enable the trainmen to see more than from twelve to fifteen feet ahead, and we may safely conclude that they were not going at a very great rate of speed.

On this evidence was the court below justified in setting aside the verdict? Defendant's counsel rely on *Toudy v. N. & W. R. Co.*, 38 W. Va. 694, 18 S. E. 896, *Maynard v. N. & W. R. Co.*, 40 W. Va. 332, 21 S. E. 733, *Lovejoy v. C. & O. Ry. Co.*, 41 W. Va. 693, 24 S. E. 599, and *Kirk v. N. & W. R. Co.*, 41 W. Va. 722, 24 S. E. 639, 32 L. R. A. 416, 56 Am. St. Rep. 899, and characterize the killing of the horse in this case as one of inevitable accident, for which under these decisions, defendant can not be held liable. They say that the horse was killed because it was a very dark rainy night, and the vision of the trainmen obscured thereby, and by the fact that the lantern on the tender did not throw the light far enough ahead to enable them to see the horse in time to avoid hitting and killing it. This proposition as we see excludes the idea of negligence in failing to provide a suitable headlight which we hold to be negligence per se. Both engineer and fireman swear they were looking ahead at the time the horse was evidently struck by their train, but did not see him, and to that extent performing their duty to the owner of the horse. Why did they not see him on a straight track of some four or five hundred yards in time to avoid killing him? The jury might justly have inferred that it was because of the absence of a sufficient headlight. The question was one of mixed law and fact peculiarly within the province of the jury, and not one for the court, independently of the jury, to decide. As was said by Judge Snyder in *Johnson v. Railroad Co.*, 25 W. Va. 570, apropos to this discussion: "If the engineer had discovered them (the horses) promptly as he should and would have done had he exercised due care, he could, by blowing his whistle and stopping his train, have, perhaps, prevented any collision and saved the horses. This was at least a probability for the consideration of the jury." So we may say in the case, if the engine had been provided with a sufficient headlight, the trainmen, who claim to have been looking ahead, as it was their duty to do, consistent with their paramount duty to the passengers, would in all probability have seen the horse of the plaintiff in time to have avoided killing him. At all events the probability was one for the consideration of the jury, and which they

evidently resolved, as they had the right to do, in favor of the plaintiff.

Our opinion, therefore, is to reverse the judgment below, and enter judgment here in favor of plaintiff for the amount of damages as found by the verdict of the jury, with costs incurred here and in the court below, and it will be so ordered.

(70 W. Va. 208)

DAVIDSON v. DAVIDSON et al.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

1. RECEIVERS (§ 16*)—SUIT FOR APPOINTMENT—SUFFICIENCY OF PLEADING.

A bill for the appointment of a receiver to take charge of real estate and rent it, pending a creditors' suit by the administrator to sell it for the payment of decedent's debts, which fails to allege that the rents and profits, as well as the corpus, of the land are necessary to pay debts, and which fails to allege insolvency of the party in possession, is demurrable.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 24, 28; Dec. Dig. § 16.*]

2. APPEAL AND ERROR (§ 71*)—DECISIONS REVIEWABLE—APPOINTMENT OF RECEIVER.

An interlocutory decree appointing a receiver to take charge of and rent real estate is an appealable decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 400; Dec. Dig. § 71.*]

Appeal from Circuit Court, Monroe County.

Bill in equity by W. A. Davidson, administrator, against George T. Davidson and others. From a decree appointing a receiver, C. E. Lynch appeals. Reversed and remanded.

Rowan & Meadows, for appellant C. E. Lynch. Clark & Keadle, for appellees W. A. Davidson and others. R. Kemp Morton, for appellees Julia W. Davidson and others.

WILLIAMS, J. This appeal is taken by C. E. Lynch from an order of the circuit court of Monroe county, made on the 19th of April, 1909, appointing a receiver to take charge of, lease and collect the rents, issues, and profits from the real estate of which C. H. Davidson died seised, pending a suit brought by his administrator against his heirs and creditors to subject the real estate to payment of debts, on the alleged ground that the personalty is not sufficient to pay same. Appellant is one of the creditors of said estate, and, as such, is made a defendant to the bill.

Pending suit, C. E. Lynch purchased a one-fifth undivided interest in both realty and personalty belonging to the estate. At the time of his purchase, he was in possession of a large part of the real estate, under a contract of lease from the administrator, who was also one of the heirs at law. Lynch set up these facts by petition filed in

the case. Plaintiff then filed an amended bill, alleging "that there is danger of the loss or misappropriation of the rents and profits from the said lands, or a material part thereof," and prayed for the appointment of a receiver to take charge of the lands, with authority to rent same and collect and account for the rents and profits. Some of the other heirs who had answered the bill joined in the motion for a receiver. Lynch demurred to the amended bill and also answered, denying the allegation that there was danger of loss or misappropriation of assets, and averred his ability to account for the rents and profits to those entitled to them. The amended bill was verified by the affidavits of plaintiff and S. S. Steele, and the answer of Lynch was verified by himself and by the affidavits of H. P. Tracy and L. E. Campbell. The motion was heard on no other proof, and a receiver appointed.

[1] Even granting that the administrator, who has brought a creditors' suit, might, under certain circumstances, have a receiver for the real estate appointed to protect the rights of creditors, a question which we do not decide, still the amended bill is bad for want of sufficient averments. It neither avers the insolvency of Lynch, nor that the rents and profits, as well as the corpus, of the real estate, are necessary for the payment of decedent's debts, both of which must appear before the court can, in any event, sequester the rents and profits. But none of the creditors are asking for a receiver; and, if they were, the facts alleged do not show grounds for his appointment. The amended bill shows on its face that Lynch is rightfully in possession. It alleges that he is assignee of one of the heirs, which makes him a joint tenant having equal rights with his cotenants to possession of the land. This is not a suit among cotenants. Their rights are determinable at law. The amended bill falls utterly to show any equitable grounds for the appointment of a receiver. This case is controlled by the principles announced in *Sult v. Hochstetter Oil Co.*, 68 W. Va. 318, 61 S. E. 307, *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775, and *Grantham v. Lucas*, 15 W. Va. 425.

[2] Counsel for appellees insist that the order appointing a receiver was not appealable. But it has been too often decided by this court to admit of doubt that a decree or order of a court, changing the possession of property, is appealable under clause 7, § 1, c. 135, Code 1906. A decree appointing a receiver to take charge of real estate is certainly a decree changing the possession of such real estate. *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. 801; *Hutton v. Lockridge*, 27 W. Va. 428; *Whyel v. Coal & Coke Co.*, 67 W. Va. 651, 69 S. E. 192.

The decree appealed from, appointing J. D. Beckett receiver, will be reversed, and

this court will enter an order sustaining the demurrer to the amended bill and remanding the cause, with leave to plaintiff to make such further amendment as he may be advised is necessary and proper, and for further proceedings to be had therein according to the rules and principles governing courts of equity.

(70 W. Va. 205)

LANG v. LANG et al

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 289*)—SEPARATE MAINTENANCE—EQUITABLE JURISDICTION.

A court of equity, independently of proceedings for divorce, on the ground of inadequate remedy at law, may decree maintenance to a wife who has been deserted by her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1078; Dec. Dig. § 289.*]

2. VENUE (§ 4*)—SUIT FOR SEPARATE MAINTENANCE.

The venue of a suit for maintenance without divorce is not governed by the divorce statutes, but by the laws relating to place of suit for the vindication of ordinary legal or equitable rights.

[Ed. Note.—For other cases, see *Venue*, Dec. Dig. § 4.*]

Appeal from Circuit Court, Harrison County.

Bill by Susan C. Lang against George W. Lang and others for alimony. Decree for defendants, and complainant appeals. Reversed and remanded.

F. E. Parrack and E. G. Smith, for appellant. John Bassel and Philip P. Steptoe, for appellee Lee J. Lang.

ROBINSON, J. May a court of equity, independently of proceedings for divorce, decree alimony or maintenance to a wife who has been deserted by her husband? The appeal in the case before us concretely presents this question. The bill is brought by a wife whose husband deserted her to live with another woman. The wife seeks alimony or maintenance, but no divorce, from the husband. The court below held that equity would not entertain such case. The bill was dismissed on demurrer.

In *Chapman v. Parsons*, 66 W. Va. 308, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. Rep. 1033, we noticed the question now presented, but reserved answer thereto. Now that it is squarely before us, we must answer the same in the light of reason and authority.

[1] We hold that equity has jurisdiction to decree alimony or maintenance to a wife, independently of our divorce statutes. Out of the great contrariety of opinion on the point, we choose that which seems best to

accord with reason and justice. Indeed we adopt the view which is now recognized by the current of authority in the United States, whatever may be said in some of the older encyclopedias and text-books. An extended critical examination of the subject convinces us that the courts of this country have so rapidly accepted the view which we now approve that the weight of authority is in its favor, though only a few years ago the writers generally announced that the weight was the other way.

A most recent work, collecting all the adjudicated cases on the subject and announcing a text therefrom, says: "In the United States it is maintained, by much authority, that in the absence of legislation to the contrary, alimony should not be allowed in an independent suit in courts of equity. The proper remedy, at common law, where the husband deserted his wife and refused to supply her with necessaries according to her rank and condition, was an action at law by the person supplying such necessaries for her. But in many of the states alimony may be decreed independently of any proceeding for separation or divorce where the husband refuses to support his wife, or where she has separated from him, on the ground that in the absence of adequate relief or remedy at law, equity will interfere; and in other states where the rule was formerly that an independent action would not lie, it is now held that such an action will lie although no statute authorizes it. The inherent right of equity to entertain an action for alimony apart from any proceeding for divorce is not taken away by a statute authorizing the granting of alimony in an action for divorce, or by a statute making it a misdemeanor for a person willfully to neglect to provide support for his wife." 3 Enc. L. & P. 65. Then, showing that the trend of legislation has followed the reason and justice of a suit for maintenance without divorce, the same text proceeds: "In nearly all the states where the authority of courts to award alimony independently of divorce was denied at common law, statutes now exist authorizing an independent action for alimony, with limitations in some instances; and in several jurisdictions where the common-law authority of equity courts to award alimony without divorce is recognized, statutes now exist which are declaratory of the common law. In other states, where the common-law authority to award alimony without divorce has not been passed upon, statutes now exist authorizing the awarding of alimony in an independent action."

It is not our purpose in this opinion to treat of the subject in an original manner. Indeed we could not do so more ably than has been done by many courts and eminent text writers. That which we should say in justification of a well grounded jurisdiction in equity for alimony without divorce would

only be repetition of what has been written time and again. That equity has such jurisdiction because of the want of an adequate remedy at law, we are satisfied. That the recognition of such jurisdiction has met the approval of most eminent minds, there can be no doubt. That the reasons for such recognition are sound, is made clear by a reading of the authorities. 2 Nelson on Divorce and Separation, §§ 1000-1003; 2 Story, Equity Jurisprudence, § 1423a. Some of the older cases are: *Glover v. Glover*, 16 Ala. 440; *Galland v. Galland*, 38 Cal. 265; *Butler v. Butler*, 4 Litt. (Ky.) 202; *Garland v. Garland*, 50 Miss. 694; *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118, 20 Am. St. Rep. 667. The doctrine finds favor in new jurisdictions, by interesting opinions in the following: *Bueter v. Bueter*, 1 S. D. 94, 45 N. W. 208, 8 L. R. A. 562; *Bauer v. Bauer*, 2 N. D. 108, 49 N. W. 418; *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557; *Dole v. Dole*, 14 Hawaii, 554. For collections of the cases generally, see: 3 Enc. L. & P. 66; 2 Amer. & Eng. Enc. Law, 94; 14 Cyc. 744.

"The broad ground upon which these authorities rest is, that it is the duty of the husband to support the wife, and if, without fault upon her part, he refuses to do so, the courts will compel him to render her a reasonable support in accordance with his means, even though the wife does not seek or wish a legal separation dissolving the bonds of matrimony, and that an action for this purpose may be maintained, because of the inadequacy of ordinary legal remedies to enforce this duty. Again, the policy of the courts is to discourage, rather than encourage, divorces. The wife may be entitled to a divorce, but whether or not she will exercise that right is optional with her, and to hold that unless she did she could not maintain an action for support would be both unreasonable and unjust, for, although the conduct of the husband may be such that she could dissolve the marriage contract, he is not relieved from his duty of supporting her because she does not wish to pursue that course, and, besides, a case might arise where the husband withheld support, but not for a sufficient length of time to entitle the wife to a divorce upon that ground, and in the interim she would be without an adequate remedy, unless permitted to maintain an action for separate maintenance." In *re Popejoy*, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222.

But there is direct Virginia authority on the subject. "In Virginia, not only is alimony granted as incidental to divorce of either kind, with the largest discretion as to the estates of the parties, but it may be granted by the court of chancery, independently of any divorce, or any application for one, as where the misconduct of the husband

drives the wife from her home, or he turns her out of doors, or perhaps wherever a divorce from bed and board, or a restoration of conjugal rights would be decreed had they been asked for." 1 Minor's Inst. (4th Ed.) 308. A Virginia chancellor was perhaps the first to promulgate this doctrine. Purcell v. Purcell, 4 Hen. & M. (Va.) 507. Judge Tucker says the decision in that case is sound. Tucker's Com. book 1, ch. 9, page 101. Justice Story cites it and says: "There is so much good sense and reason in this doctrine, that it might be wished it were generally adopted." 2 Equity Jurisprudence, supra. The doctrine was again affirmed in Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781. It is distinctly recognized in the opinion in Latham v. Latham, 30 Grat. (Va.) 307. Judge Johnson seemingly approves it in Stewart v. Stewart, 27 W. Va. 167. We have observed that Mr. Minor, in the last edition of his great commentaries, considered it the law of Virginia. Yet, the argument is made that the Purcell and Almond cases must be distinguished because there were no divorce statutes in Virginia when these cases were instituted. No such reason is given for the opinion in either of the cases. Plainly in them, equity was accorded jurisdiction on the ground that the wife had no adequate remedy at law to secure—not a divorce—but the maintenance due to her from the husband. These decisions are binding authority in this jurisdiction. We have already indicated that we have no disposition to overthrow them.

Our divorce statutes do not contain a word that either expressly or impliedly takes away the right of a wife to sue for maintenance without divorce. Those statutes grant the right to divorce—a thing entirely different from the right to mere maintenance. The latter right belonged to a wife long before the divorce statutes were passed. How the granting of an entirely different right can exclude the exercise of one already vouchsafed we cannot readily conceive. In this connection, the following is pertinent: "But there is no provision of the statute which authorizes an application for alimony, except in connection with a prayer for divorce; and it is claimed on behalf of the defendant, that, inasmuch as provision is made for the allowance of alimony only on an application for divorce, it was the intention of the Legislature to limit the power of the court to grant alimony to that class of cases. The maxim 'expressio unius est exclusio alterius' is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject-matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class of cases. The Legislature was dealing with the general subject of alimony, as an inde-

pendent subject-matter of legislation; but, only, as one of the incidents of an application for divorce. It saw fit to define the power of the court over the allowance of alimony on an application for divorce; but was not considering the subject of alimony on any other class of cases." Galland v. Galland, supra. See also an able discussion of the same point in Edgerton v. Edgerton, supra.

[2] The venue of a suit for maintenance without divorce is in no wise controlled by the statute in relation to jurisdiction in divorce suits. The place of suit is governed by the laws applying to ordinary suits for the vindication of legal or equitable rights. The divorce statutes do not relate to an independent suit for maintenance and cannot control it.

Some minor grounds of demurrer to the bill are assigned, but they are plainly untenable. They call for no discussion here. Nor are cross-assignments of error, relating to the validity of the attachment proceedings, well taken. They must be overruled.

Pursuant to the foregoing observations, the order of the circuit court sustaining the demurrer and dismissing the bill will be reversed, the demurrer to the bill will be overruled, and the case will be remanded to be further proceeded in.

(70 W. Va. 221)

HILL v. HORSE CREEK COAL LAND CO.
(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

1. DOWER (§ 49*)—RELEASE—EFFECT OF DEED.

A deed, signed, sealed, and acknowledged by a husband and wife, which, not naming the wife in the body thereof, makes her a grantor by the designation of wife of the other grantor, is the deed of the wife, as well as of the husband, and relinquishes her dower in the land.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-175; Dec. Dig. § 49.*]

2. ACKNOWLEDGMENT (§ 37*)—SUFFICIENCY OF CERTIFICATE—ABBREVIATION.

Abbreviation of the word "wife" thus, "wi," in a certificate of the privy examination of a married woman, respecting her execution of a deed and her acknowledgment thereof, does not invalidate the certificate.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 37.*]

3. CANCELLATION OF INSTRUMENTS (§ 31*)—BONA FIDE PURCHASER—EFFECT OF PURCHASE IN GOOD FAITH.

Fraud in the procurement of a deed is unavailing, in a suit to set it aside, against a bona fide purchaser without notice and for value.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 48; Dec. Dig. § 31.*]

4. ACKNOWLEDGMENT (§ 62*)—EVIDENCE TO IMPEACH.

Denial of the execution of a deed and acknowledgment thereof, unaided otherwise than by the facts that the signature is by mark, and

the party could write, and denies having ever signed any papers by mark, is not sufficient to overcome a certificate of acknowledgment, nearly 30 years old, and pronounced genuine by the officer who certified the acknowledgment.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. § 62.*]

Appeal from Circuit Court, Boone County. Bill by Mary A. Hill against the Horse Creek Coal Land Company. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

W. L. Ashby, for appellant. H. W. B. Mullins and L. Fulton, for appellee.

POFFENBARGER, J. The decree here complained of sustained a bill for assignment of dower in a tract of land, despite and against the deed of the alleged complainant, on the theory of a fatal defect therein, apparent on its face, and forgery of the signature and certificate of acknowledgment.

The deed purports to, and did, as to the husband of the complainant, convey this land in exchange for three other tracts, which the deceased husband seems to have conveyed away in his lifetime by deeds in which his wife joined, so as to pass her inchoate right of dower, although the testimony leaves some doubt as to this. Assuming these lands not to have been so conveyed, the widow would have had the right to elect whether she would take her dower out of the land here in controversy or the lands obtained in exchange therefor, and could not be endowed of both. *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. 242, 11 Ky. Law Rep. 799; *Mahoney v. Young*, 3 Dana (Ky.) 588, 23 Am. Dec. 114; *Hartwell v. De Vault*, 159 Ill. 325, 42 N. E. 789; *Wilcox v. Randall*, 7 Barb. (N. Y.) 633; *Towsley v. Smith*, 12 U. C. Q. B. 555; *Stafford v. Truman*, 7 U. C. C. P. 41; *White v. Laing*, 2 U. C. C. P. 186. This being true, and dower not appearing to have been obtained or sought in the lands taken by way of exchange, this suit would be an election to take it out of these lands. Assuming the lands obtained in exchange for this tract to have been conveyed away, the joinder of the wife in the deeds by which they were disposed of seems not to have been an election to take dower therein. Such was the holding in *Mahoney v. Young*, cited, and *Stevenson v. Brasher*, cited, the only cases found bearing upon the question. We deem it unnecessary, however, to assert either of these propositions as matter of decision, since, in our opinion, the deed is good on its face, and the other objections to it unsustained.

[1] Omission of the name of the wife from the body of the deed is the basis of a contention that she was not a party to it, notwithstanding her signature and the certificate of acknowledgment, if both are genuine, since the mere signing, sealing, acknowledg-

ment, and delivery of a deed, in the body of which the party is not mentioned, are insufficient to make him a grantor. Though her name was not inserted in the body of the deed, that instrument recites that it was made by Spencer Hill and —, his wife, and asserts that the said Spencer Hill and —, his wife, did grant the tract of land. The deed thus purports to have been made for and on behalf of two persons—Spencer Hill and his wife—and contains words of grant applicable to both of them. If, therefore, it is not operative as to the wife, it must be merely because her name is not used, despite the fact that it contains words by which she could be identified with absolute certainty as one of the grantors. We think this amply sufficient. In *Laughlin Bros. & Co. v. Fream*, 14 W. Va. 822, and *Adams v. Medsker*, 25 W. Va. 127, relied upon by the appellee, the parties signing the deeds, and held not to have been parties thereto, were not referred to in the bodies of the instruments in any manner whatever. They contained no language sufficient to connect them therewith. Hence these decisions do not sustain her contention. The conclusion here stated is in accord with the text of *Washburn on Real Prop.* (section 2115), reading: "The object of the names being merely to distinguish one person from another, it seems to be sufficient if this is effected, though the true name of the party be not used, or even no name at all. The general principle is, 'Id certum est quod certum reddi potest;' and a man may be described by his office or his relationship to a known person." Agreeably to this principle, a patent from the United States government to the heirs of Isabella Morrison, deceased, without further words of description or the insertion of any names, was held sufficient. *Blomberg v. Montgomery*, 69 Minn. 149, 72 N. W. 56. So a deed in which the grantors described themselves as "we, the heirs and devisees of Sarah Stearns," was held sufficient in *Blaisdell v. Morse*, 75 Me. 542.

[2] The certificate of acknowledgment is not informal nor defective in any respect, except in that it abbreviates the word "wife," thus, "wl." The justice certifies that Mary Hill, the "wl" of Spencer Hill, appeared before him in his county and was examined privily and apart from her husband, and, having had the writing fully explained to her, acknowledged the same to be her act, and declared that she had willingly executed the same and did not wish to retract it. We do not regard the abbreviation as anything more than a mere formal defect. Nobody could be misled by it, and it could have been intended for nothing other than the word "wife." Its context proves this. A substantial compliance with the statute is all that is required. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Pickens v. Kniseley, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622.

[3] The deed was made on the 5th day of January, 1877, and was admitted to record on March 21, 1877. In 1883 the grantors therein conveyed to Julian Hill. In 1901 Julian Hill and wife conveyed to J. R. Wingfield, trustee. In June, 1904, Wingfield and others conveyed it to the Horse Creek Coal Land Company, a corporation, the defendant in this suit. The record contains no evidence whatever of any notice to the defendant of any fraud or imposition practiced upon the complainant. Except for fraud or collusion, the certificate of acknowledgment is conclusive upon the grantor, and such fraud, coercion, or collusion could not affect a bona fide purchaser for value, without notice, such as the defendant appears to be. *Pickens v. Kniseley*, 29 W. Va. 1-10, 11 S. E. 932, 6 Am. St. Rep. 622; *Whitehorn v. Hines*, 15 Va. 557. A deed fraudulently procured is not absolutely void, but voidable only. Hence it passes the title, and, if this reaches the hand of a person who is not a party to the fraud, and has no notice of it, and is a purchaser for value, the injured party has no remedy against the subsequent purchaser in good faith, without notice, and for value. We think it clear, therefore, that no relief can be had against this deed in the hands of the defendant, unless it is for some reason absolutely void.

[4] Though the bill charges forgery thereof, which would make it absolutely void, if proven (*Middleton v. Findla*, 25 Cal. 76; *Cole v. Long*, 44 Ga. 579; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Pry v. Pry*, 109 Ill. 466; *Dev. on Deeds* [3d Ed.] §§ 240, 726), the evidence does not sustain the charge. All we have is the denial of the signature and acknowledgment, accompanied by proof of the ability of the complainant to write, variation of the form of the signature from that generally used by her, and her protest that she had never signed a deed by mark, or had anybody write her signature to one for her. There is no proof of any fabrication of the deed by any person. It is the genuine deed of her husband. At the time of the institution of this suit, it had been in existence for 29 years, and the grantees and those claiming under them had never been disturbed, or their title to the

land questioned. The husband had taken and held or disposed of the other lands obtained by way of exchange. The justice who took the acknowledgment testifies that the certificate thereof bears his signature, and is genuine; and that he would not have signed it, if the complainant had not appeared before him and acknowledged it in the manner and form certified. He does not remember the actual presence of the parties on the occasion; but this signifies nothing, in view of the long lapse of time. His failure of memory as to the circumstance indicates very strongly that the complainant herself may be laboring under a failure of recollection. After this long lapse of time, during which she never questioned the genuineness of the deed or certificate, her unsupported statement cannot be allowed to prevail over a solemn judicial record. The burden of proof is upon her. She is now 65 years old. Thirty years had elapsed from the date of the deed when she testified. Under such circumstances, it is fair to say failing and treacherous memory should not prevail over a solemn contemporaneous memorial, sustained by the testimony of a reputable citizen who made it. Some authorities hold that the official certificate of the officer cannot be overthrown by the unsupported evidence of the grantor that he did not make the deed. *Sassenberg v. Huseman*, 182 Ill. 341, 55 N. E. 346; *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 834; *Swett v. Large*, 122 Iowa, 267, 97 N. W. 1104. That a grantor can write is not sufficient to overcome the certificate of the notary as to the execution of a deed by mark. *Gritten v. Dickerson*, 202 Ill. 372, 66 N. E. 1090. The evidence to impeach a certificate must be clear and convincing, and establish the fact beyond a reasonable doubt. *Pickens v. Kniseley*, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; *Dev. Deeds* (3d Ed.) § 529. We have here no evidence of any facts or circumstances corroborating the denial of the plaintiff, except her ability to write. No motive in any person for the crime of forgery is shown; nor have we any evidence tending in the slightest degree to prove the commission thereof.

These conclusions and principles necessitate reversal of the decree and dismissal of the bill.

(113 Va. 183)

WOOLFOLK et al. v. GRAVES.

(Supreme Court of Appeals of Virginia. Jan. 25, 1912.)

JURY (§ 14*)—RIGHT TO JURY TRIAL—ENJOINING TRESPASS.

Where defendants, in a suit to restrain the cutting of timber on land, not only failed to make out a prima facie title to the land on which the trespass occurred, but their assertion of title clearly appears not to have been bona fide, they are not entitled to a trial of the issue by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 49; Dec. Dig. § 14.*]

On rehearing. Former opinion adhered to. For former opinion, see 69 S. E. 1089.

PER CURIAM. A decree was rendered in this cause on the 12th day of January, 1911, which upon a petition to rehear was set aside.

As said in the opinion disposing of the case on the former hearing, "the appellants set up their own title to the land in question in their answer, and made a fruitless effort to support it by evidence. They nowhere denied the trespasses committed and threatened by them, as charged in the bill, nor did they attempt to meet the charge of insolvency, fully sustained by the proof of appellees."

Upon a careful consideration of the case upon the rehearing, the conclusion is irresistible that appellants not only failed to make out a prima facie title to the land upon which the trespasses were committed and threatened, but that their assertion of title is not bona fide; therefore they are not entitled, as has been so earnestly pressed in argument, to a trial of the issue by jury. *Moorman & Hurt v. City of Lynchburg*, 73 S. E. 987, just decided by this court.

For the reasons given and the authorities cited in this and in the opinion of this court filed at the former hearing of the case, the decree entered at that time is approved and will be adhered to.

Affirmed.

(113 Va. 80)

MEREDITH et al. v. TRIPLE ISLAND GUNNING CLUB, Incorporated.†

(Supreme Court of Appeals of Virginia. Jan. 18, 1912.)

1. GAME (§ 2½*)—RIGHT OF FOWLING—COMMON-LAW PRIVILEGES.

Code 1904, § 2070a, and Acts 1901-02, p. 107, in force in the county of Princess Anne, designed to regulate the killing of game for the benefit of all the citizens of the commonwealth, and Code 1904, § 1338, declaring that all the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of the commonwealth and not specially granted shall continue the property of the commonwealth, and may be used as a common by all the people for the purpose of fishing and fowling, are not arbitrary assumptions of power on the part of

the commonwealth, but are declaratory of the common law.

[Ed. Note.—For other cases, see Game, Dec. Dig. § 2½.*]

2. INJUNCTION (§ 103*)—SUBJECTS OF RELIEF—CRIMINAL ACTS.

Equity will not enjoin a violation of Code 1904, §§ 1338, 2070a, or Acts 1901-02, p. 107, in force in the county of Princess Anne, declaring that the beds of bays, creeks, and the shores of the sea not specially granted according to law, may be used as a common by all the people of the commonwealth for the purpose of fowling, etc., and protecting such right by making a violation subject to penalties, since equity will not restrain the commission of public offenses.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 176, 177; Dec. Dig. § 103.*]

3. GAME (§ 2½*)—RIGHTS PROTECTED—FOWLING ON NAVIGABLE WATERS.

A gunning club acquired title to an island situated in a bay and valuable for shooting, and defendants obtained title to an island of about two square rods situated in the middle of a channel between the island belonging to the club and other islands and in a position to intercept flocks of ducks flying over the bay so as to prevent them from coming within range of the club's premises. *Held*, in the club's action for an injunction, alleging irreparable injury to its hunting rights, but no malicious interference therewith, that, in view of the rights of all citizens to shoot upon navigable waters in the jurisdiction of the commonwealth, equity would not restrain defendants' use of their island; the injury to the club being *damnum absque injuria*.

[Ed. Note.—For other cases, see Game, Dec. Dig. § 2½.*]

4. PUBLIC LANDS (§ 183*)—GRANTS BY STATE—REPEAL AT SUIT OF PRIVATE OWNER.

Under Code 1904, § 2368, which provides that the commonwealth, or any other party desiring to repeal any grant of land because obtained to the prejudice of such party's equitable right, may file a bill in equity for that purpose, no private citizen can maintain a suit to set aside such grant unless he can show that he has some right therein which is prejudiced by the grant.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.*]

5. NUISANCE (§ 72*)—PUBLIC NUISANCE—REMEDY OF PRIVATE PERSON.

Where acts constitute a public nuisance, a private person who has only suffered with the general public cannot complain thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

Appeal from Circuit Court, Princess Anne County.

Action for an injunction by the Triple Island Gunning Club, Incorporated, against William B. Meredith and others. From a decree perpetually enjoining defendants, they appeal. Reversed.

D. H. & Walter Leake and Scott, Buchanan & Cardwell, for appellants. Loyall, Taylor & White and A. Johnston Ackiss, for appellee.

KEITH, P. The Triple Island Gunning Club filed its bill in the circuit court of Princess Anne county, in which it states that it is a corporation organized under the laws of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the state of Virginia, and in pursuance of the power granted it acquired title to Half Moon Island, situated in the waters of Back Bay, within the county of Princess Anne; that this island is chiefly marsh land and land covered by water, and valuable only for fishing and shooting; that Meredith, Fearing, and Whitehurst, who are afterwards named as defendants, had purchased a parcel of land containing $10/1000$ of an acre, for which a grant from the commonwealth appears to have been issued by the Governor of the commonwealth to George W. Whitehurst; that it consists only of a few stakes driven into the bed of the bay, connected by boards and filled in with earth and other material, thereby making an artificial island, distant between 200 and 300 yards from complainant's property; that the purpose of the defendants in constructing this artificial island is to shoot ducks and other game therefrom, all of which is in violation of the statute laws of the state, and will result in great injury to complainant; that owing to the location of the island, directly in the channel and almost equidistant between complainant's island and certain other islands used for shooting and hunting purposes, known as Dudley's Island and Horse Island, it will be in a position to intercept the fies of ducks and other game as they fly over the waters of the said bay; that these acts constitute a trespass, nuisance, or ouster as the case may be, involving oppressive litigation and a multiplicity of suits on the part of complainant in order to protect its rights; that, if respondents are allowed to continue the construction of the said island, it will result in ruining the value of complainant's property for the only purpose for which it can be used, namely, for hunting and fishing; and that the damages to complainant will be irreparable.

The defendants filed their demurrer and answer, in which they deny that the property owned by them is an artificial island, or that they or their predecessors formed or attempted to form an island at said place, or that it is an obstruction to navigation, or that it is within the legal bounds of complainant's land, or that it is land covered entirely by water, or that the public has a right to pass and repass over the same; but they admit that the waters of Back Bay are navigable and surround the property of complainant. They claim that the property granted to them is a natural island and was not formed by boards and stakes and by filling in with earth or other materials between said boards, as alleged by complainant. Respondents admit that it is their purpose to shoot ducks and other game from their island; but they deny that shooting therefrom is in violation of the laws of this state, and that shooting therefrom will injure complainant or its property. They say that, under the laws of the state of Virginia, the waters of Back Bay are open to all persons for hunting and

shooting purposes, except in certain ways, and that the excepted ways in which shooting is forbidden are punishable as a crime, and equity has no jurisdiction to enjoin the commission of such acts. They deny that complainant has any exclusive right of hunting in the waters of Back Bay adjacent to or surrounding the property owned by complainant, but claim that the same is open to all the people of the commonwealth, and, even if respondents did disturb complainant or its members in shooting from its own land over the waters of Back Bay by preventing ducks from coming into said waters at said point, that would not have injured complainant or its members in any rights which they had except as individual citizens of the state. They deny that they have done any act constituting a trespass, nuisance, or ouster of or to the complainant, or were the cause of litigation or a multiplicity of suits, and they deny that any act of theirs will result in ruining the value of complainant's property, either for hunting or fishing purposes.

Upon the issues thus made evidence was taken, and a decree was entered by the circuit court perpetually enjoining the defendants, their agents and employes, from using the property claimed by them, known as "Duck Island," for shooting game or fishing, or for any other purpose whatsoever; and from this decree the defendants obtained an appeal.

Counsel for appellee, in their brief, state: "That no evidence concerning the title to the property was introduced, other than that showing the island's nonexistence. * * * The complainant in the court below confined itself to proving the sole and single fact that Duck Island is an artificial structure, and the respondents to disproving that fact." All questions of title, therefore, are eliminated.

[1, 2] On the part of appellee it is claimed that the parcel of land occupied by the appellants is an artificial blind, erected and maintained in violation of law, and that, while a court of equity has no criminal jurisdiction and cannot interfere to prevent the commission of criminal or illegal acts, yet that the act complained of constitutes a criminal offense does not defeat the jurisdiction of a court of equity, if it also constitutes an invasion of rights of property of a pecuniary nature, but that when there is such interference, and there is no adequate remedy at law, the criminality of the act will not divest the jurisdiction of equity to prevent it, citing 16 Am. & Eng. Enc. p. 363; Attorney General v. Utica, 2 Johns. Ch. (N. Y.) 371.

In *Beveridge v. Lacey*, 24 Va. 63, it was said by Judge Cabell: "It is not the province of a court of equity to correct abuses merely public. It interferes on the ground of private injury only."

The principle, however, is well settled, and does not need authorities to support it.

Section 2070a of the Code of Virginia and the private acts governing hunting in the

several counties, including the act in force in the county of Princess Anne (Acts 1901-02, p. 107), are designed to regulate and control the killing and capture of game of all sorts for the benefit, not of any individual, but for the good of all of the citizens of the commonwealth; and it is declared, by section 1338, that "all the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling," etc.; and it has been held that the rights declared by this section are not an arbitrary assumption of power on the part of the state, but are declaratory of the common law. *Taylor v. Com.*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

[3] The right of fowling in these waters being common to all of the citizens of the commonwealth, and those rights being protected by laws which denounce the offenses and prescribe penalties for their violation, it is certain that those facts alone do not confer upon a court of equity jurisdiction to prevent their violation by injunction. The only inquiry, therefore, which it is necessary to make, is to ascertain whether or not the acts of appellants violate any of appellee's rights of property.

The Triple Island Gunning Club was organized and acquired the property which it holds for fishing and hunting thereon, and it alleges that the acts of appellants done and threatened upon the blind or artificial island which they have constructed will result in great injury to complainant, because, owing to the location of the said island directly in the channelway, almost equidistant between complainant's island and other islands used for hunting and shooting purposes, the artificial island of appellants will be in a position to intercept the flies of ducks and other game as they fly over the waters of said bay. The appellee leaves out of view the fact that appellants have rights equal to its own with respect to the waters of Back Bay for the purpose of fishing and fowling; that the Virginian statutes for the protection of game in force with respect to those waters were not intended for its peculiar behoof and benefit but for that of all the citizens of the commonwealth. If, then, appellants in the exercise of their rights of shooting game upon the waters of Back Bay, not with a malicious motive, but in the enjoyment of a privilege common to them with all other citizens, by the firing of guns frighten or intercept the flies of ducks or other game as they fly over the waters of the bay and prevent their coming within range of the premises of the Triple Island Gunning Club, it is *damnum absque injuria*.

This question was long ago examined by Lord Chief Justice Holt. In *Keoble v. Hick-*

ringill, 11 Mod. 74, 11 East, 574, note, the declaration, in an action on the case, that the defendant was possessed of a certain close, and a decoy therein, and that the defendant knowingly, and with intention to injure him by preventing ducks from coming to the decoy, did, on divers times, maliciously shoot off guns, etc., was held to be good, although it was not stated that the defendant entered the close. Lord Chief Justice Holt said that: "While the ducks are in the pond the plaintiff has a property, and the defendant was a wrongdoer to disturb him; but to intend that he entered, or that he came upon his ground, would be too material to intend, it being trespass. But suppose the defendant had shot in his own ground; if he had had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong." Justices Powys and Gould said: "A man may lawfully shoot in his own ground, as to kill venison, but not to destroy maliciously the property of another."

In the case before us we have neither charge nor proof that the acts complained of were done maliciously. On the contrary, it appears that they were done in an honest belief by appellants that they were doing what they had a right to do as citizens of the commonwealth, and, on the authority of the case just quoted, their conduct was not actionable.

To show that there has been such an invasion of its rights as a court of equity will enjoin, appellee relies upon certain Minnesota cases, among them *Lambrey v. Danz*, 86 Minn. 317, 90 N. W. 578. There it appeared that the United States surveyed, selected, and by its patent conveyed to the state of Minnesota as swamp and overflowed land the real estate in controversy, without meandering any of the waters thereon; that the plaintiff had acquired the title of the state thereto; and that in fact the land was covered by the waters of a lake, which it was impossible to use for the purpose of travel or commerce, or for pleasure other than hunting. It was held "that such acts of the United States are conclusive as to the character and title of such land, and that the plaintiff is the absolute owner thereof, and that the public have no right to fowl on the waters thereon." It is further said that "the facts found by the trial court justify its conclusion of law to the effect that the defendant be restrained from shooting on or over the plaintiff's land, or any of the waters thereof."

It is hardly necessary to point out the broad line of distinction between that case and the one under judgment. It was there held that the plaintiff was the absolute owner of the land, and that the public had no right to fowl on the waters thereon, while with us just the contrary appears.

In *Realty Company v. Johnson*, 92 Minn.

363, 100 N. W. 94, 66 L. R. A. 439, 104 Am. St. Rep. 677, the action was brought to enjoin the appellant from shooting wild fowl in their passage over and across a highway on respondent's premises. It was held that: "The owner of the soil has exclusive dominion over it, and the exclusive privilege of hunting, including the unqualified right to control and protect the wild game thereon; that, in granting an easement across his premises for the purposes of a public highway, the owner does not surrender to the public his right to foster and protect wild game on the land, and the public does not acquire any right to pursue and kill the same while it is temporarily passing to and fro across the highway."

In *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921, 117 Am. St. Rep. 703, the plaintiff and appellant sought perpetually to enjoin defendants and respondents from constructing covers or blinds on the surface of a lake in front of a strip of land, to which plaintiff claimed ownership, separating two navigable lakes, and from shooting across or over the strip of land. The court entered judgment for the defendants, and this appeal was taken from the order denying a motion for a new trial. The essential question was whether the decision was justified by the evidence and was consistent with law. The court found the following facts:

"The plaintiff owned the long, narrow strip, and accretions, extending to a creek connecting the waters of the lakes, which formed what is known as a 'duck pass.' Although there was a public highway over the duck pass, by virtue of an agreement with the supervisors of the township the plaintiff had the right of fishing and hunting thereon to the same extent as though the road had not been laid out. The defendants and other persons wrongfully had previously gone on plaintiff's land at the highway and shot ducks and water fowl, and now threaten to continue to do so. The effect of the acts was to practically monopolize the shooting privileges and to largely impair the value of the privileges to the plaintiff and her guests. The defendants had been previously restrained by an order of the district court from going upon the highway for the purpose of hunting, and from hunting or shooting ducks or other water fowl upon the highway. That the defendants have heretofore erected, and intend and threaten to hereafter erect, upon the surface of Upper Ten Mile Lake, directly in front of the said pass, and at a distance of about 325 feet from the shore line thereof, certain covers or blinds, with the purpose and intention of shooting therefrom the wild ducks and other water fowl flying over said pass, and that in hunting said game defendants are liable to shoot over plaintiff's said land. That said lake is of large extent, and it is not necessary, for the mere purpose of hunting or shooting the

said wild fowl, that said defendants should locate such cover or blinds at the place above mentioned. That the probable result of such acts on the part of the defendants will be to injuriously affect the facilities for shooting wild fowl afforded by said pass, and as a consequence thereof the value of said shooting privileges will be to a considerable extent impaired.' There was testimony to the effect that a shotgun would carry shot probably 400 feet, maybe more than that. In consequence, when persons in the blind would shoot towards plaintiff's place, the shot could not help but drop around plaintiff's place, on the point, in the woods, or in the timber, or across the point. A certain amount of the shot would go over the pass. From 30 to 50 per cent. of the shot would go over the land and on the pass. It depends on the winds, and which way the ducks fly. In shooting ducks flying from the north, south, some of these ducks in the ordinary course of shooting naturally would fall, when they were killed, on this pass.

"The first question is whether the facts found show a trespass. Defendants urge that the falling of the shot and of ducks on plaintiff's land, not having been shown to become a nuisance to her, certainly could not be sufficient to constitute a trespass on the part of the defendants. The old maxim that the law does not concern itself with trifles might well be invoked here. This contention involves a misapprehension of the law of trespass.

"With respect to damages as an essential, the common law recognizes two kinds of actions. In the first class there is a direct invasion of another's person or property without permission, which is actionable per se, or which gives rise to a presumption of at least some damage, without proof of any actual damage. Unpermitted contact with the person constitutes assault and battery. Unpermitted invasion of premises constitutes a trespass *quare clausum fregit*. In the second class, actions on the case, in which the damages are indirect and consequential, there can be no recovery unless the plaintiff shows, as an essential part of his case, that damages, pecuniary in kind, proximate in sequence, and substantial in extent, have resulted. In trespass *quare clausum fregit*, it is immaterial whether the quantum of harm suffered be great, little, or inappreciable. * * *

"The mere fact that damage from falling shot or birds would be insignificant, as has been shown, has no logical bearing at all upon the question. The record, besides, conclusively shows substantial damage to the premises. At common law, trespass on the case would have lain. The inherent danger to landowners from guns in the hands of hunters, often irresponsible and reckless, and sometimes malicious, must be adequately guarded against if the law is to be more than a name. As the hazard from the use or

threatened use of dangerous instrumentalities increases, in all branches of the law, the responsibility of the person employing them becomes stricter and may amount to insurance of safety. All remedial resources of law and equity may be exercised to prevent such peril to person or property, or conduct likely also to result in breach of peace.

"The second question is whether or not an injunction will lie under the circumstances. It is elementary that equity will grant that relief to prevent a threatened trespass, especially where there can be no adequate pecuniary compensation, because it would be difficult or impossible to ascertain the damage resulting from such an act, and where otherwise a multiplicity of suits cannot be prevented. * * * There has been a material modification in such cases of the requirements that the injury should be irreparable and the legal remedy inadequate. The tendency of American authorities is to extend the application of the remedy"—and to grant it in many instances, and under many circumstances, where it would formerly have been refused.

In that case the injunction was issued upon the ground that the facts showed that the defendants shot over the plaintiff's land, which constituted a trespass.

[4] Appellee relies also upon section 2368 of the Code, which provides that: "The commonwealth or any other party desiring to repeal, in whole or in part, any grant of land, because it was obtained by fraud or issued contrary to law, or to the prejudice of such party's equitable right, may file a bill in equity for that purpose in the circuit court of the county or the circuit or corporation court of the corporation in which the land, or some part thereof, lies, exhibiting with the bill a certified copy of the patent, and making all the proper parties."

Argument is hardly necessary to show that the case of appellee does not come within the purview of this statute. Nowhere in the record does it appear that the appellee has any equitable right in the grant from the commonwealth of the land in question to George W. Whitehurst on the 15th of February, 1909, and we take it that no private citizen could maintain a suit in equity or otherwise to set aside that grant, unless he could show that he had some right therein which was prejudiced by the grant.

[5] Upon the whole case, we are of opinion that appellee has failed to show any such interference with its rights on the part of appellants as entitles it to the protection of a court of equity; that, if the acts complained of constitute a nuisance, it has only suffered with the general public; and that, if the acts complained of violate the criminal law, those guilty should be proceeded against and punished in the mode which the criminal law prescribes.

It follows that the decree of the circuit court must be reversed, and the bill dismissed, with costs to the appellants.
Reversed.

CARDWELL, J., absent.

(70 W. Va. 211)

COX v. ORNDORFF.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 2*)—ON APPEAL FROM JUSTICE OF PEACE.

On the trial of an appeal in proceedings originating before a justice to try a claim to property levied on, the circuit court does not err in setting aside a verdict which is manifestly contrary to the very right of the controversy.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 2.*]

Error to Circuit Court, Randolph County.

Action by W. J. Cox against W. R. Orndorff. Verdict for defendant was set aside in the circuit court, and he brings error. Affirmed.

Taylor & Allen and W. B. Maxwell, for plaintiff in error. W. E. Baker and S. T. Spears, for defendant in error.

ROBINSON, J. This case involves a trial of the right to property under levy in attachment proceedings. The issue was decided against the claimant by the justice before whom the petition claiming the property as not liable to the levy was originally filed. By appeal, the claimant transferred the case to the circuit court. There a trial before a jury resulted in a verdict against the claimant. On his motion, the verdict was set aside and a new trial was granted. From the order setting aside the verdict and awarding a new trial, the defendant in the issue—the attaching creditor—has obtained a writ of error. He insists that the verdict is in accord with law and the evidence and that he should have judgment accordingly.

The issue was tried on the theory advanced by the claimant that he had a conditional interest in the property at the time the levy was made. On this theory alone, there is evidence to support the verdict which denies the property to the claimant. But the evidence unquestionably shows that the debtors in the attachment proceedings had no interest in the property at any time. If the claimant had no interest in the property at the time of the levy, as indeed the jury found, it is clear that the property belonged to a third party, named in the evidence. Now, the evidence without contradiction shows that the claimant, very soon after the levy, acquired the title of this third party to the property in question. Even if the claimant had no title when the levy was

made, he could rely on the title which he afterwards obtained from the real owner other than the attachment debtors, to secure a release of the property from the levy. It might be necessary for the claimant to amend his petition and proceedings seeking a release of the property from the levy, but such amendment of proceedings begun before a justice will be permitted with great liberality where the same is essential to the establishment of the very right of the case. Since the evidence without contradiction shows that in any event the claimant actually purchased and paid for the property, dealing with the true owner who was in no wise subject to the levy, the verdict was contrary to the right of the controversy, and the court properly set it aside and awarded a new trial. Let the order be affirmed.

(70 W. Va. 226)

BRIAR CREEK RY. CO. v. KANAWHA CENT. RY. CO. et al.

(Supreme Court of Appeals of West Virginia. Jan. 23, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§§ 79, 80*)—RIGHT TO COMPENSATION—WAIVER.

As the constitutional provision, inhibiting the taking of private property for public use without compensation, is a mere limitation upon the power of eminent domain, constituting no abridgement of the power of a citizen to dispose of his property or rights or interests therein by contract, the protection it affords from unlawful entries upon private lands by internal improvement companies may be waived by agreement or conduct creating an estoppel.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205-214; Dec. Dig. §§ 79, 80.*]

2. EMINENT DOMAIN (§ 276*)—REMEDIES OF OWNERS OF PROPERTY—INJUNCTION.

If an owner of land permits a railroad company to build a railroad through his land, under an oral agreement for compensation, or, without protest and with full knowledge of the fact, permits a railroad to be built on his land, he is limited to his remedy for compensation for the land, and cannot prevent the operation of the road by injunction, nor compel removal thereof from the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 774; Dec. Dig. § 276.*]

3. EMINENT DOMAIN (§ 276*)—REMEDIES OF OWNERS OF PROPERTY—INJUNCTION.

A railroad company, claiming part of a common carrier railroad, built on private land, as a private enterprise, by the owners of adjacent lands, as successor in title to the owners of the land on which it was built, and under a location made by it in the manner prescribed by law, against another railroad company, claiming that part of it under a location made by it, is not entitled to an injunction to prevent the latter from taking possession of the road and operating it, pending condemnation proceedings to determine the legal rights of the parties.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 276.*]

Appeal from Circuit Court, Kanawha County.

Action by Briar Creek Railway Company against the Kanawha Central Railway Company and others. From a decree for defendants, plaintiff appeals. Affirmed.

Price, Smith, Spilman & Clay and Linn & Byrne, for appellant. Avis & Hardy, for appellees.

POFFENBARGER, J. In a contest between two railway companies for the same right of way, or rather a railroad already constructed, the appellant sought an injunction to prevent the appellee from taking possession of the property and from operating the railroad, or running its engine and cars over the same; and the court below refused the injunction, sustained a demurrer to the bill and dismissed it, without prejudice to the assertion of any rights the appellant may have in a court of law.

Following the general course of a stream known as Briar creek, crossing it at several points, and running partly on one side thereof and partly on the other, the right of way and railroad are at some places on the lands of the Emmons Tract Coal Company, a tract of about 5,000 acres, and at others on lands owned by Thomas L. and others of the Broun family and D. G. Courtney, a tract of about 4,200 acres; the stream being the line between the two boundaries of land. It was built by the Emmons Tract Coal Company under some sort of a loose verbal arrangement, as a means of developing the natural resources of said two tracts of land, and operated as a common carrier by the Coal River & Western Railway Company and its successor, the Coal River Railway Company. On this point, the bill says: "In the year 1904 and subsequent thereto, as plaintiff is informed and believes, certain negotiations were had between the said Brouns and Courtney on the one side, and the said Emmons Tract Coal Company on the other, for the construction of a railroad up and along Briar creek from Brounland, as a means of developing the coal upon the properties belonging to said parties, respectively; that, pending said negotiations, a railroad track was graded and constructed by or under the direction of the said Emmons Tract Coal Company, or some one connected with it, upon and along the said Briar creek from its mouth at Brounland for a distance of four miles, crossing and recrossing the said Briar creek at various points, and passing over and through the lands of the said Brouns and Courtney and of the said Emmons Tract Coal Company and small pieces belonging to other persons, substantially upon the same route as set forth on plaintiff's map and profile, hereinbefore mentioned; that the said railroad was built without any authority from, and without the consent of, the said Brouns and Courtney, or either of them, so

far as it runs through their land, but that they took no steps to interfere with its building, believing, as plaintiff is informed and believes, that the negotiations aforesaid which were pending with reference to its construction with the Emmons Tract Coal Company would be carried out satisfactorily to them, so that the railroad could be operated in such way as to benefit their tract of land, giving them main line rates and other facilities which they were insisting upon in their said negotiations." Then follows this allegation: "After said railroad was built, the defendant the Coal River & Western Railway Company began to operate it by sending its cars and engines over said railroad and transporting freights and other articles along its line; that until very recently neither the Emmons Tract Coal Company, nor any other person by whom said railroad was constructed, so far as plaintiff is informed, claimed any right to the said railroad track and roadbed, or the right to operate the same, so far as it runs through the said Broun and Courtney land; but the Coal River & Western Railway Company, or its successor, the Coal River Railway Company, was allowed to operate it, as aforesaid, without interference from the landowners on either side."

Shortly before the institution of this suit, the Kanawha Central Railway Company, claiming the railway upon some ground not disclosed by the bill, notified the Coal River Railway Company to cease using the railroad, and itself took possession of the same, placing its engine and cars thereon, and transporting freight and passengers for compensation; and, on March 27, 1906, it instituted condemnation proceedings to obtain title to so much of the right of way as lies within the boundaries of the Broun and Courtney lands. The bill, without indicating the basis of the claim of the Kanawha Central Railway Company to title to the railroad or right to use it, denies such right, and yet sets up no claim of right in the plaintiff, except title to the right of way by virtue of prior location thereof and conveyances from the Brouns and Courtney. The latter obtained its charter January 6, 1906, and claims to have adopted a map and profile of a survey of its route, corresponding substantially with the location on which the railroad is already built, and filed them in the offices of the Secretary of State and the clerk of the county court of Kanawha county, January 9, 1906. On the following day, it purchased the right of way, as so surveyed, through the Broun and Courtney lands, which was conveyed to it by deed on March 21, 1906. It also commenced condemnation proceedings to acquire the right of way through the Emmons Tract Company lands. The Kanawha Central Railway Company was chartered January 22, 1906, and filed its map and profile, covering the same

right of way, February 5, 1906, and on the 27th day of March, 1906, commenced condemnation proceedings to acquire the right of way on which the road is located through the Broun and Courtney lands, as stated. According to the allegations of the bill, these were the conditions under which the Kanawha Central Railway Company took possession of the road and began to operate it.

The allegations of the bill, respecting the construction of the railroad in controversy, fairly construed, show acquiescence in the use of the land on which it is built for general railroad purposes. It was built by the Emmons Tract Company while negotiations, looking to the accomplishment of that end, were pending. Hence it is reasonable and fair to say it was built in reliance upon the negotiations, and upon belief in final consummation of an agreement. In other words, not doubting their ability to reach a satisfactory agreement with the Emmons Tract people, the Brouns and Courtney, by their silence and noninterference, permitted them to build the road, for use as a common carrier, a public railroad, the ultimate ownership, management, and control of which were to be settled and determined by the pending negotiations. These having failed, the present contest for settlement or acquisition of title and control came on, in the form of rival and contending corporations prosecuting and defending actions in the legal forum, in which every question indicated by the bill can be determined, except that of possession of the railroad and right of way, including use and operation, pending disposition of the actions in the law court.

Thus the land and the fixtures, the rails and cross-ties, have been voluntarily devoted to a public use, subject to rights of compensation and title, susceptible of complete vindication, for aught that appears here, by legal proceedings. Under this tacit agreement, the road was built and actually operated as a common carrier. As to the details of the negotiations, the bill is silent. Whether the Brouns and Courtney expected to have stock or interests in the road for the right of way, or to contribute ratably or in some proportion to the cost of construction, or whether they did so, is not disclosed; but we think there is a clear admission of acquiescence in the building of the road, founded upon expectation of both rights and duties respecting the same as a public carrier, on the part of the Brouns and Courtney, to whose rights the Briar Creek Railway Company has succeeded.

[1] Under these circumstances, that company, by its bill, invokes the constitutional provision inhibiting the taking of private property for public use without compensation, notwithstanding the offer of such compensation and intent to pay it, manifested by the commencement of the condemnation proceedings. But for acquiescence in the con-

struction of the road and devotion of the land to public use, subject to the right of compensation, and possibly some interest in the railroad, the case would clearly fall within the protection of the organic provision referred to and the remedy by injunction. The constitutional guaranty was intended, however, for the protection of such persons only as see fit to retain possession and title to their property until compensation therefor shall have been ascertained and paid. Those who voluntarily yield them to a railroad or other internal improvement company, or devote their land to public uses, necessarily waive and lose the benefit thereof. That provision does not abridge the right of a citizen to contract with his neighbor or an internal improvement company. It is only a limitation upon the sovereign power of eminent domain, provided and resorted to for procurement of private property for public use, when the owner thereof declines to yield it voluntarily, either denying the right of appropriation to the use contemplated, or unable to agree upon the amount of compensation.

[2] If a landowner sees fit to permit an entry upon his land by a railroad company or an adjoining landowner, under some sort of an oral agreement, and large expenditures upon the faith of such agreement or permission, carrying an assurance of a conveyance of the title to the land or an easement therein, his situation is similar to that of a vendor by verbal contract, when the vendee has entered into possession and made substantial improvements, or of a father who has orally given a son land, and the latter has entered upon it, and by his labor and outlay of money made improvements of which it would be inequitable and unjust to deprive him. Nothing in either the terms or purpose of the provision invoked imports any intention to destroy or abridge the right of contract on the part of a landowner. On the contrary, all internal improvement companies, as well as all municipal bodies, are empowered, and the state and all individuals have inherent right, to purchase land; and the exercise of these contractual powers is contemplated in all those cases in which the law of eminent domain is available, in case of necessity for the invocation thereof. The latter is supplementary to the contractual power through which most of the acquisitions of private property for public use are made. Logically, therefore, as held by numerous courts, if an owner of land puts a railroad company in possession of a right of way through it, or, without protest, sees a railroad company build its road on his land, he is estopped from asserting title to, or taking possession of, so much of it as is so used by the company. *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *Kakeldy v. Columbia R. Co.*, 87 Wash. 675, 80 Pac. 205; 33 Cyc. 155; 23

A. & E. Enc. L. 701; *Elliott, Railroads*, § 949.

[3] Here the entry was made and the work done by the Emmons Tract Coal Company, whose charter may not have extended its corporate powers to the building and operation of a railroad. As to the extent of its powers the bill is silent; but this does not affect the application of the principle. It was permitted to enter upon the land and lay out thereon large sums of money in building the road, and indirectly to operate the road as a public carrier, and this bill shows an express desire that it shall continue to be such a carrier. This plaintiff, chartered as a railroad company and claiming to be one, has bought the right of way, stands in the shoes of the former owners, and claims right to possession of the road for the purpose of operating it as a common carrier. That contemplated agreement, whatever its terms were, was consummated and executed to the extent of the construction of the railroad and employment thereof in the public service. All that remained was the determination by agreement, if possible, of the ownership thereof, or the interests and rights of the negotiating parties respecting it. The effort to do this having failed, they have resorted to other methods, including condemnation proceedings, in which their legal rights may be fully ascertained and declared. Under such conditions, we are clearly of the opinion that none of these proceedings should be aided or retarded, or the operation of the railroad interfered with, by injunction. There is no technical reason for it. Both the constitutional guaranty and the statute of frauds are eliminated by the conduct of the parties, amounting to an agreement *pro tanto*. In this class of cases, nothing sustains the remedy by injunction but the arbitrary inhibition of the constitutional guaranty. Viewed as a mere trespass or unlawful entry, the wrong is remedial by the ordinary legal possessory actions. There is no element of irreparable injury. Hence waiver of the constitutional guaranty destroys the sole ground of equity jurisdiction.

The decree complained of will be affirmed.

(30 S. C. 363)

ATLANTIC COAST LUMBER CORPORATION v. LITCHFIELD et al.

(Supreme Court of South Carolina. Feb. 19, 1912.)

APPEAL AND ERROR (§ 832*)—REHEARING.

A fact not called to the attention of the court on the original hearing is not ground for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8218; Dec. Dig. § 832.*]

On petition for rehearing. Dismissed, and former judgment modified.

For former opinion, see 73 S. E. 182.

PER CURIAM. At the hearing respondent's attorney admitted that the deed upon which this action is based falls within the rule of construction announced in the recent cases of *Flagler v. A. C. L. Corporation* and *McClary v. A. C. L. Corporation*, and that, if the court adhered to the decision in those cases, it would be conclusive of this appeal, and warrant reversal of the judgment below. The court was asked to review those cases, but declined to do so. Therefore the judgment below was reversed. 73 S. E. 184.

Counsel failed to bring to the attention of the court at that time the fact which is now brought to the court's attention in this petition, to wit, that upon the record in this case, under the authority of the cases above cited, the plaintiff was entitled to have the preliminary injunction maintained until the decision on the merits of the question whether plaintiff had allowed a reasonable time, within which its right must be exercised, to elapse before commencing to cut the timber in question. This, however, does not afford ground for a rehearing; but the court will now make the judgment which it would have made then, if the matter had been brought to its attention.

Therefore it is ordered that the former judgment of this court be modified to this extent, that the judgment of the circuit court be reversed, in so far as it made the preliminary injunction permanent, and that the preliminary injunction remain in force until the hearing. Further ordered that the order staying the remittitur be revoked.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur. WOODS, J., did not participate.

(137 Ga. 531)

FLODING v. FLODING.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§ 117*)—VALIDITY—LEGALITY OF CONSIDERATION—RESTRAINT OF TRADE.

Where, by the terms of an agreement, upon a valuable consideration, one party to the agreement stipulates that he "will not again engage in the manufacture and sale of regalia, alone or in conjunction with others, within five years of the date of this agreement, under penalty of five thousand dollars liquidated damages, to be paid to the party of the second part if this agreement is violated," without any limitation as to space or territory, this stipulation cannot be enforced in a suit brought to recover the sum named as liquidated damages. The agreement is in general restraint of trade and void.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 117.*]

2. DAMAGES (§ 78*)—LIQUIDATED DAMAGES—"THIS AGREEMENT."

One paragraph of a contract stipulated that the party of the first part "will not again engage in the manufacture and sale of regalia, alone or in conjunction with others, within

five years of the date of this agreement, under penalty of five thousand dollars liquidated damages, to be paid to the party of the second part if this agreement is violated." Held, that the forfeiture named applies only to this paragraph of the agreement, and not to any other paragraph of the agreement. (Hill, J., dissents as to this headnote.)

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

3. DAMAGES (§ 80*)—LIQUIDATED DAMAGES OR PENALTY—CONSTRUCTION OF CONTRACT.

Where a contract contains several stipulations, and the sum named in the contract as "liquidated damages" for a breach of the agreement can apply to the breach of any stipulation of the contract, and it is apparent that the damages which could result from the breach of some of the stipulations would be so small in comparison with the sum named as liquidated damages as to make the latter excessive and unjust, the amount of damages stipulated will be held to be in the nature of a penalty, and not "liquidated damages."

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. E. Floding against G. A. Floding. Judgment for defendant, and plaintiff brings error. Affirmed.

C. W. Smith and M. A. Hale, for plaintiff in error. Slaton & Phillips, for defendant in error.

HILL, J. [1] 1. The court did not err in sustaining the general demurrer filed in this case. The contract entered into between the plaintiff and the defendant is as follows: "Articles of Agreement. Know all men by these presents, that I, Mr. Geo. A. Floding, of the county of Fulton, and the state of Georgia, party of the first part, in consideration of the sum representing the value of all regalia supplies, machinery, appliances, and materials used in the manufacture and sale of regalia, as determined by inventory, to be made at the earliest possible date, do hereby grant, bargain, sell, and convey unto W. E. Floding, party of the second part, his executors, administrators and assigns, forever all my regalia business, regalia supplies and equipment, used in the manufacture, sale, and prosecution of said regalia business as per invoice. I further covenant and agree to aid said party of the second part, during the first year following the date of this agreement, by all reasonable means to acquire a working knowledge of the business. Further, said party of the second part shall have full and entire right to the name, 'Floding,' as applied to the regalia business, it being intended that the said party of the second part shall enjoy all benefits whatsoever, derived from the publicity of the prior business of the said party of the first part. Terms of sale shall be as follows: One thousand (\$1,000.00) dollars cash,

to be paid on the completion of the invoice, and the balance to be paid in one year from that date. Deferred payments to draw interest at the rate of 6 per cent. per annum, from the date of closing invoice. Further, said party of the second part agrees to pay to the said party of the first part 5 per cent. of the net earnings of the business, for the first year following the closing of the invoice. The said party of the first part further agrees that he will not again engage in the manufacture and sale of regalia, alone or in conjunction with others, within five years of the date of this agreement, under penalty of five thousand (\$5,000.00) dollars liquidated damages, to be paid to the party of the second part if this agreement is violated. As evidence of good faith ten (\$10.00) dollars, the receipt of which is hereby acknowledged, is paid on the sale price of the said regalia stock. Said party of the first part agrees to lease to the said party of the second part, the first and second floors and a storeroom on the third floor in his business block, 155 Whitehall St., Atlanta, Ga., to be used for the transaction of the regalia business, for a period of three years, at a rental of fifty (\$50.00) dollars per month, payable monthly, the said party of the first part reserving desk room in the office for his private use, and also reserving space in the vault for the filing of valuable papers. The said party of the first part hereby agrees to pay the said party of the second part twenty (\$20.00) dollars per month for the first year following the closing of the invoice, for serving him in the capacity of private secretary, in the collection of accounts or other office work he may have to do. It is intended that the inventory shall be closed and the business turned over to W. E. Floding, party of the second part, on or about October 1, 1909. Signed in duplicate, July 29, 1909."

Is this a valid subsisting contract? If so, it should be upheld. But it is insisted by the defendant that it is in restraint of trade, against public policy, and therefore void. If this latter position is true, then the contract cannot be enforced. Where one, for a valuable consideration, solemnly agrees to do or not to do a particular thing, the law ought and will compel such person to comply with his obligation, unless the imperative mandate of the same authority declares the contract void, or for other reasons it cannot be enforced. Courts cannot make contracts, and can only enforce those that are legal. Is this contract sued on void? In the case of *Seay v. Spratling*, 133 Ga. 27, 65 S. E. 137, the contract sued on stipulated: "That whereas the said G. W. Seay is the owner of seventy-four shares of stock of the Warren Manufacturing Co., a corporation of said state and county, and is the president of said company; and whereas the said E. J. Spratling has offered to pay to the said G. W. Seay the sum of thirty-five hundred (\$3,500) dollars for said seventy-four shares of

stock of the Warren Manufacturing Co., providing said G. W. Seay will tender his resignation as president of the said Warren Manufacturing Co. to said company, and agree to neither directly nor indirectly, as an individual, member of a firm, stockholder in a corporation, or as an employé of an individual, firm, or corporation, engage or take part in any line of business, either selling or manufacturing, similar or like that now done by the Warren Manufacturing Co., which said offer the said G. W. Seay has accepted: Now, therefore, for and in consideration of the premises and the sum of thirty-five hundred (\$3,500) dollars, the purchase price of said stock, the receipt of which is hereby acknowledged, said G. W. Seay does hereby agree and bind himself for a period of two years, beginning the 20th day of August, 1908, and ending the 20th day of August, 1910, neither directly nor indirectly, as an individual, member of a firm, stockholder in a corporation, or as the employé of an individual, firm, or corporation, to engage or take part in any line of business, either selling or manufacturing, similar or like that now or heretofore done by the Warren Manufacturing Company." It was held in the *Seay Case* that in the agreement sued on there was no limitation as to space or territory, and the contract was therefore against public policy and void. But the plaintiff in error here insists that the present case does not come within the ruling made in the *Seay Case*. He further insists that the contract here sued on is severable, and that, though the contract be void in part (which was not conceded), the remainder, if severable, could be enforced as to the part which is legal. After careful and painstaking consideration of the record, we are constrained to hold that that portion of the contract whereby the defendant agreed not to again engage in the manufacture and sale of regalia comes within the ruling made in the *Seay Case*, and numerous other authorities bearing on the same subject. The agreement is that the defendant "will not again engage in the manufacture and sale of regalia, alone or in conjunction with others, within five years of the date of this agreement, under penalty of five thousand dollars liquidated damages, to be paid to the party of the second part if this agreement is violated." Here the trade is lawful, but there is no limitation as to space or territory, and this portion of the contract comes clearly within the ruling made in the *Seay Case*.

[2] 2. Is the contract severable, and, if so, is the stipulation as to the forfeiture of the \$5,000 to the plaintiff to be regarded as a "penalty," or as "liquidated damages"? If it is a penalty, then the plaintiff cannot enforce the payment of "liquidated damages," even if it be held that the contract is severable. And this involves the question, Is the sum stated as a forfeiture so unreason-

able when applied to the other paragraphs of the contract (if it can be applied to them) as to render it void as being excessive and unreasonable? The majority of the court is of the opinion that the forfeiture is confined to that portion of the contract already held to be void as in restraint of trade, but the writer does not concur in this view, as the language is that the sum stated is "to be paid to the party of the second part if this agreement is violated." The writer thinks that the words "this agreement" were intended to refer to the entire agreement, and not to one paragraph of it. These words are previously used in the same sentence, wherein the defendant stipulates that he will not again engage in the regalia business "within five years of the date of this agreement." The words "this agreement," so previously used, can only refer to the contract as a whole, since no date of the contract is given except that immediately preceding the signatures thereto, which manifestly is inserted as the date of the execution of the contract as one instrument, and, where they again appear in the same sentence and closely following their use in referring to the entire contract as "this agreement," the writer thinks the second use of the same words must have been intended to have the same meaning; i. e., to denominate the entire agreement. And the argument now made only applies when the words "this agreement," as used in reference to the violation of the agreement, are construed as having application to all the stipulations of the contract which the defendant undertakes to perform.

[3] In the view we take of the entire case, however, the result is the same, whether the majority or the writer be correct in the construction which should be placed upon the words referred to. In the case of *Swift v. Crow*, 17 Ga. 609, the court held: "T. C. executed a bond by which, in consideration that S. would yield up to him a certain mortgage, given to secure payment of a promissory note due by T. C. to S., he bound himself to pay the sum of \$100 to S., upon condition that he should fail to give to S. acceptable security on this note within 10 days, and should also fail, before the 1st of May then next, in giving to S. a mortgage on real estate as further security, and pay the recording fee for the same. Upon action brought for a breach of said bond, held, that the sum stipulated was in the nature of a penalty, and not liquidated damages." And Judge Starnes, in delivering the opinion, on page 611, said: "But where the covenant is to perform several things or pay the sum specified, and the claim may extend to the breach of any stipulation, in such case, it seems to be well settled that the sum specified should be considered in the nature of a penalty. *Astley v. Weldon*, 2 Bos. & P. 845;

Kemble v. Farren, 6 Bing. 141; *Davies v. Panton*, 6 B. & C. 210; Ch. on Con. 863, 854; Sedg. on Dam. 406, 407, 408. Now, the agreement in this case was first to give acceptable security on the note in 10 days; secondly, before the 1st day of May then next to give a mortgage on real property as additional security; thirdly, to pay the fee for recording the same. Here, then, are two or three stipulations, a failure in either of which would appear to be a breach of the bond. And yet, if that failure were only to pay the recording fee, would it not be most unreasonable that the sum of \$100 should be paid as damages?" The doctrine laid down in the case just cited accords with that announced by text-writers on the subject. See 1 *Sutherland on Damages*, §§ 294, 295; *Fetter on Equity*, § 72. Assuming, in the present case, that the sum named as liquidated damages was intended to apply to any breach of the agreement, the contract contains a provision in reference to the lease of certain floors of a building and a store room, the rental for which during the term of the lease would amount to \$1,800, and another stipulation whereby the defendant agrees to employ the plaintiff in a stated capacity for one year, and pay him a compensation for his services amounting to \$240. With respect to at least these stipulations of the contract, under the ruling in *Swift v. Crow*, supra, the forfeiture named in the contract would be so disproportionate to the damages which would be occasioned by a breach of either that it must be construed to have been intended as a penalty and not as liquidated damages. It follows that on either view of the case the plaintiff could not recover in a suit brought for liquidated damages. If the sum named as a forfeiture be considered as applicable only to that paragraph of the contract in which the defendant undertook not to again engage in the business of manufacturing and selling regalia, and so considered would be regarded as liquidated damages for a breach of this undertaking, the plaintiff could not recover damages for such breach because of the invalidity of that portion of the contract. On the other hand, if applicable to all the stipulations of the contract, under the principles of law herein announced, the forfeiture would have to be treated as being in the nature of a penalty, and the plaintiff could only recover actual damages sustained from a breach of the legal provisions of the contract (which he does not lay claim to in his petition), and could not recover as liquidated damages the forfeiture specified in the contract and for which he brings suit.

Therefore the court committed no error in dismissing the petition on the demurrer thereto.

Judgment affirmed. All the Justices concur.

(127 Ga. 537)

BANKS v. TUCKER et al.
(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

INTERLOCUTORY INJUNCTION.

Under the evidence and the pleadings in the case, the court below did not abuse his discretion in refusing to grant the interlocutory injunction.

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Action by O. O. Banks against J. L. Tucker and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. S. Wimberly, for plaintiff in error. Rogers & Knox, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 551)

BARFIELD et al. v. MAYOR, ETC., OF CITY OF MINTER.
(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

REFUSAL OF INJUNCTION.

There was no error on the part of the court below in refusing to grant the injunction prayed for in this case. *Central of Ga. Ry. Co. v. State*, 104 Ga. 843, 31 S. E. 531, 42 L. R. A. 518; *Town of Constitution v. Chesnut Hill Cemetery Ass'n*, 136 Ga. 778, 71 S. E. 1037.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action by B. F. Barfield and others against the Mayor, etc., of the City of Minter. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hal B. Wimberly, for plaintiffs in error. K. J. Hawkins, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(127 Ga. 495)

MCCURDY v. FAMBRO et al.
(Supreme Court of Georgia. Feb. 13, 1912.)

(*Syllabus by the Court.*)

1. REVIEW ON APPEAL.

The assignments of error upon rulings of the court relative to the admissibility of evidence, and as to the disallowance of certain amendments which were offered to the plaintiff's petition, were without merit. The evidence was of such character as to require a verdict in favor of the defendants, and the court did not err in directing a verdict in their behalf.

2. MORTGAGE FORECLOSURE.

No point was raised in the record as to whether a mortgage on realty can be foreclosed against a lunatic unless a guardian ad litem be duly appointed in the foreclosure proceeding.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Angeline McCurdy and Fannie Fambro and others. From the judgment, McCurdy brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error. Moore & Branch and Jno. W. Cox, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified, and HILL, J., not presiding.

(127 Ga. 550)

LOUISVILLE & N. R. CO. v. SPENCE.
(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

1. REVIEW ON APPEAL.

While the charges complained of may not have been in all respects accurate, in the light of the evidence and of the entire charge, there was no error requiring a reversal, for any reason assigned.

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict; and, the presiding judge having refused to grant a new trial, this court will not reverse the judgment.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by S. A. Spence against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. W. Blair and E. W. Coleman, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 428)

GORDAY et al. v. SCOTT & CO.
(Supreme Court of Georgia. Jan. 12, 1912.)

(*Syllabus by the Court.*)

1. RECOVERY OF PERSONALTY—SUFFICIENCY OF EVIDENCE.

Under the evidence in this case the defendants were not entitled to a judgment against the plaintiffs, upon the demand of the former for the value of certain mules, and the hire of the same, delivered to the latter in payment of certain promissory notes due at the time of the delivery of the mules.

2. SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT.

The evidence did not authorize the verdict directed by the court, and must for that reason be set aside and a new trial granted.

3. SUFFICIENCY OF EVIDENCE—INSOLVENCY OF PLAINTIFFS.

No opinion is expressed as to the sufficiency of the evidence to show the insolvency of the plaintiffs, which was relied on by the defendants as a basis of their right to set off certain alleged damages against a liquidated demand of the plaintiffs.

*(Additional Syllabus by Editorial Staff.)***4. SALES (§ 347*) — REMEDIES OF PARTIES — PAYMENT OF PRICE — DELIVERY OF PERSONALTY — RECOVERY BY BUYER.**

Where plaintiffs sold defendants a sawmill outfit, taking their notes for the price, and, when certain of the notes became due, defendants, being unable to pay them in cash, agreed to deliver four mules which they were using in operating the sawmill at a stipulated price, and an agent of plaintiffs, to whom defendants delivered the mules, gave defendants notes not yet matured in place of the matured notes, which they were to receive under the agreement, and after maturity of the notes delivered to defendants, plaintiffs brought suit, and at the trial tendered to defendants the notes which should have been delivered to them, defendants were not entitled to recover the value of the four mules and their hire, but their delivery constituted a payment of the notes to the extent of their stipulated price, which payment the defendants might set up in defense to the suit on the notes.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

5. JUDGMENT (§ 731*) — CONCLUSIVENESS — MATTERS CONCLUDED.

In an action on notes for the price of a sawmill outfit, a contention that a plea of partial failure of consideration was *res judicata* was not sustained by proof that in an action on another note of the same series the defendants set up failure of consideration, but that on the trial the plea was stricken on special demurrer, not going to the merits of the defense.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1259, 1261; Dec. Dig. § 731.*]

Error from Superior Court, Turner County; Frank Potts, Judge.

Action by Scott & Co. against S. T. and J. H. Gorday. Judgment for plaintiffs, and defendants bring error. Reversed.

Haygood & Cutts, for plaintiffs in error. J. H. Pate and Crum & Jones, for defendants in error.

BECK, J. Scott & Co. brought suit against S. T. and J. H. Gorday on four promissory notes, each being dated January 27, 1906, and due, respectively, February 1, April 1, June 1, and August 1, 1907. The defendants admitted a *prima facie* case and assumed the burden of proof. It appears that the four notes sued on, together with certain others, were given for the purchase of a certain sawmill outfit, consisting of a boiler, engine, wagons, mules, a barrel of lubricating oil, and other articles of personal property going to make up the outfit. The defendants pleaded, among other issues, a partial failure of consideration, alleging that the plaintiffs failed to deliver to defendants one of the mules included in the outfit, which it is averred died in possession of the plaintiffs before it was delivered, being of the value of \$175, and that a barrel of oil, worth \$15, was not delivered; and they claimed a credit for the aggregate of these two amounts. Defendants in their plea alleged, further, that subsequently, after certain of the notes which they had given

for the outfit became due, being unable to pay the same in cash, they agreed to deliver four mules, which they were then using in and about the business of operating the sawmill, at the stipulated price of \$850; that this was to be in payment of the indebtedness to the plaintiffs which was past due, and the note next maturing, and the sum of \$50 on one of the notes which became due subsequently; that the plaintiffs accepted the mules under this agreement, but when the plaintiffs sent an agent of theirs to take possession of the mules, he left with an agent of the defendants, who did not know of the terms of the contract upon which the mules were to be delivered to the plaintiffs, certain notes which were not then mature, instead of the notes which were past due, in violation of the contract between the parties; and that afterwards, on the 17th day of October, 1906, the plaintiffs maliciously and without probable cause instituted attachment proceedings for the purchase money of the property sold by them to the defendants, which they alleged to be due and unpaid, and the attachment was levied on the sawmill and other personal property constituting the sawmill outfit. The defendants further pleaded that possession of the four mules which were delivered by the defendants' agent to the plaintiffs was obtained by fraud; that they had tendered back to the plaintiffs the notes which had been left when the mules were taken away; that they had demanded the return of the mules by the plaintiffs, which demand was refused; and that this amounted to a conversion of the property. Defendants allege the insolvency of the plaintiffs, and say that they are entitled to recover the value of the mules and their hire, and also damages incurred in consequence of the suing out of the attachment and the seizure of the sawmill outfit. At the close of the evidence the court directed a verdict in favor of the plaintiffs for the amount of \$897, principal, together with interest, costs, and attorney's fees.

[1,4] 1. We do not think that the defendants were entitled to recover the value of the four mules and their hire, as they contend in their plea. The suit was brought upon the four notes which were not due at the time the plaintiffs took possession of the four mules under the contract set forth in the plea, being the notes which were delivered to the defendants at that time. Plaintiffs in bringing this suit recognized the terms of the contract relied upon by the defendants to be as alleged by the defendants themselves; and when the notes, for the payment of which the mules were delivered to the plaintiffs, were tendered to the defendants at the trial as their property, the plaintiffs had complied with their part of the contract in reference to the payment of the past-due indebtedness at the time of the making of the contract. And even if they had never tender-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed these notes, the defendants were not and could not have been injured by the retention of the notes in the hands of the plaintiffs. By the delivery of the mules the defendants paid the notes past due and became entitled to a credit on the notes not then due in an amount in excess of the stipulated price of the mules over the aggregate of the past-due notes, and could have pleaded payment as a defense to a suit on the notes, whether brought by the plaintiffs themselves or by any one else to whom the notes might have been transferred, the notes not having been transferred before maturity.

[2, 5] 2. The defense of a partial failure of consideration, based upon the failure of the plaintiffs to deliver one of the mules and a barrel of oil included in the contract of purchase and sale between the parties, was met by a contention on the part of the plaintiffs that the defendants were not entitled to a credit equal to the aggregate value of the oil and the mule, because the matter of this credit was res adjudicata between them, and became so as the result of a suit between the parties in the city court of Ashburn on a note dated January 27, 1906, being one of the series of notes given for the purchase price of the property in controversy. The record of the suit just referred to was introduced in evidence. It appears from the plea filed in that case that the defendants set up a failure of consideration, based upon the non-delivery of a mule, of the value of \$175, a yoke of oxen, of the value of \$75, and a barrel of oil, of the value of \$15. Upon the trial the plea of failure of consideration was stricken on special demurrer not going to the merits of the defense, and a judgment was rendered for the plaintiffs in an amount equal to the sum sued for, less \$75; it being admitted on the trial by counsel for plaintiffs that the defendants were entitled to this credit of \$75 "on account of oxen." Thus it appears that the issue raised in the present case by the plea of failure of consideration was not adjudicated in the case tried in the city court of Ashburn. The plea of failure of consideration here being considered was stricken from the plea in the former suit, and no evidence was introduced or could have been introduced to sustain it; and the court below erred in holding in favor of the plaintiffs' contention that the matter involved in that particular part of the defendants' plea now under consideration was res adjudicata.

[3] 3. Inasmuch as the case is to go back for another trial, it is unnecessary to pass upon the question of the sufficiency of the evidence to support the defendants' contention that plaintiffs were insolvent; their insolvency being the basis of defendants' right to plead, against plaintiffs' liquidated demand, damages alleged to have been sustained in consequence of the institution of the attachment proceedings, which was, ac-

cording to the contention of the defendants, malicious and without probable cause.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 352)

LINDER v. BROWN.

(Supreme Court of Georgia. Jan. 10, 1912.)

(Syllabus by the Court.)

1. PERSONAL INJURIES.

The petition set out a cause of action.

2. TRIAL (§ 31*)—CONDUCT IN GENERAL—INSPECTION OF PREMISES—WAIVER OF OBJECTION.

Whether or not, pending the trial of an action for damages to the plaintiff, the presiding judge can properly send the jury to inspect the place where the injury occurred, on motion of counsel for one party, and without the consent of the other party, yet where counsel for the latter is present when the motion is made, and interposes no objection, he will be considered as waiving any right to object which he may have, and mistrial will not be granted upon motion therefor made after the jury have been sent to the place and allowed to inspect it. On the subject of allowing the jury to inspect the premises see *Broyles v. Priscock*, 97 Ga. 643 (3), 25 S. E. 389; *Johnson v. Winship Machine Co.*, 108 Ga. 554 (2), 33 S. E. 1013; *County of Bibb v. Reese*, 115 Ga. 348 (3), 41 S. E. 636; *Central of Georgia Ry. Co. v. Dukes*, 134 Ga. 588 (3), 68 S. E. 321.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 55, 84; *Dec. Dig.* § 81.*]

3. OPERATION OF RAILROADS—BLOW POSTS—SIGNALS AT CROSSING.

Under the pleadings and evidence, the duty of a railroad company to erect blow posts 400 yards from a public crossing, and the declaration that a failure to do so is a misdemeanor, as stated in Civil Code 1910, § 2676, was not relevant. But the facts authorized a charge as to the duty of engineers to signal the approach of their trains to public road or street crossings in the limits of cities, towns, and villages, contained in Civil Code 1910, § 2677 (Civ. Code 1895, § 2224).

4. RAILROADS (§§ 351, 325*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF INFANT.

In a suit by a minor nearly 10 years of age for a personal injury resulting from the operation of a railroad train, after giving in charge section 2781 of the Civil Code of 1910 (to the effect that no person shall recover damages from a railroad company for an injury done by his consent, or caused by his own negligence, and touching the doctrine of contributory or relative negligence), and section 4426 (to the effect that, if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he cannot recover), it was inaccurate to add: "I charge you that this law applies to grown-up people." A railroad company is not liable to either a grown person or a minor for damages to him caused by his own negligence, or where he could have avoided the consequences of the defendant's negligence by the use of due care.

(a) The standard of due care on the part of an adult and a child of tender years is different, and this is what the presiding judge doubtless meant; and if the instructions as to diligence and negligence on the part of the plaintiff (a boy not quite 10 years of age) had been correctly given, they might have been

construed in connection with this charge, and have rendered a reversal because of it unnecessary.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. §§ 351, 325.*]

5. NEGLIGENCE (§§ 85, 141*)—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF INFANT—"DUE CARE."

"Due care" in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation. Due care according to age and capacity is all the law exacts of a child of tender years. Neither the average child of its own age, nor the prudent man, is a standard by which to measure its diligence with legal exactness. Civil Code 1910, § 8474; W. & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Id., 83 Ga. 512, 10 S. E. 197.

(a) Charges which fixed the standard of care due by a child nine years of age as "what could be expected by a party of [the] age this plaintiff is proven to have been," and which stated that if both parties were at fault, but the jury could find "that the plaintiff, considering his age, could not have avoided the accident by the exercise of ordinary care," then he would not be prevented from recovering, did not correctly state the rule as to due diligence on the part of the plaintiff, there being an allegation in his petition and some evidence tending to throw light on his capacity.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129, 382-399; Dec. Dig. §§ 85, 141.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2221, 2222; vol. 8, p. 7643.]

6. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTION.

While the extent of pain and suffering arising from a physical injury is not susceptible of proof with exact certainty, and the measure of the amount of damages allowable therefor rests in the enlightened conscience of impartial jurors, the presiding judge should not have charged: "If you do not find that he is entitled to recover from permanent injuries, you would then determine what he would be entitled to recover from his pain and suffering, whether permanent or not; that is a matter not required to be proven." Such a charge was calculated to lead the jury to believe that they could find damages on account of pain and suffering, without any evidence to show that any had been endured in the past or would probably be endured in the future.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

7. DAMAGES (§ 205*)—ASSESSMENT—DISCRETION OF JURY.

In a suit to recover for injuries to the person of a plaintiff, if damages are sought on account of expenses incurred, pecuniary losses which have resulted from the injury, and the like, such matters are susceptible of proof; and as to such elements of damage the standard is not to be left solely to the discretion of the jury. But where special damages of the character indicated are not sought to be recovered, but the damages claimed are for pain and suffering, the measure rests in the enlightened conscience of impartial jurors, seeking to do justice between the parties. Augusta & Summerville R. Co. v. Randall, 85 Ga. 297 (8), 11 S. E. 706; Crown Cotton Mills v. McNally, 123 Ga. 35 (6), 51 S. E. 13; Southern Ry. Co. v. Broughton, 128 Ga. 814, 58 S. E. 470.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 530; Dec. Dig. § 205.*]

8. INFANTS (§ 74*)—ACTIONS—PARTIES—NEXT FRIEND.

Where a suit is brought by a minor for a tort committed upon him, the proper method is for the petition to be brought in the name of the minor, by his guardian ad litem or next friend. A suit in the name of a person as next friend of the minor has been held to be substantially a suit by the minor, and amendable, so as to state the case correctly, and good after verdict. Lasseter v. Simpson, 78 Ga. 61, 3 S. E. 243; Walden v. Walden, 128 Ga. 126, 132, 57 S. E. 323; Hart v. Atlanta Terminal Co., 128 Ga. 764, 772, 58 S. E. 452; Van Pelt v. Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622; Ellington v. Beaver Dam Co., 93 Ga. 55, 19 S. E. 21.

(a) Where the point is expressly raised by special demurrer that the suit is brought in the name of a person as next friend of the minor, instead of by the minor himself through his next friend, the better practice is to sustain the demurrer, and allow the petition to be amended, so as to proceed accurately.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 188-190; Dec. Dig. § 74.*]

9. MOTION FOR NEW TRIAL.

None of the other grounds of the motion for a new trial require special discussion.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by G. W. Brown, next friend, against T. J. Linder, lessee. Judgment for plaintiff, and defendant brings error. Reversed.

T. W. Teasley and A. G. & Julian McCurry, for plaintiff in error. Jas. H. Skelton, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 550)

HARRELL v. FORSYTH COUNTY.

(Supreme Court of Georgia. Feb. 14, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION—ERROR CURED BY GIVING OTHER INSTRUCTIONS.

The defendant having introduced no evidence, but the witnesses for the plaintiff having been cross-examined at length, and not being in exact accord in some respects, even if it were not entirely apt to charge that the plaintiff must show her right to recover by a preponderance of the evidence, and to give in charge section 5730 of the Civil Code of 1910 on that subject, this furnishes no ground for a reversal, where the court charged fully the law touching the right of the plaintiff to recover and the defense of the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718, 715, 716, 718; Dec. Dig. § 296.*]

2. BRIDGES (§ 46*)—DEFECTIVE BRIDGES—INJURIES—ACTION—EVIDENCE OF REPAIRS.

Under the decisions in Georgia Southern & Florida R. Co. v. Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118, and L. & N. R. Co. v. Barnwell, 131 Ga. 791, 63 S. E. 501, on the trial of an action against a county, brought to recover damages on account of a personal injury alleged to have resulted from a defect

tive bridge forming a part of a public road, one alleged defect being a want of proper guard rails, there was no error in rejecting evidence that when a new bridge was built, after the injury, banisters were placed on both sides from end to end of the bridge.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 118; Dec. Dig. § 46.*]

8. INSTRUCTIONS.

The assignment of error on the ground that the court erred in failing to charge the jury with sufficient distinctness as to results of a failure of county authorities to repair a bridge forming part of a public highway within a reasonable time was without merit.

4. APPEAL AND ERROR (§ 1006*)—REVIEW—SUFFICIENCY OF EVIDENCE.

No error of law requiring a new trial appearing, two verdicts having been rendered in favor of the defendant on successive trials of the case, there being sufficient evidence to authorize the finding, and it having been approved by the presiding judge, this court will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by Susie Harrell against Forsyth County. Judgment for defendant, and plaintiff brings error. Affirmed.

H. L. Patterson, for plaintiff in error. J. P. Brooke, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 495)

CITY OF ATLANTA v. CALLAWAY.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§§ 153, 201*)—PERSONS ENTITLED TO COMPENSATION—POSSESSION UNDER BOND FOR TITLE—EVIDENCE.

In *Fulton County v. Amorous*, 89 Ga. 614 (3), it was held: "One in possession of land under a bond for titles from the true owner, with purchase money partly paid, is the owner of the freehold relatively to all persons except the maker of the bond and those claiming under him. In case the premises are taken or damaged for public purposes, the possessor under the title is entitled to full compensation; certainly so by showing affirmatively the acquiescence of his vendor in his claim, and this may be done by producing in evidence a conveyance from the latter, made pending the action and passing the absolute title in fee simple." *Held*, that the ruling there made, upon application to review and overrule the same, after examination and consideration, is reaffirmed. *Towaliga Falls Power Co. v. Washington*, 136 Ga. 397, 71 S. E. 731. The ruling in *L. & N. R. Co. v. Ramsay*, 134 Ga. 107 (2), 67 S. E. 652, is not in conflict with what is held in the two cases cited above, as in the *Ramsay* Case the plaintiff was not in possession under a bond for title with part of the purchase price paid, but attempted to show title by a deed executed subsequent to the commission of the trespass and to the commencement of the action.

(a) In view of such holding, the court did

not err in admitting in evidence a conveyance from the true owner to the plaintiff, who was in possession of the land under a bond for title, with the purchase money partly paid; such conveyance having been made pending the action and passing the absolute title in fee simple.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 407-416; Dec. Dig. §§ 153, 201.*]

2. DEMURRERS.

The demurrers to the petition were so manifestly without merit that it is unnecessary to specifically deal with them. There was evidence to support the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by A. V. Callaway against the City of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Mayson and W. D. Ellis, Jr., for plaintiff in error. T. J. Ripley, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 510)

ROBERTS v. ROBERTS et al.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ACCOUNTING AND SETTLEMENT—SUFFICIENCY OF EVIDENCE.

The verdict was not supported by the evidence, and the court erred in refusing to grant a new trial upon that ground.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. §§ 473, 474.*]

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by Mrs. M. E. Roberts and another for an accounting and settlement against W. A. Roberts, Jr., administrator of W. A. Roberts, Sr. Judgment for plaintiffs, and defendant brings error. Reversed.

Crum & Jones, for plaintiff in error. C. B. Garlick and E. L. Brinson, for defendants in error.

BECK, J. Mrs. M. E. Roberts, the widow of W. A. Roberts, Sr., and W. M. Fulcher, as guardian for James, Susie, Willie, and Ethel Roberts, minor children of W. A. Roberts, Sr., brought a petition for accounting and settlement against W. A. Roberts, Jr., the administrator of W. A. Roberts, Sr., in the court of ordinary of Burke county, Ga. The administrator made answer, and after trial and judgment the case was appealed to the superior court. The administrator answered that he had completely and legally disposed of all the estate left by his intestate, and that there was no money, property, or effects belonging to said estate in his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† 13 S. E. 201.

hands as such administrator. The jury returned the following verdict: "We, the jury, find for the widow the amount of insurance policy, less the premiums paid on same, and the premium due for the unexpected [unexpired] year." Thereupon it was adjudged that the plaintiffs recover of the defendant, W. A. Roberts, Jr. the sum of \$3,000 principal debt, \$297 interest to judgment, and all costs of court. The court overruled a motion for a new trial, and the defendant excepted.

The finding of the jury in this case and the judgment of the court was for the amount of an insurance policy issued by the Franklin Life Insurance Company, of Springfield, Ill., upon the life of the intestate of the defendant. There was some conflicting evidence as to the liability of the administrator to account for certain personal property which had gone into his hands, other than the insurance policy referred to. The finding of the jury seems to be in favor of the defendant's contention that he had accounted for the personal property referred to, and the verdict returned is based upon the contention that the plaintiffs were entitled to recover the proceeds of the life insurance policy, less certain premiums.

We are satisfied, after an examination of the evidence in the record, that the verdict is not supported by the evidence. The defendant's intestate, as appears from the uncontradicted evidence, at the time of his death was indebted upon a promissory note to the defendant in the sum of \$4,000; and it also appears from the uncontradicted evidence that the policy of insurance had been transferred to him as collateral security for the payment of the indebtedness of the intestate to the defendant, who became the administrator of the former. There is not, so far as we can discover, any evidence in this record impeaching the validity of the note representing the indebtedness of W. A. Roberts, Sr., to W. A. Roberts, Jr. It is true, as appears from the evidence, that the note had been given to the payee for an interest in a business in which the decedent and the defendant in this case were partners, and in the course of his testimony the defendant undertook to show that in the conduct of the enterprise or business in which they were interested as partners certain losses had occurred; and it is insisted in the argument of counsel that this testimony of the defendant was so vague, indefinite, and unsatisfactory that the jury, especially in view of other testimony in the case which tended to show that the defendant had not suffered all the losses claimed by him, could infer that the note did not represent any valid indebtedness of the maker to the payee. But after all the evidence in regard to the losses in the business referred to is considered, and the view thereof most favorable to the plaintiffs'

contention is taken, nothing is found impeaching the validity of the note referred to. If that note was invalid for any reason, if it did not bona fide represent an indebtedness of the maker to the payee, the burden was upon the plaintiffs to show wherein or to what extent the note was invalid or unenforceable. This burden, so far as we can discover from reading the record, the plaintiffs failed entirely to carry; or, to speak more exactly, they did not attempt to carry it. It can serve no useful purpose to set forth, literally or in substance, the evidence contained in this voluminous record; but it is adjudged that the evidence did not support the verdict, and that the court erred in refusing to grant a new trial upon that ground.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 530)

STEVENS v. STATE.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 47*)—MANSLAUGHTER—STATUTORY PROVISION.

If a wife has been suspected by her husband of infidelity, and some little time thereafter she stated to him that she had been guilty of adultery, and expressed an intention to see her paramour again, and if thereupon her husband seized a gun and killed her, such facts were not sufficient, under Penal Code 1910, § 65, to authorize the submission to the jury of the theory of voluntary manslaughter, though a charge on that subject was requested.

(a) The evidence for the state showed a plain case of murder. The statement of the accused alone raised the question determined in the preceding headnote.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 71; Dec. Dig. § 47.*]

2. MOTION FOR NEW TRIAL—GROUNDS.

None of the grounds of the motion for a new trial are such as to require a reversal.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Hezekiah Stevens was convicted of murder, and brings error. Affirmed.

Green & Michael and Geo. C. Thomas, for plaintiff in error. Clifford Walker, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Stevens shot and killed his wife. He was convicted of murder, moved for a new trial, and, upon the overruling of his motion, excepted.

[1] 1. The case turned upon one leading point, whether the evidence or the prisoner's statement involved the theory of voluntary manslaughter, so that a failure to charge on the subject, or a refusal to give in charge certain requests, requires a reversal. The evidence presented no such theory. It showed a shocking, brutal murder. Did the statement of the accused require a charge on that

subject, on request? The statement was in brief as follows: He had received warnings that his wife was unfaithful to him. On a certain Tuesday evening he pretended that he was going to a neighboring town, but returned about half past 8 o'clock, and found the lamp turned low, his wife in the act of turning down the bedclothes, and the man with whom she was suspected of being intimate sitting down, with his slippers untied. The man left, and the wife made some excuse. On the following Sunday the wife left, saying she was going to see her mother, and remained away about three weeks. On her return she expressed an intention to pack up her personal property and leave. Some words followed as to the rumors in regard to her, and she said (referring to the man in question), "Yes, I had him, and there isn't a darn bit of help for it," and "if Jim can't come in the house you pay rent in, he can come in one you don't pay rent in." Thereupon the accused seized a gun and shot her. He did not know what he was doing. That is the reason he shot her.

Reduced to its finality, the question is whether a statement by a wife to her husband that she has been guilty of adultery and an expression of an intention to see her paramour again may suffice to reduce the killing of her by her husband to manslaughter. Penal Code 1910, § 65, declares: "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." It was argued that while the words uttered by the wife would not justify the homicide, or amount to an assault, or an attempt to commit a serious personal injury on the accused, they might amount to "other equivalent circumstances to justify the excitement of passion," and suffice to reduce the crime to voluntary manslaughter. We cannot concur in this construction of the statute. Immediately following the words last quoted, it is declared that provocation by words shall in no case be sufficient to reduce the crime from murder to manslaughter, thus excluding words alone from amounting to "equivalent circumstances." *Edwards v. State*, 53 Ga. 428.

It is not necessary to undertake to define accurately that expression; but an illustration or two may not be out of place. An attempt to commit a serious personal injury on a member of one's family in his presence, the catching of a man in adultery with one's wife, or a violent trespass on one's

property in his presence, and a killing then taking place, might authorize a submission to the jury of the theory of voluntary manslaughter. But mere words will not. In some cases, where it may appear at first glance that words were treated as authorizing a submission of that theory, a careful consideration will show some added fact or conduct on the part of the person slain. Thus, in *Golden v. State*, 25 Ga. 527, 533, the deceased seized a tumbler. In *Mack v. State*, 63 Ga. 693, the person killed had a knife in his hand, raised above the father-in-law of the accused, whom he held by the waist. In *Mize v. State*, 135 Ga. 291, 69 S. E. 173, there was evidence tending to show an absence from home of a little daughter of the accused, a boastful declaration by a boy indicating that he had had illicit relations with her, when questioned by her father, the presence of the boy's father with a gun, a firing by the accused at the boy, the presenting of a gun toward the accused by the boy's father, and the shooting of the father by the accused. While some broad language was used in the opinion, it was not ruled that words alone can reduce murder to manslaughter.

[2] 2. None of the other grounds of the motion were such as to require a new trial. The evidence fully sustained the conviction.

Judgment affirmed. All the Justices concur.

(137 Ga. 496)

WARWICK v. MADDOX.

MADDOX v. WARWICK.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 275*)—SALES—IRREGULARITIES—ESTOPPEL TO DENY VALIDITY.

In 1893 certain real estate was regularly offered for sale by the sheriff of Fulton county. The defendant in the *fi. fa.* had previously applied for a homestead covering the property, naming his wife as sole beneficiary. On the day of the sale, when the property was offered by the sheriff, the defendant and his counsel were present. The counsel, in the presence of the defendant, announced that there was a homestead application pending, and whoever bought the property would buy subject to this application. After such announcement the property was cried off, and C. D. Maddox, being the only bidder, became the purchaser for the price of \$10. A sheriff's deed was regularly executed and recorded. After the sale the defendant continued in possession, residing on the property until 1910, when his wife died; there being no other beneficiary of the homestead estate. Immediately after the death of the beneficiary, Maddox demanded possession of the defendant in *fi. fa.*, and upon a refusal to surrender possession instituted rule proceedings against the sheriff and the defendant in *fi. fa.* to be put in possession of the property. *Held:*

(a) The court correctly held that the applicant was entitled to possession of the property, although the *fi. fa.*, which purported to be signed by the clerk of the superior court of Fulton county, had not been actually signed by him,

and for that reason might have been invalid. *Biggers v. Winkles*, 124 Ga. 990, 53 S. E. 397.

(b) The defendant was estopped, by the conduct of himself and his counsel at the time of the sale, from contesting the validity of the *fi. fa.* on the ground that it had not been signed by the proper officer; there being no question as to the validity of the judgment on which the *fi. fa.* issued. *Reichert v. Voss*, 78 Ga. 54, 2 S. E. 558; *Allagood v. Cook*, 92 Ga. 570, 17 S. E. 920; *Mock v. Stuckey*, 96 Ga. 187, 23 S. E. 307; *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123; *Rawles v. Jackson*, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 275.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Application by C. D. Maddox for rule to show cause against Jno. C. Warwick and another. To a judgment for the applicant, defendant Warwick brings error, and the applicant files a cross-bill of exceptions. Judgment affirmed on main bill of exceptions, and cross-bill dismissed.

R. J. Jordan, for plaintiff in error. Walter McElreath, for defendant in error.

ATKINSON, J. Judgment on the main bill of exceptions affirmed; cross-bill dismissed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 515)

LEWIS v. BECK & GREGG HARDWARE CO.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. EXECUTION (§ 203*)—CLAIM BY THIRD PERSON—COSTS.

Where a creditor of the plaintiff in a mortgage *fi. fa.* became the holder of the *fi. fa.* as collateral security for a debt due from the plaintiff to the holder, and the *fi. fa.* was subsequently levied upon certain property described therein as the property of the defendant, and a claim to the property was filed by a third person, which claim was sustained upon the trial of the case, the costs in the claim case could not be taxed against the party to whom the *fi. fa.* had been delivered as collateral security, the latter having never been made a party to the record, although the *fi. fa.* was proceeding for his benefit, and he would have been entitled to the proceeds in the event the trial of the claim case had resulted in a verdict subjecting the property levied on to the execution, and he had employed counsel who conducted the case for the collection of the *fi. fa.*

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 584; Dec. Dig. § 203.*]

2. EXECUTION (§ 167*)—AFFIDAVIT OF ILLIQUITY.

An affidavit of illegality may be filed by an attorney in fact, and it is not necessary that any writing showing his authority so to do be exhibited or attached to the affidavit of illegality. Civil Code 1910, § 5310; *Cook v. Buchanan*, 86 Ga. 760, 13 S. E. 83.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 167.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by Ellen Lewis, for use, etc., against the Beck & Gregg Hardware Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. James, for plaintiff in error. Roberts & Hutcheson, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 514)

SPENCE v. MATHIS.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. DOWER (§ 14*)—PROPERTY SUBJECT.

Dower may be assigned in lands held under bond for title, or other instrument in writing having like effect, where a portion of the purchase money has been paid; but the estate in dower shall be liable for the unpaid purchase money. Civil Code 1910, § 5248.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 45, 54, 55; Dec. Dig. § 14.*]

2. DOWER (§ 14*)—PROPERTY SUBJECT.

M. bought a tract of land from A., and took a bond for title. A. held under a bond for title from B., who held a bond for title from C. M. paid a portion of the purchase money to his vendor, A., paying some of it to C. by direction of A. When the debt for the purchase money to C., the original vendor, matured, an arrangement was entered into by the parties, by which M., A., and B. surrendered their bonds, and C. conveyed the land to a firm, who advanced the money to pay the balance of the purchase money due to C. The consideration expressed in this deed was \$500. M. gave to the firm five notes for \$80 each and one note for \$100. The last-mentioned note was secured by a mortgage on cotton. The firm made to M. a bond to make title upon the payment of the five notes of \$80 each. M. paid the \$100 note to the firm. Later the firm transferred the remaining notes to a bank, and executed to it a deed to secure them, reciting the bond to M., and subject to it. M. paid to the bank \$37.50 as interest on the notes, and afterwards died. *Held*, that this was a case falling within Civil Code 1910, § 5248, and the widow of M. was entitled to dower in the land, though subject to the payment of the debt due the bank.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 45, 54, 55; Dec. Dig. § 14.*]

3. DOWER (§ 14*)—PROPERTY SUBJECT—STATUTORY PROVISIONS.

Where, under such circumstances, the widow applied for dower, and a caveat was filed by the administrator of the decedent, and during the pendency of the case the administrator sold other lands of the estate than that in which the commissioners had assigned dower, and paid the debt due to the bank, this did not destroy the right of the widow to dower.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 45, 54, 55; Dec. Dig. § 14.*]

4. NO CONFLICT WITH FORMER DECISION—REPAYMENT OF PURCHASE MONEY.

The ruling here made in no way conflicts with that in *Harris v. Powers*, 129 Ga. 74, 84, 58 S. E. 1038.

(a) No question was raised as to whether the widow should repay any part of the amount of purchase money paid to the bank.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by J. F. Spence, administrator, against Dora Mathis. From the judgment, the administrator brings error. Affirmed.

H. L. Patterson, for plaintiff in error. J. P. Brooke, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 493)

KIGHT v. STEPHEN PUTNEY SHOE CO.
(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§§ 47, 228*)—NATURE OF TRANSACTION—SALES IN BULK.

A sale of a stock of merchandise in bulk, not in compliance with the provisions of Civil Code, § 3226 et seq., is void as to creditors, on the ground of fraud; and a creditor may proceed by attachment against his fraudulent debtor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 34, 665, 667; Dec. Dig. §§ 47, 228.*]

2. FRAUDULENT CONVEYANCES (§ 47*)—PRINCIPAL AND AGENT (§ 105*)—SALES IN BULK—AUTHORITY OF AGENT.

Where a mercantile corporation turns over its stock of merchandise to its president and principal stockholder, who undertakes to buy up at a discount the claims against the corporation, and who, after purchasing a majority of such claims, sells the stock of merchandise in bulk to a third person, who knows that the corporation's president is buying up the claims against the corporation, and that some of the claims had not been purchased at the time of the sale, such a transaction falls within the operation of the sales in bulk statute; and the sale by the president of the corporation to such third person without complying with the terms of the statute is void as against creditors of the corporation. Any agreement between a traveling salesman of the creditor, who sold the goods for his principal and was authorized to collect the amount of his sales, and the president of the corporation, looking to the sale and transfer of the creditor's claim for less than the undisputed amount of the claim, is not binding on the creditor, in the absence of proof of the agent's authority to accept less than the full amount of the claim.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47; **Principal and Agent*, Cent. Dig. §§ 298-310, 374; Dec. Dig. § 105.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Attachment proceedings by the Stephen Putney Shoe Company against the J. W. Johnson Company. B. T. Kight, administrator, filed a claim. Judgment for plaintiff, and claimant brings error. Affirmed.

Daley & Daley, for plaintiff in error. W. A. Thompson and Jno. R. L. Smith, for defendant in error.

EVANS, P. J. E. A. W. Johnson, the president of the J. W. Johnson Company, a mer-

cantile corporation, sold its entire stock of merchandise to N. J. Kight without complying with the terms of the sales in bulk statute. The Stephen Putney Company, a creditor of the corporation, sued out an attachment against the corporation as a fraudulent debtor, and upon the levy of the attachment Mrs. Kight filed a claim. On the trial of the case it appeared that the mercantile corporation, being financially embarrassed, entered into a conference with some of its creditors, looking to a possible composition of its indebtedness. At this meeting only a few of the creditors were present, and E. A. W. Johnson, president and principal stockholder of the corporation, was invited to make a proposition. He proposed to pay each creditor, for an assignment to him of the creditor's demand against the corporation, the sum of 50 cents on the \$1, payable in cash, or 60 cents, if payment was accepted in notes. The defendant in error was an account creditor, and sent its claim to a local attorney for collection. Mr. Johnson submitted his proposition to the local attorney of the defendant in error, which was accepted, subject to the approval of his client, and the attorney transferred to Mr. Johnson his client's account against the debtor, and received from Mr. Johnson his notes for 60 cents on the \$1, which he transmitted to his client. The defendant in error promptly refused to accept the notes and returned them to its attorney, who delivered them to Mr. Johnson. Pending these negotiations Mr. Johnson, who had purchased a majority in amount of the claims against the corporation, sold its entire stock of merchandise to the agent of the claimant, who knew of the financial stress of the Johnson Company, and that the corporation's president and principal stockholder was buying up the claims against the corporation, and that some of the claims had not been purchased at the time of the sale to him. The sale was made in bulk, without any attempt at compliance with the sales in bulk act, as contained in Civil Code, § 3226 et seq. The traveling salesman of the defendant in error was present at the meeting of the creditors, when Mr. Johnson was invited to make his proposition. He testified that he happened to be in town, and was called in to the conference, but accepted no proposition. Mr. Johnson testified that the traveling salesman did accept his proposition. It was undisputed that neither the traveling salesman nor the attorney of the defendant in error had authority to compromise or sell at discount the claim of the defendant in error. At the conclusion of the evidence the court directed a verdict for the plaintiff.

[1] 1. A sale of merchandise in bulk, without complying with the statute providing for such sales (Civil Code, § 3226 et seq.), gives to a creditor the right to proceed against the

vendor as a fraudulent debtor. *Carstarphen v. Fried*, 124 Ga. 544, 52 S. E. 598. Such sale is declared to be fraudulent by the statute.

[2] 2. Under the evidence the verdict was demanded. The only conflict in the testimony related to a transaction between the creditor's traveling salesman and the president of the debtor corporation. But that is immaterial, as no authority of the agent to accept less than the full amount of his principal's debt was shown. An agent to collect cannot accept a less sum in settlement of his principal debt, nor sell at discount his principal's claim, without authority from his principal. *Kaiser v. Hancock*, 106 Ga. 217, 32 S. E. 123.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 497)

WADLEY SOUTHERN RY. CO. v. STATE.
(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 113*)—SUBJECTS AND TITLES—RAILROAD COMMISSION ACT.

The Railroad Commission act of 1907 (Acts 1907, p. 72) does not offend article 3, § 7, par. 8, of the Constitution of Georgia on the ground that the twelfth section of the act contains matter different from what is expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.*]

2. CARRIERS (§ 10*)—REGULATION—STATUTORY PROVISIONS.

Section 6 of the Railroad Commission act of 1907 (Civil Code 1910, § 2663) contemplates that notice and an opportunity of a hearing be given to persons, railroads, or other corporations interested in the orders issued by the Commission, and that provision may be made for such notice either by statute or rule of the Commission. This section is to be construed to mean that the Commission shall not issue a special order in a particular case and directed to a person or corporation, without first giving notice and an opportunity for hearing to the person or corporation so to be affected thereby.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 10.*]

3. CONSTITUTIONAL LAW (§§ 241, 297*)—CARRIERS (§ 2*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW—POWER OF RAILROAD COMMISSION.

A state statute, which confers on a Railroad Commission the power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes or lines alike, and to make just and reasonable rules for preventing unjust discriminations, and provides for notice and an opportunity of a hearing of the railroad company to be affected by any order of the Commission, and for a violation of an order of the Commission imposes a penalty on the corporation in a sum not to exceed \$5,000, in the discretion of the trial judge, and also subjects any person violating or abetting the violation of the order to punishment for a misdemeanor, does not offend the constitutional guaranties of due process of law and the equal protection of the laws, in that the railroad to be affected by the order is prevented

from testing the validity of the statute of the order of the Railroad Commission because of excessive penalties.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701, 832-834; Dec. Dig. §§ 241, 297; Carriers, Dec. Dig. § 2.*]

4. CARRIERS (§ 13*)—REGULATIONS—VALIDITY.

The Georgia Railroad Commission act invests the Railroad Commission with power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes or lines alike, and to make reasonable rules for preventing unjust discriminations. Under this power it is competent for the Commission to declare as an unlawful discrimination a course of conduct, whereby a railroad company, connecting with other railroad companies at each of its termini, which converge to a common point, affording a choice of routes from the common point to stations on its own line, receives from one of its connections freights destined to points on its own line without requiring prepayment of the earned charges of the favored carrier, and declines to receive from the connecting carrier at the other terminus freight destined to points on its own line without prepayment of the freight charges earned by that connecting carrier, where the conditions are substantially similar, and the effect of the course of conduct is to seriously curtail competition in rates and service to the patrons on its own line.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

5. CARRIERS (§ 20*)—REGULATIONS—PENALTIES—ACTIONS TO RECOVER.

The action was properly authorized by the Governor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

6. NEW TRIAL (§ 41*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of irrelevant and immaterial evidence, not prejudicial to the losing party, is not cause for a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 41.*]

7. APPEAL AND ERROR (§ 692*)—EXCEPTIONS—SCOPE AND SUFFICIENCY—EXCLUSION OF EVIDENCE.

An exception to the refusal of the court to allow a witness to answer a stated question is insufficient where the answer expected to be elicited is not given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

8. CHARGE OF COURT—SUFFICIENCY OF EVIDENCE.

The charge was adjusted to the law and facts and free of substantial error, and the evidence authorized the verdict.

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by the State against the Wadley Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The action is by the state of Georgia against the Wadley Southern Railway Company to recover a penalty for disobedience to an order of the Railroad Commission of Georgia. The Central of Georgia Railway Company, a domestic corporation, owns and

operates a line of railroad from Macon to Wadley and beyond. The Macon, Dublin & Savannah Railroad Company owns and operates a railroad from Macon to Rockledge. The Stillmore Air Line Railway Company operated a railroad from Wadley to Collins, where it connected with the Seaboard Air Line Railway Company. The Wadley & Mt. Vernon Railroad Company operated a line of railroad from Wadley to Rockledge. In 1906 the Stillmore Air Line Railway Company and the Wadley & Mt. Vernon Railroad Company merged into a new corporation called the Wadley Southern Railway Company, and which was duly chartered under that name. The Central of Georgia Railway Company is the owner of all the stock and bonds of the Wadley Southern Railway Company. Adrian is a station on the Wadley Southern Railway Company between Wadley and Rockledge, being 27 miles distant from Wadley and 10 miles distant from Rockledge. On August 17, 1909, certain merchants and business men of Adrian addressed a petition to the Railroad Commission of Georgia representing that "the Wadley Southern refuses to handle freights delivered them at Rockledge by M. D. and S. without freight charges being fully prepaid to Rockledge," and praying the interposition of the Railroad Commission in aid of interchange of freights at that point. A hearing was had upon this petition, and on March 16, 1910, the following order was passed by the Railroad Commission of Georgia: "In re refusal of the Wadley Southern Railway Company to accept freight from the Macon, Dublin & Savannah Railroad Company, at Rockledge, Georgia, without the prepayment of freight charges. * * * The Commission having heard evidence and argument of counsel in the foregoing complaint as to discrimination alleged to be practiced by the Wadley Southern Railway Company as against shippers to Adrian, Ga., over the line or route of the Macon, Dublin & Savannah Railroad Company via Rockledge, Ga., and in favor of shippers over the line or route of the Central of Georgia Railway Company, at Wadley, Ga., and it appearing that the alleged unlawful discrimination arises out of the requirement of the Wadley Southern Railway Company that shippers shall prepay charges via Rockledge before it will receive freight at that point from the Macon, Dublin & Savannah Railroad Company for Adrian, but does not require like prepayment of charges on freight via the Central of Georgia Railway Company at Wadley, thus affording facilities to patrons of the Central of Georgia Railway Company's line or route, for the interchange of freight, denied to patrons of the Macon, Dublin & Savannah Railroad Company's line or route, and it appearing that the Macon, Dublin & Savannah Railroad Company's line or route via Rockledge is a competitor of the Central of Georgia Railway Company's route

or line via Wadley for freight moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley, and that the rule or requirement of the Wadley Southern Railway Company complained of is intended to afford and does afford to patrons of the Central of Georgia Railway Company facilities denied to patrons of the Macon, Dublin & Savannah Railroad Company, a connecting line of the Wadley Southern Railway Company, and a competitor of the Central of Georgia Railway Company for Adrian business, which interferes with the exercise of the freedom of choice in routes by shippers, the Commission is of the opinion that the practice complained of is, under the law of Georgia, an unlawful discrimination, and such a discrimination as the Commission is required by law to forbid. It is therefore ordered that the Wadley Southern Railway Company at once desist from the discrimination specifically complained of in this case. Ordered further, that the Wadley Southern Railway Company, on and after the receipt of this order, afford to patrons or shippers over the line of the Macon, Dublin & Savannah Railroad Company via Rockledge, the same facilities for the interchange of freight afforded to patrons or shippers over the line of the Central of Georgia Railway Company via Wadley." Notice of this order was duly communicated to the general freight agent of the Wadley Southern Railway Company, and the attorneys of the Wadley Southern corporation replied that they had advised that company that "the order of the Railroad Commission is not legal, and that the railroad company is not legally bound to observe it." Whereupon his excellency, the Governor, passed the following order: "In re Wadley Southern Railway Company refusal to accept at Rockledge, Ga., freight from the Macon, Dublin & Savannah Railway Company, unless freight charges are prepaid. Whereas, the Railroad Commission of Georgia having notified me that the Wadley Southern Railroad Company had refused to obey the order of said Commission directing that said railway company should receive freight from the Macon, Dublin & Savannah Railroad Company without requiring prepayment of freight charges, which refusal it is claimed by such Commission is an unauthorized and illegal discrimination under the facts, and subjecting the said company to a penalty for a violation of the Commission's orders. It is therefore ordered in conformity with the act approved August 23, 1907, that suit be instituted by the special attorney of the Railroad Commission in the name of the state of Georgia for the recovery of such penalty."

In pursuance of this order a petition was filed in the name of the state to recover of the Wadley Southern Railway Company \$5,000 penalty as provided by the act approved Au-

gust 23, 1907. The petition contained two counts. The first count alleged that the railroad company had failed and refused to obey, observe, and comply with the order of the Commission, whereby they became indebted to the state of Georgia in a sum not to exceed \$5,000. The second count alleged that since July 6, 1909, the Wadley Southern Railway Company had refused and still refuses to receive freight from the Macon, Dublin & Savannah Railroad Company at Rockledge, Ga., for points on its line, without prepayment of the freight, while during all this period the company had received and still receives from the Central of Georgia Railway Company at Wadley, Ga., freights shipped from Macon, Ga., and other points along its line of railroad without prepayment of the freight, and in this way the Wadley Southern Railway Company had discriminated against the Macon, Dublin & Savannah Railway Company, one of its connecting lines, in favor of the Central of Georgia Railway Company, another of its connecting lines, and thus fails and refuses to afford the usual and customary facilities for the interchange of freight to the patrons of each of said routes and lines alike, contrary to the provision of the statute in such cases made and provided. The Wadley Southern filed its answer, denying its liability under either count, and attacked the constitutionality of the law providing for the penalty. A trial was had and a verdict was returned finding the railroad company subject to the penalty. A new trial was refused, and a bill of exceptions was sued out, complaining of the judgment refusing a new trial and various interlocutory rulings.

Lawton & Cunningham, for plaintiff in error. Jas. K. Hines, for defendant in error.

EVANS, P. J. [1] 1. We will first consider whether the Railroad Commission Act of 1907 (Acts 1907, p. 72) contains any of the constitutional infirmities urged against it. The title is "An act to increase the membership of the Railroad Commission of Georgia, * * * to prescribe and fix penalties and punishments for failure and refusal to obey any order, rule or regulation of the Railroad Commission; to prescribe the form of procedure for enforcing the same * * * and for other purposes." The twelfth section (Civil Code 1910, § 2667) provides that "any common carrier * * * which shall violate any provision of this act or the acts heretofore passed, or which fails, omits or neglects to obey, observe or comply with any order, direction or requirement of the Commission * * * shall forfeit to the state of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge." It is contended that article 3, § 7, par. 8, of the Constitution of Georgia, to the effect that

no law shall pass which contains matter different from what is expressed in the title, has been violated by the inclusion in the twelfth section of matter not referred to in the title—in so far as it undertakes to give to the state a right of action for a violation of "any provisions of this act or of the acts heretofore passed, whereas the title refers only to penalties for the failure and refusal to observe any order, rule or regulation of the Railroad Commission." The general scope of this legislation was to retain to the Railroad Commission the power and authority heretofore conferred upon it by law, except as changed by the act, and to confer additional powers upon the Commission, with the view that the Commission should be vested with a general supervision over public service corporations, with power to require them to establish and maintain such public service and facilities as may be reasonable and just. Some of the rules for the regulation of railroads which were designed to be enforced by the Commission were in the form of statutes; but they were nevertheless binding on the Commission and all parties to be affected, as rules, just as much so as if such rules had been promulgated by the Commission. It was competent for the Legislature to deal with these statutory provisions as rules prescribed for the Commission to enforce, and the act did not offend the constitutional provision as contended. *Richardson v. Macon*, 132 Ga. 122, 63 S. E. 790.

[2] 2. It is said that the statutes giving validity to the orders of the Railroad Commission, which is the basis of this suit, do not provide for notice and hearing, nor do the rules of the Commission so provide, and therefore due process of law is not afforded. The Commission act of 1907 enlarged the powers of the Railroad Commission so as to give it jurisdiction and power over practically all public service corporations. In defining the jurisdiction the sixth section of the act (codified in Civil Code 1910, § 2663) declares that the Railroad Commission shall have and exercise all power and authority heretofore conferred on it by law and shall have general supervision over railroads and other public service corporations. In the exercise of its powers it was provided that it may proceed on its own initiative or on the complaints of others, and may require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases, "provided that nothing in this section shall be so construed as to repeal or abrogate any existing law or rule of the Commission as to notice or hearings to persons, railroads or other corporations interested in their rates, orders, rules or regulations issued by said Commission before the same are issued, nor to repeal the law of this state as to notice by publication of a change

in rates." The most casual reader of this section cannot fail to be impressed that the legislative purpose was to afford parties affected by any order in a particular case an opportunity to be heard in advance of its promulgation by the Commission. While the literal application of the proviso concerns the preservation of existing statutes, and orders of the Commission, with respect to notice and hearings, yet the implication is so pregnant of the legislative conception that such specific orders of the Commission must be made only after notice and hearing, that it would be doing violence to the legislative plan of supervision by the Commission to construe the act so as to impute a contrary purpose and intent. It was contemplated that provision for notice should be made by statute or rule of the Commission. Special statutory provision was made as to notice of a hearing for joint rates to roads that are not under the management of the same company, and as to the requirement about the location of depots (Civil Code 1910, § 2631); but as to other matters the Legislature left it to the Commission to formulate rules respecting notice and hearing. Although the reference in the clause relating to notice was to the preservation of existing statutes and rules of the Commission, there is no negation that the Commission might not from time to time amend or enlarge its rules so as to give other or additional notice. There is nothing in the present record contradicting the existence of a rule of the Commission providing for notice at the time of the passage of the act of 1907, nor is there any contention made that the Wadley Southern Railway Company did not in fact have notice of the hearing in the particular case. The defendant pleaded that the law did not provide for a hearing on the facts, and for that reason it violated the constitutional guaranties of due process of law and the equal protection of the laws. The burden was on the railroad company to sustain its plea by submitting proof of the absence of any rule of the Commission providing for notice and a hearing. Civil Code, § 2626. It wholly failed in this particular, and we are bound to assume that there was a rule of the Commission as contemplated in the statute.

With regard to the complaint in the plea that the act made no provision for an appeal, it has been settled by the Supreme Court of the United States that the due process of law guaranteed by the fourteenth amendment does not require that an appeal shall be provided for a party who has had one hearing before a competent tribunal, with full notice as to the time and place of hearing. *Mich. C. R. R. Co. v. Powers*, 201 U. S. 301, 302, 26 Sup. Ct. 459, 50 L. Ed. 744.

It will be observed that the point raised in the plea is the nonexistence of any rule of the Commission, and not any deficiency of the rule. As the defendant failed to show

the nonexistence of any rule of the Commission, or, if there was a rule, that it was faulty in any respect, the latter question cannot arise in this case.

[3] 3. It is urged that the provisions of the act of 1907 (Civil Code 1910, §§ 2667, 2668) prescribing penalties are unconstitutional as being a denial of due process of law and the equal protection of the laws as guaranteed by the Constitutions of the state of Georgia and of the United States because of their excessive penalties. The first of these sections subjects a public service corporation to a penalty not to exceed \$5,000 for each and every violation of any provision of that section, or of acts heretofore passed, or of any order of the Commission; the amount of the penalty to be fixed by the presiding judge. The latter section declares that every officer, agent, or employé of the corporation violating or abetting the violation of any statute, or of any order of the Commission, shall be guilty of a misdemeanor. The general policy of the act of 1907, as well as the previous acts pertaining to the regulation of railroads, etc., is to devolve upon the Railroad Commission the duty of formulating rules and regulations, rather than doing so by direct enactment. The Legislature has not undertaken by statute to establish either passenger or freight rates, but has referred the ascertainment of just and reasonable rates to the Railroad Commission.

The penal feature is the force of the law, and to deny the right of the Legislature to impose appropriate penalties for violations of orders of the Commission, which the Commission is authorized to issue after due notice to the corporation to be affected, and on the fullest investigation, would in effect be a denial of the power of the state to regulate public service corporations by commissions or other administrative agency. The power of the Legislature to create a commission to regulate public service corporations and to prevent unjust discriminations by them is too well established in the jurisprudence of this state to be contested at this late day. *Ga. R. R. v. Smith*, 70 Ga. 694. The distinction is obvious between a case where the statute imposes a penalty for disobedience to an order of the Commission, made after notice and an opportunity to be heard, and the case of a statute which imposes serious and heavy penalties for its violation, where the validity of the statute depends upon the existence of facts and their effect, which can only be determined after an investigation of a most complicated and technical character. An illustration of the latter instance may be found in the case of *Ex parte Young*, 209 U. S. 123, 23 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. In that case the Legislature of the state of Minnesota enacted a statute fixing passenger tariffs and commodity rates for railroads much lower than existing schedules, and subjected the carrier, its agents

and employes, to serious and heavy penalties for each violation of the statute; and it was held that the statute was unconstitutional because the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts for the purpose of showing the tariff schedules provided in the statute would yield so little revenue that their observance would practically confiscate the carrier's property. It will hardly be doubted that a state may impose penalties, such as will tend to compel obedience to its mandates. If the penalties are imposed for the violation of an order, passed after notice and an opportunity for a hearing, it cannot be said that the parties affected have been denied due process of law or the equal protection of the law.

[4] 4. The point is made that the order of the Commission is null and void because it is neither just nor reasonable, in that it undertakes to exact of the defendant unreasonable and unlawful requirements. It is therefore important to ascertain exactly upon what state of facts the order was intended to operate, and in reaching a conclusion upon the matter it is proper to consider the application of the merchants of Adrian in connection with the order of the Commission made thereon. These merchants represented to the Commission that the Wadley Southern Railway Company refused to handle freights delivered to them at Rockledge by the Macon, Dublin & Savannah Railroad Company without freight charges being fully prepaid to Rockledge, and the commissioner's order recited that after investigation the Commission found that the alleged unlawful discrimination arose out of the requirement of the Wadley Southern Railway Company that shippers shall prepay charges via Rockledge before it will receive freight at that point from the Macon, Dublin & Savannah Railroad Company for Adrian, but does not require like prepayment of charges on freight via the Central of Georgia Railway Company at Wadley, thus affording facilities to patrons of the Central of Georgia Railway Company's line or route, for the interchange of freight, denied to patrons of the Macon, Dublin & Savannah Railroad Company's line or route; that the Macon, Dublin & Savannah Railroad Company's line or route via Rockledge is a competitor of the Central of Georgia Railway Company's route or line via Wadley for freight moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley; that the requirement of the Wadley Southern Railroad Company complained of is intended to afford, and does afford, to the patrons of the Central of Georgia Railway Company facilities denied to patrons of the Macon, Dublin & Savannah Railroad Company, a connecting line of the Wadley Southern Railway Company for Adrian business, which interferes with the exercise of the freedom of choice in routes by shippers; and

that the practice complained of is an unlawful discrimination, and such as the Commission is required by law to forbid. From these findings of fact it is clearly apparent that the act condemned as an unlawful discrimination was the practice of the Wadley Southern Railway Company to receive from the Central of Georgia Railway Company at Wadley, one of its termini, shipments of freight destined to Adrian without prepayment of freight, and to refuse to receive shipments of freight destined to Adrian from the Macon, Dublin & Savannah Railroad Company at Rockledge, its other terminus, unless the charges were prepaid. The order prohibited the defendant from declining freight shipped over the Macon, Dublin & Savannah Railroad Company to Adrian with freight charges to be paid and collected at points of destination, or furnishing different facilities in this matter to the Central of Georgia Railway Company.

Given this construction, does the order exact of the defendant an unreasonable and unlawful requirement? In the original act establishing the Railroad Commission it was enacted that the Commission shall make just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads of this state. Civil Code, § 2630. The supplementary act of 1907 clothes the Commission with power and authority "to require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just either by general rules or by special orders in particular cases." Civil Code, § 2663. The contention is that even under these broad powers it is not competent for the Commission to pass the order complained of. It is argued that the Commission is not vested with power to force the defendant into contractual relations with other lines, or to prevent it from selecting those with whom it shall deal on preferential terms, or terms of mutual confidence and trust. It is true that railroad companies cannot be required to issue through bills of lading or to contract to forward goods beyond their own lines. *Coles v. Central R. R.*, 86 Ga. 251, 12 S. E. 749; *State v. W. & T. R. R. Co.*, 104 Ga. 437, 30 S. E. 891. Neither the purpose nor the effect of this order is to require the defendant to issue a through bill of lading beyond its own line. Nor is its purpose and effect to require any independent contractual relation between the defendant and another carrier. Though the collection of the entire freight charge at destination implies an obligation to account for the connecting carriers' share of it, nevertheless this is but one incident of a course of business voluntarily adopted by the carrier, whereby facilities respecting the interchange of freight is afforded to one connecting carrier, and denied to another connecting car-

rier, in contravention of the statute against unjust discrimination. The imperative quality of the order is to prohibit the defendant from favoring one carrier to the injury of another, and the public, where conditions as to the service are substantially alike in both cases. It is to prevent a discrimination which practically deprives the merchants of Adrian of any competition in rates and service because of the defendant's favoritism to the carrier on one end of the line, and the refusal of the same privileges to the carrier at the other end of the line. Where conditions are substantially the same, the denial by a carrier to one of its connections of the same facilities for the interchange of freight accorded to another connecting carrier, and which practically deprives points on its line of the opportunity of competition in service and rates, is an unjust discrimination. *A. T. & S. R. R. v. D. & W. O. R. R.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *B. & O. R. R. Co. v. Adams Express Co.* (C. C.) 22 Fed. 404; *A. & V. Ry. Co. v. Miss. R. R. Co.*, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. Ed. 289; *Diamond Mills Co. v. B. & M. R. R. Co.*, 9 Interst. Com. R. 311. And it is within the power of the Commission to make rules and regulations for preventing unjust discriminations in the transportation of freight. *Augusta Brokerage Co. v. Cen. of Ga. Ry. Co.*, 121 Ga. 48, 48 S. E. 714.

A case much in point is that of *Logan v. Central R. R. Co.*, 74 Ga. 684. The Central Railroad Company operated a road from Savannah to Macon, with branches to other points in the state. It adopted a rule that no shipments of salt or other merchandise from Brunswick in competition with Savannah would be received from local stations on its line unless charges were prepaid and shipments delivered by drays as local business. There was another railroad from Brunswick to the interior of the state, from which the Central Railroad refused to receive merchandise unless charges were prepaid and delivered in drays. This court held that this rule of the railroad was in the very teeth of the act of 1874 (Civil Code, § 2657), in that it did not "afford the usual and like customary facilities for interchange of freights to patrons of each and all routes or lines alike." And this court also held in *Macon, Dublin & Savannah Railroad Company v. Graham*, 117 Ga. 555, 43 S. E. 1000, that "a common carrier cannot, in this state, lawfully discriminate against one of two or more connecting carriers as to facilities afforded, or the charges made touching an interchange of freight."

It is contended that section 2657 does not require the Commission to afford the facilities of the character required by this order of the Commission, but that its requirement is only applicable to physical connections and physical appliances. We do not think the section should be so restricted in its ap-

plication. It applies to every facility necessary for the safety and convenience of passengers and for the prompt transportation of freight. Besides, the more recent act of 1907 (Civil Code, § 2630) confers on the Railroad Commission the power to require all railroads to maintain such public service and facilities as may be reasonable and just. It does not require argument to prove that a preferential discrimination by a carrier in favor of one of its connections, which has the effect to stifle competition to points on its own line, because the same facilities are not extended to another of its connections under substantially the same conditions, is neither just nor reasonable. At common law common carriers were allowed to discriminate in favor of some of its patrons so long as the bestowal of favors did not violate their duty to the public. *Ocean Steamship Co. v. Savannah Supply Co.*, 131 Ga. 834, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044. But railroad companies of the present day are not only common carriers charged with the performance of their common-law duties as such, but they are also quasi public institutions, and in this relation owe additional duties to the public and are subject to governmental regulation. Certainly a regulation is just and reasonable which requires a carrier not to enter into a specific contract with a connection, but, if it voluntarily extends facilities and privileges to one of its connections, that it must also, under substantially the same conditions, give the same facilities and privileges to the other connections, where the result of its favoritism is the injury of its patrons at intermediate points on its own line.

[5] 5. The suit was for a violation of the order of the Commission. That order was based on the acts of 1874 and 1907, as has already been pointed out. A suit for a penalty for disobedience to the order of the Railroad Commission must be brought in the name of the state by direction of the Governor. Civil Code, § 2667. As the order of the Commission is based on the violation of the acts of 1874 and 1907, the violation of the Commission's order is likewise a violation of the statute. The Governor ordered a suit to be instituted in the name of the state for the violation of the Commission's order, and even if the second count was necessary there was no demurrer interposed to it, and it is not made to appear that any evidence was received but what was admissible under the first count.

[6] 6. Objection was made to certain evidence as being irrelevant and immaterial. Granting the objection should have been sustained, this is not cause for a new trial where the evidence was not of such character as to prejudice the defendant.

[7] 7. Exception is also taken to the refusal of the court to permit a witness to an-

swer a certain question. But as the expected answer is not set out, the assignment of error is insufficient.

[§] 8. The court's charge was in substantial accord with the principles of law herein enunciated and sufficiently comprehensive to cover the real issues in the case, and the evidence authorized the verdict.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 516)

NIXON et al. v. LEHMAN.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. RECORDS (§ 17*)—ESTABLISHMENT OF LOST RECORDS—COURT OF ORDINARY.

After an action of complaint for land is filed, if it becomes necessary to perfect any muniment of title by a proceeding in another court to establish one of its lost records, a party may apply to such court for any proper order, upon giving notice to the adverse party.

(a) The court of ordinary, being a court of general jurisdiction concerning the administration of estates, has the inherent power to establish a copy of one of its own orders (pertaining to such administration) which has been recorded, where both the order and the book containing its record are lost.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25, 26, 29, 30; Dec. Dig. § 17.*]

2. TRIAL (§ 15*)—DOCKETS—ORDER OF CALLING AND HEARING CAUSES.

The judge of the superior court is not required to peremptorily call the trial docket in its order; and where two cases between the same parties are on the docket he may, in his discretion, give precedence in trial to the case last on the docket. There was no abuse of discretion in this case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

3. RECORDS (§ 17*)—ESTABLISHMENT OF LOST RECORDS—AMENDMENT OF PLEADING.

In a proceeding to establish a copy of a lost record, the date of the record, as alleged in the pleading, may be changed by amendment. There was no error in refusing a continuance in this case because of the allowance of the amendment.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 31; Dec. Dig. § 17.*]

4. RECORDS (§ 17*)—ESTABLISHMENT OF LOST RECORDS—ADMISSIBILITY OF EVIDENCE.

In a proceeding to establish a copy of a lost record of an order granting an administrator leave to sell the land of his intestate, it is competent to receive in evidence the newspaper containing the notice of the application, the newspaper containing the advertisement of sale, the ordinary's receipt for the fee for granting the order of sale, and the administrator's return of the sale of the land. While a recital in an administrator's deed that he sold the land affords no direct evidence of the truth of the facts recited, nevertheless the deed with such recital is competent evidence, as tending to show that the administrator was not acting independently of the court of ordinary, but conformably to an order of that court.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 33; Dec. Dig. § 17.*]

5. EXECUTORS AND ADMINISTRATORS (§ 337*)—SALE OF PROPERTY—NOTICE OF APPLICATION.

The statute does not require that notice of an application by an administrator for leave to sell the land of his intestate shall be in the form of a citation by the ordinary; it may be signed by the administrator. The form of the notice in this case was substantially that required by the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1397-1409; Dec. Dig. § 337.*]

6. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

An administrator's return must be under oath. Where a return was made, and upon it was indorsed: "Examined and approved, and ordered to record. July 1, 1873. John M. James, Ordinary"—and the return was recorded without the vouchers which were filed with it, and the vouchers are subsequently recorded under a nunc pro tunc order, the record of such return will not be rejected, on the ground that it does not appear that the return was made under oath. It is to be presumed that the ordinary did his duty in requiring that the administrator make oath to his return before he received it, in the absence of aliunde evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

7. SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to demand the verdict.

(Additional Syllabus by Editorial Staff.)

8. CONTINUANCE (§ 30*)—GROUNDS—SURPRISE—AMENDMENT OF PLEADING.

In proceedings for the establishment of a lost record, a continuance, on the ground of surprise in allowing a pleading to be amended as to the date of the record, was properly refused, where the application did not measure up to the requirement of Civ. Code 1910, § 5714, stating the requisites of an application for continuance on the ground of surprise in allowing amendments to pleadings.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by E. E. Nixon and others against J. S. Lehman. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. S. James, for plaintiffs in error. L. R. Ray, for defendant in error.

EVANS, P. J. The heirs at law of John W. Nixon instituted an action of complaint for land against J. S. Lehman in Douglas superior court. The defendant claimed title through mesne conveyances under a deed from Z. A. Rice, administrator of John W. Nixon, purporting to have been executed on December 25, 1872. Lehman then filed a petition to the court of ordinary to establish a copy of an order of sale, alleged to have been granted by the ordinary, and the plaintiffs in the ejectment suit resisted the application. By consent, the case was appealed to the superior court; and the exceptions are to the direction of a verdict establishing the lost original, and to certain pendente lite rulings made on the trial.

[1] 1. After an action of complaint for land is filed, if it becomes necessary to perfect any muniment of title by a proceeding in another court to amend or add to its records thereof touching such muniment, a party may apply to such court for a nunc pro tunc order, upon giving notice to the adverse party. *Wimberly v. Mansfield*, 70 Ga. 783. The application was by the defendant in the ejectment suit, who alleged: That he was the owner of the land (which was described); that one of his muniments of title was an order, granted at the September term, 1872, of the court of ordinary of that county, authorizing Z. A. Rice, the administrator of John W. Nixon, to sell the land for the purpose of paying the debts of his intestate and making distribution; that the order, copy of which was attached, was lost, and the record book wherein it was recorded was also lost; that the administrator was dead, and there was no representation of his estate; and that the plaintiffs in the ejectment suit were the heirs at law of John W. Nixon. The prayer was to establish the lost order and record. Service of notice on the heirs at law of John W. Nixon was acknowledged by their attorney. The court of ordinary is a court of record, and has power to establish its lost records; and the allegations of the application presented a proper case for the exercise of this power.

[2] 2. When the case on appeal was called, counsel for the plaintiffs in the ejectment suit objected to its being called out of its order, in advance of the ejectment suit, which was docketed earlier on the court's calendar. The judge overruled this objection. A judge of the superior court is not required to peremptorily call the cases on his docket in their order; he may exercise a discretion in calling the docket. *Wood v. Wood*, 135 Ga. 385, 69 S. E. 549. The court did not abuse his discretion in this case.

[3, §] 3. On the trial the court alleged several amendments to the application, changing the date of the granting of the alleged order. There was no error in allowing the pleadings to be amended in this respect. The various dates ranged between August and October, 1872, and the final amendment fixed the date of the grant of the alleged order at the September term, 1872. A motion was made for a continuance on the ground of surprise; but, as the showing did not measure up to the requirement of the Civil Code of 1910, § 5714, the court did not err in refusing to continue the case.

[4] 4. The order was alleged to have been granted at the September term, 1872, of the court of ordinary of Douglas county, and the proceeding to establish it was filed on December 15, 1903, a little more than 31 years thereafter. Not only was it alleged that the order was lost, but also that the record book which contained it could not be found. From this great lapse of time, necessarily circumstantial evidence must be re-

sorted to; and any circumstance legitimately offering an inference that the order was granted, as contended, may be considered. The newspaper containing the advertisement of notice of the application for leave to sell, the return of the administrator that he had sold the land and distributed the proceeds, a receipt by the ordinary for his costs for granting the order, and similar evidence may be looked to in determining whether the order was in fact granted by the court of ordinary. *Attaway v. Carswell*, 89 Ga. 343, 15 S. E. 472. When the applicant tendered in evidence the administrator's deed, it was objected to, on the ground that it recited that the order was granted on August 24, 1872, and that the land was insufficiently described. With reference to the first objection, the recital in the deed of the order of sale affords no direct evidence of the truth of the facts recited; but the deed is receivable in evidence, as showing a consistency with the contention that the administrator was acting under power of the court of ordinary, and not independently of it. *Attaway v. Carswell*, supra. If, in point of fact, the ordinary granted the administrator power to sell, a misrecital of the date of the order will not invalidate the deed, nor require its exclusion from evidence. And, although the description of the land may be lacking in definiteness, so as to give efficacy to the deed as a conveyance of title, yet, as the contention is that the order was to sell all of the lands of the estate, and the deed purports to convey land under such order, the deed is not inadmissible for lack of a full description of the land it purports to convey.

[5] 5. The court allowed in evidence several issues of the *Atlanta Daily Sun*, which contained the following advertisement: "Georgia, Douglas County. Notice is hereby given to all persons concerned, that application will be made to the court of ordinary of said county, at the first regular term after the expiration of sixty days from the date of this notice, for leave to sell the lands belonging to the estate of John W. Nixon, late of said county deceased. June 29, 1872. Z. A. Rice, Administrator." Four of the issues of the paper were dated in July; the first bearing date July 9, 1872. Six issues were dated in August; and several were dated in September and October. There was proof that there was no newspaper published in Douglas county at that time, and that the county advertisements were published in the *Daily Sun* newspaper, which circulated in Douglas county. The form of the notice was in compliance with the statute. Civil Code, § 4026; *Davie v. McDaniel*, 47 Ga. 195; *Reese on Executors*, 402. The fact that the paper contained the advertisement beyond the time the application was to have been made does not in any way affect the legality of the notice. Several issues of the *Atlanta Daily Sun*, containing an advertisement of the sale of "the tract of land in said county

[Douglas] whereon John W. Nixon resided at his death," and reciting that it was to be sold by his administrator, pursuant to an order of the ordinary of Douglas county, were admitted in evidence. The advertisement purported to have been dated September 2, 1872. This evidence was competent to show that the administrator purposed to sell under an order of the ordinary, and was not open to any of the objections thereto.

[8] 6. The applicant introduced in evidence the record containing what purported to be the annual return of Z. A. Rice, administrator of the estate of John W. Nixon, wherein the administrator charged himself with the proceeds of the sale of the land and credited himself with certain items, including payments to the heirs of their distributive shares and to the ordinary for his costs for granting the order to sell the land of the deceased. The original return was also introduced, and upon it was indorsed: "Examined and approved, and ordered to record. July 1, 1873. John M. James, Ordinary." The original return was not signed; nor was the approval of the ordinary recorded with the return. Subsequently, in 1906, the original return and vouchers were found in the ordinary's office, and the ordinary passed an order nunc pro tunc, amending the record of the return by adding the approval of the ordinary which appeared on the original return, and by recording the vouchers. This evidence was competent. While the statute requires that returns by an administrator shall be made under oath, and contemplates that the return shall be signed by the administrator, and shall disclose that it was made under oath, yet, where the return is made to the ordinary, accepted and approved by him, and entered of record, it will be presumed prima facie that the ordinary did his duty, and would not have approved and ordered the return to record, except they were sworn to by the administrator.

[7] 7. There was no error in the various rulings complained of, and the evidence demanded the verdict.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 551)

COHEN v. MEADOR et al.

(Supreme Court of Georgia. Feb. 14, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 171*)—JUDGMENT (§ 138*)—EQUITABLE RELIEF—GROUNDS.

A court of equity will not enjoin the enforcement of an execution issued by a court of competent jurisdiction, where it appears that the parties to the suit have had their day in court, and the defendant in execution offered no evidence on the trial of the case, and it not appearing that he was prevented from so doing by fraud or accident, or the act of the other party, unmixed with negligence or fraud on his part.

(a) The judgment of the court, in such a

case, adjudicated that all the elements necessary to a valid judgment were had at the trial, and that all the issues made between the parties were adjudicated.

(b) Where a suit was filed by the trustee of a bankrupt, as such, to recover a debt due by the defendant to the bankrupt, and pending the suit in court the trustee was discharged by the bankrupt court, but defendant offered no evidence on the trial, and judgment was taken in favor of the trustee against the defendant by default, *held*, that the plaintiff and defendant are concluded by the judgment, which adjudicated the rights of the parties as shown by the pleadings, among which are that the trustee as alleged, is trustee; and it is too late, after judgment, to ask a court of equity to open the judgment and let in defenses which could have been made before judgment.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 171;* Judgment, Dec. Dig. § 138.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Morris Cohen against T. D. Meador, trustee in bankruptcy for the J. J. & J. E. Maddox Grocery Company, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. Clay Smith, Morris Macks, and R. O. Lovett, for plaintiff in error. Tindall & Silverman, for defendants in error.

HILL, J. T. D. Meador, as trustee in bankruptcy for the J. J. & J. E. Maddox Grocery Company, filed a suit to the January term, 1911, of the Fulton superior court, against Morris Cohen, on a contract of guaranty for the debt of one Loeb. At the appearance term Cohen filed an answer, which was stricken on motion. No exception was taken to the order striking the defendant's answer. Pending this case in the superior court, the assets of the bankrupt were sold, and some of the defendants in the present case became the purchasers of such assets, including the claim in suit against Cohen. The trustee was discharged by the bankruptcy court, and after the order of discharge, the case being in default, judgment was taken in the name of Meador, trustee, against the defendant, and no attack was made thereon until the present suit was filed, other than an affidavit of illegality to the fi. fa. issued on the judgment, made by Cohen, which the sheriff refused to accept. Cohen then filed the present petition, praying for injunction and relief from the enforcement of the judgment, on the ground that prior to the filing of the suit against him he had settled in full the debt for which the judgment was obtained, and because the judgment was obtained in the name of T. D. Meador, trustee, when in fact, while the suit was pending, Tindall & Silverman became the transferees and true owners of all the assets of the J. J. & J. E. Maddox Grocery Company, and Meador as trustee had been discharged. On the interlocutory hearing, the court declined to grant the injunction prayed for, and the plaintiff excepted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The controlling question made by the record in this case is whether the judgment taken in the name of Meador, as trustee, after he had been discharged as such by the bankruptcy court, was a valid judgment. This suit was brought by the plaintiff against the defendant to recover an amount claimed to be due to the parties for which the plaintiff was trustee. It is elementary that necessary parties are essential in the trial of every case, before a valid judgment can be rendered by a court of competent jurisdiction. But where such a court has the necessary parties before it, and the proper subject-matter within the jurisdiction of the court, a judgment rendered adjudicates the rights of the parties to the suit. Where there is a real party plaintiff, and a real party defendant, and the plaintiff recovers in the cause of action against the defendant the amount sued for, such a judgment adjudicates that the defendant owed the plaintiff the amount recovered. And such a suit settles the further fact that every element necessary in the suit was present which enabled the plaintiff to recover, and when that appears the parties to the suit are concluded by the judgment. What are the elements here? The defendant was alleged to owe the bankrupt, and the trustee in bankruptcy was the representative of the interest of the bankrupt. The plaintiff was therefore a proper party to sue. The defendant was alleged to owe the plaintiff and was a proper party to be sued. The amount sued for was awarded by the judgment. Rightly or wrongly, the judgment adjudicates these facts. It does not matter what the real fact is; the judgment cannot be upset by saying that some element necessary to a recovery is lacking, or is untrue, after the judgment is rendered. The judgment is attacked as void because these elements necessary to the suit and judgment are lacking, but the judgment settled those contentions against the defendant. In the case of *Roberts v. Martin*, 70 Ga. 186, 197, 198, it was said: "When, therefore, the order of the court of ordinary was shown, granting leave to Jarrell Beasely, the administrator, to sell the lands belonging to the estate of Robert C. Beasely, the law presumed that all had been done which was necessary to have been done, before the same was granted, and the court should not have gone behind the judgment. This includes not only the necessity of the sale, and that it would be for the benefit of the heirs and creditors, but of the fact that Jarrell Beasely was the administrator, and authorized to make the sale. [*Davie v. McDaniel*] 47 Ga. 195; [*Patterson v. Lemon*] 50 Ga. 231."

It is also insisted that the judgment was void because no evidence was introduced on the trial; but under our system of procedure a judgment by default is the same as where proof is offered, and the judgment here is by default. The discharge of a bankrupt

prevents the enforcement of a debt against him, covered by such discharge; but, if he fails to plead it in an action on the debt, he is bound by the judgment rendered against him. The judgment adjudicates all issues between the parties to the case. The judgment involved in this case finds that the plaintiff was the trustee of the bankrupt, and that the defendant owed the plaintiff as the trustee of the bankrupt. Whether it was so in point of fact before the judgment, it is too late after the judgment to enjoin it, if the defendant did not avail himself, on account of his own laches, of whatever defense he might have had at the trial. Anything affecting the plaintiff's right to recover ought to be set up before judgment, and not after it is rendered. There would be no end to litigation if any other rule obtained. No sufficient reason appears why the defendant did not appear and make whatever defense he might have legally or equitably set up at the trial. He was duly served and had his day in court, and it is too late after judgment to seek the aid of a court of equity in order to make the defense he should have made at the trial. That he did not appear in court and make his defense is due to his own laches. The plaintiff in error insists that he had suffered bodily and mentally for many months, that all of his business was in bad shape and very much disorganized, and that this is the real reason he could not recall the circumstances and produce the receipt for payment at the trial. But we do not think this state of facts furnished a sufficient excuse for a court of equity to interfere, and, besides, there was evidence in this case from which the trial court could have reached the conclusion that the receipt on which the plaintiff in error relied to show payment of the debt on which the judgment was based had been given to the plaintiff because of a payment by him of another and entirely distinct account. No motion was made to open the judgment or set it aside, and after the proper parties have had their day in court, and the subject-matter of the suit was adjudicated by a court of competent jurisdiction, a court of equity will not interfere to enjoin the execution issued upon the judgment from proceeding according to law. It nowhere appears that the defendant was prevented from making his defense at the trial by fraud, accident, or mistake, or by the act of his adversary, unmixed with any negligence or fraud on his own part; and the well-established rule in such cases is that a court of equity will not interfere. *Civil Code* 1910, § 4585; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732; *Moore v. Gill*, 43 Ga. 388; *Thomasson v. Fannin*, 54 Ga. 361; *Lamar v. Knott*, 74 Ga. 379; *McWilliams v. Walthall*, 77 Ga. 9; *Gentle v. Atlas, etc., Ass'n*, 105 Ga. 406, 31 S. E. 544.

Judgment affirmed. All the Justices concur.

(10 Ga. App. 529)

CHRISTIE v. SHINGLER. (No. 3,686.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

*(Syllabus by the Court.)***1. CORPORATIONS (§ 519*) — TRANSFER OF NOTE—EXECUTION—EVIDENCE.**

The execution of a written transfer of a promissory note by a corporation as the payee, denied on oath, is proved by the undisputed evidence of the president of the corporation that he, as president and duly authorized agent of the corporation, executed the written transfer of the note for and in the name of the corporation. In such case the testimony of a subscribing witness to the written transfer was not necessary to prove its execution. Civil Code 1910, § 5833 (5).

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 519.*]

2. CORPORATIONS (§ 465*)—NOTES—TRANSFER—USE OF SEAL.

A written transfer of a note by a corporation as the payee named therein is sufficient to pass title to the transferee, although the corporate seal is not affixed to the transfer. In this case, however, the record is silent as to whether the written transfer had or had not the seal of the corporation attached. The note, with written transfer, was properly admitted in evidence. *Almand v. Equitable Mortgage Co.*, 113 Ga. 983, 39 S. E. 421.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 465.*]

3. COSTS (§ 260*)—FRIVOLOUS APPEAL—DISMISSAL—DAMAGES.

No defense whatever was made to the suit on the merits, and the special assignments of error dealt with in the foregoing rulings are so manifestly frivolous that the judgment of the lower court is affirmed, with 10 per cent. on the amount of the judgment as damages for delay in suing out and prosecuting the writ of error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996; Dec. Dig. § 260.*]

Error from City Court of Miller County; C. C. Bush, Judge.

Action between J. H. Christie and T. J. Shingler. From the judgment, Christie brings error. Affirmed, with damages.

W. I. Geer, for plaintiff in error. E. M. Donalson, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(10 Ga. App. 492)

COX v. MCKINLEY. (No. 3,650.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 538*) — ACTION ON NOTE—BURDEN OF PROOF.**

In a suit on a promissory note, where the defendant admitted the execution of the note and that the plaintiff was the lawful holder, and assumed the burden of establishing an affirmative defense, it was erroneous to charge that the burden was on the plaintiff to make out his case by a preponderance of the evidence. A prima facie right to recover having been admitted, and the burden assumed by the defendant, this instruction was calculated to mislead and confuse the jurors, and induce them to solve any doubts against the plaintiff,

especially as the evidence was close, and a verdict for either party would have been authorized.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

2. WITNESSES (§ 393*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

The evidence of a party as a witness on a previous trial of the case, contained in a brief of the evidence agreed to by his attorney and approved by the court and filed as a part of his motion for a new trial, is competent and admissible for the purpose of impeachment; proper preliminary proof for its introduction having been made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by J. M. Cox against M. D. McKinley. Judgment for defendant, and plaintiff brings error. Reversed.

M. C. Few, for plaintiff in error. Thos. W. & Watt. H. Milner, for defendant in error.

HILL, C. J. Cox sued McKinley on two promissory notes, alleged to have been given for the rental of land therein described for the year 1909. The defendant admitted the execution of the notes, and set up as a defense that, before the time arrived when he was to take possession of the land rented, he notified the plaintiff that he would be unable to carry out his contract, and thereupon the plaintiff re-rented a portion of the land to other tenants, and cultivated the remainder of the land himself; and the defendant sets up these acts of the plaintiff as amounting in law to a rescission of the rental contract, and says that he was thereupon released from all liability on the note. On the trial the testimony in behalf of the defendant tended to prove his defense. This defense was met by evidence in behalf of the plaintiff which tended to show that he had refused to release the defendant from the rental contract, and that in re-renting the land and cultivating the portion not rented he did so under the express direction and authority of the defendant, who promised him that he would be responsible for any balance that might be due on the rent notes over and above what the plaintiff had realized from the re-rental of the land. The plaintiff further contended that, even without this direction and promise, it was his duty under the law to lessen the damages, and that in pursuance of this obligation he had lessened the damages to the defendant to the extent of half of the amount of the rent notes, by renting some of the land, and now only claimed the other half due on the notes. The issue thus presented by the evidence was in sharp conflict, and a verdict for either party would have been authorized. The law applicable to this issue was correctly charged.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Unquestionably the plaintiff, after the renunciation of the rental contract by the defendant, was at liberty to treat such renunciation as a breach of the contract, and to sue for any damages he might have sustained by reason of the breach, treating the contract as still binding. *Smith v. Georgia Loan, Savings & Banking Co.*, 113 Ga. 975, 39 S. E. 410. If, without authority or direction of the defendant, upon the renunciation of the contract by the defendant, the plaintiff had consented either expressly or constructively to the renunciation of the contract, it would have amounted in law to a rescission; but if, on the contrary, he did not by his conduct rescind the contract, but simply endeavored to lessen the damages under the consent and direction of the plaintiff himself, he would have been in law and equity entitled to recover any balance due on the rental notes. But, as before stated, the law applicable to this issue made by the evidence was fairly and correctly presented to the jury, and the verdict on this issue would have settled the conflict, and in the absence of any material error, leading the jury to find for one party rather than for the other, would not be disturbed by this court. We think, however, that the court in the trial of the case committed two errors, which, in view of the close character of the case on the evidence, entitled the plaintiff in error to another trial.

[1] 1. On the trial the defendant admitted the execution of the rent notes and that the plaintiff was the lawful holder thereof, and he assumed the burden of proving his affirmative defense. Nevertheless the court charged the jury to the effect that the burden of proof was on the plaintiff to make out his case by a preponderance of the evidence. A *prima facie* case was admitted by the defendant, and in view of this fact it was misleading and confusing to the jury to instruct them that the burden still remained upon the plaintiff to prove his case to their satisfaction by a preponderance of the evidence. The court should have instructed the jury that, under the admission of the defendant as to the *prima facie* right of the plaintiff to recover, the burden was upon the defendant to meet this *prima facie* right by establishing his affirmative defense by a preponderance of the evidence. The evidence on the controlling issue in the case presented by the defendant's affirmative plea was close, and it was presumptively prejudicial to the plaintiff, under this state of the evidence, to place upon him a burden from which he had been relieved by the admission of the defendant, and it may have led the jury to decide the wavering balance in favor of the defendant.

[2] 2. The controlling question in the case was whether, upon the renunciation of the contract by the defendant, he had been re-

leased from further performance by the conduct of the plaintiff, or whether he had, upon renouncing the contract, authorized the plaintiff to re-rent the land, agreeing to pay any balance that the plaintiff might not receive from the re-renting. The plaintiff offered to prove, in support of his contention that he was simply acting under the authority of the defendant in re-renting a portion of the land, an admission which the defendant made on the former trial of the case, contained in the brief of the evidence which had been agreed to by his counsel and approved by the court. This admission is as follows: "I could not move on the land, and he would not release me. In January Mr. Lynch came to me and said there was a man down there who wanted to rent part of this land. I told him to go back and tell Mr. Cox to rent the land out to the very best advantage; to let Will Williams have what land he wanted, and do the best he could with the rest. I had repeatedly told him that he should not lose anything, and I told Mr. Lynch so." The defendant, as a witness, denied that he had made this statement on a former trial, and the record was offered to impeach him by the contradictory statement, and the judge excluded it, and plaintiff excepted. We think this was error (*Cox v. Prater*, 67 Ga. 588); and more especially error in view of the evidence introduced on the trial that the Will Williams mentioned in this record had in fact re-rented from the plaintiff a portion of the land after the defendant's renunciation of his contract, and the Mr. Lynch referred to was apparently authorized by the defendant to make this statement for him to the plaintiff.

Other than as above discussed, we find no material error of law; but, because of these two errors, a new trial is granted.

Judgment reversed.

(10 Ga. App. 497)

BROOKS v. GRIFFIN. (No. 3,658.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 241*)—PROPERTY OF WIFE—EXECUTION—QUESTION FOR JURY.

The evidence was sufficient to authorize the conclusion that the claimant, though she was the wife of the defendant in *fi. fa.*, was the true owner of the horse levied upon. In considering transactions between husband and wife, slight circumstances, under certain conditions, may be sufficient to satisfy a jury of the existence of fraud; but in all such cases the bona fides of the transaction is to be determined by the jury. In the present case it cannot be said that the evidence demanded a finding other than that returned by the jury.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 241.*]

2. TRIAL (§ 29*)—CONDUCT OF JUDGE—RULINGS ON EVIDENCE.

It is not error for a trial judge, in ruling upon the validity of objections to testimony, to

repeat, as he remembers it, the substance of a material portion of the testimony of the witness then upon the stand, and to inquire of the witness whether the court's recollection of the testimony is correct. Nor does the fact that the judge, in ruling upon the admissibility of testimony, states its substance as being what has been testified, without, however, intimating in any way the weight or credit to be attached to it, sustain an assignment of error complaining that the court "intimated and expressed an opinion as to the facts of the case."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84; Dec. Dig. § 29.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—MATTERS OF FACT OR CONCLUSIONS.

Evidence on the part of a purchaser of a horse that another person, designated by him, had never owned it, is not objectionable as being the conclusion of the witness, but is to be treated as the statement of a substantive fact, which would naturally rest in the knowledge of the witness as the owner of the horse. As title to personal property may pass by mere delivery, the nature of the title of one in possession of personal property, under such circumstances, is not an opinion, but a matter of fact, resting peculiarly within the knowledge of the party in possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. CHARGE OF COURT—APPLICABILITY TO EVIDENCE—REQUESTS.

The excerpts from the charge of the court to which exceptions are taken are adjusted to the evidence, and, though one of these excerpts is erroneous, the exception is not addressed to the error, which is apparent, but not necessarily harmful. The requests to charge, so far as they were pertinent and appropriate, are covered by the general charge.

5. TRIAL (§ 256*)—APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—NECESSITY FOR REQUESTS—REQUISITES AND SUFFICIENCY.

It will not be held reversible error, in the absence of a timely and appropriate request, to omit to instruct the jury upon the burden of proof. *Central Railway Co. v. Manchester Mfg. Co.*, 6 Ga. App. 254, 64 S. E. 1128. *Aliter*, if the court charges the jury upon the subject of the burden of proof, and errs in placing the burden upon the wrong party. *Cox v. McKinley*, 73 S. E. 751, this day decided. The court is not required to charge the jury upon the preponderance of the testimony, unless requested so to do.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.* Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

6 TRIAL (§ 255*)—INSTRUCTIONS.

The court was not required to charge that, if it was shown that the title to the property levied upon was vested in the defendant in *fi. fa.* at a time prior to the judgment, it was presumed to remain in him until the contrary was shown by the evidence, even though it was undisputed that the defendant in *fi. fa.* originally bought the horse claimed by his wife. If it was desired that the attention of the jury be directed to this specific point, an appropriate instruction upon the subject should have been requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

Error from City Court of Miller County; C. C. Bush, Judge.

Claim by Annie Griffin to property levied on as that of her husband by J. W. Brooks.

Judgment for claimant, and the execution creditor brings error. Affirmed.

W. I. Geer, for plaintiff in error. Rich & Persons, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 503)

FIRST NAT. BANK OF FITZGERALD v. SPICER. (No. 3,668.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§§ 49, 157*)—REQUESTS AND VALIDITY—DESCRIPTION OF PROPERTY—QUESTIONS OF LAW OR FACT.

The question of the sufficiency of description of property in a mortgage is one of law for the court; that of the identity of the property mortgaged is one of fact to be decided by the jury. In the present case the court erred in permitting the jury to decide as an issue of fact whether or not the description of the property mortgaged was sufficient to charge the claimant with notice.

(a) The description, "one mouse-colored mare mule, five years old," was, as matter of law, sufficient.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 90-92; Dec. Dig. §§ 49, 157.*]

2. CHATTEL MORTGAGES (§ 284*)—FORECLOSURE—CLAIMS BY THIRD PERSON.

Where a mortgage has been duly recorded, and no question is raised as to the validity of the record, it is error upon the trial of a claim case based upon a levy of the mortgage *fi. fa.*, to permit the claimant to testify that he had no notice of the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 284.*]

3. CHATTEL MORTGAGES (§ 284*)—FORECLOSURE—CLAIMS BY THIRD PERSON.

In the trial of such a case it is also error to permit the mortgagor to testify that at the time the mortgage was executed the mortgagee made an express warranty as to the soundness of the property mortgaged.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 284.*]

4. CHATTEL MORTGAGES (§ 284*)—FORECLOSURE—CLAIMS BY THIRD PERSON.

In the trial of such a case it was inaccurate and misleading to charge the jury that the burden was on the plaintiff, the transferee of the mortgage, "to prove every material allegation which they allege in their action, or mortgage foreclosure, levies, and so forth, which you now have before you for your consideration."

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 284.*]

5. FORECLOSURE OF MORTGAGE—SUFFICIENCY OF EVIDENCE.

Construing the evidence all together in the light of the principles laid down in the foregoing headnotes, the verdict in favor of the claimant was unauthorized.

Error from City Court of Fitzgerald; E. Wall, Judge.

Claim by J. T. Spicer to property levied on by the First National Bank of Fitzgerald under a mortgage *fi. fa.* Judgment for claimant, and the mortgagee brings error. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Haygood & Cutts, for plaintiff in error.
H. J. Quincey, for defendant in error.

POTTLE, J. A claim was filed by Spicer to the levy of a mortgage *fi. fa.* The mortgage described the property as "one mouse-colored mare mule, five years old." The execution and the levy followed this description. The mortgage was duly recorded, and had been transferred for value before maturity to the bank. The claimant prevailed at the trial, and the plaintiffs' motion for new trial was overruled.

[1] 1. It is not essential that the description of property in a mortgage should be so definite as that the property can be identified upon such description alone. It is sufficient if the description can be made certain by the aid of extrinsic evidence. The description in a contract of conditional sale of "one sorrel horse, seven years old," has been held to be sufficiently definite to charge with notice one who purchased the horse which was the subject-matter of the sale. *Beatty v. Sears*, 132 Ga. 516, 64 S. E. 321. The sufficiency of the description was a question of law for the court, and should not have been submitted as an issue of fact to the jury. It was conceded that the mule levied on in the present case was the one described in the mortgage. Had there been any issue as to this fact, it would have been proper for the court to submit to the jury the question of the identity of the mule levied on. *Collier v. Vason*, 12 Ga. 440 (3), 58 Am. Dec. 481; *Farkas v. Duncan*, 94 Ga. 27, 20 S. E. 267; *Reynolds v. Jones*, 7 Ga. App. 123, 66 S. E. 395. The court should have held, as a matter of law, that the description in the mortgage involved in the present case was sufficiently definite to charge the claimant with notice that the property in dispute had been mortgaged by the defendants in *fi. fa.* to Crawley, and it was error to charge the jury that it was for them to say whether or not the description was sufficiently definite to enable the claimant to have ascertained that the mule which he bought was the mule which passed under the mortgage from the defendants in *fi. fa.* to Crawley.

[2] 2. The mortgage having been duly recorded before the purchase by the claimant, it was error to permit him to testify that at the time of the purchase he had no notice of the mortgage. The law charged him with notice, and it was entirely immaterial whether or not at the time of his purchase he had actual notice that the mortgage had been given.

[3] 3. The undisputed evidence showed that the bank was a purchaser for value of the mortgage before its maturity. The bank was not bound by any contract or agreement not expressed in the mortgage made between the mortgagors and the mortgagee,

unless, of course, it had actual notice of such agreement at the time of the transfer of the mortgage. In the present case it was prejudicial error against the bank to permit one of the mortgagors to testify that at the time the mule was purchased from Crawley he made an express warranty as to its soundness. This testimony was entirely irrelevant, and did not illustrate the real issue in the case, which was whether or not the property was subject to the mortgage *fi. fa.*

[4] 4. The claimant being in possession of the property at the time of the levy, the burden was on the plaintiff to show either title or possession in the defendant in execution, since the debt of the former became a lien upon the property of the latter. *Civil Code 1910, § 5170; Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73. It was inaccurate and confusing to charge the jury that the burden was on the bank "to prove every material allegation which they allege in their action, or mortgage foreclosure, levies, and so forth, which you have now before you for your consideration."

[5] 5. We have carefully read the evidence, and to our minds, in light of the rulings laid down in the course of the opinion, it is not sufficient to authorize the verdict. Judgment reversed.

(10 Ga. App. 488)

HICKS v. MOYER et al. (No. 3,647.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 20*)—LIMITATIONS APPLICABLE—RECOVERY OF PERSONAL PROPERTY.

Neither section 4172 of the Civil Code (1910), providing that adverse possession of personalty for four years gives a title by prescription, nor section 4496, providing that action for injuries to personal property shall be brought within four years, nor any other provision of the Code of 1910, properly construed, limits the period within which suits to recover personal property may be brought.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 20.*]

2. STATUTES (§ 167*)—REPEAL—ADOPTION OF CODE.

A valid statute of this state in existence at the date of the adoption of the Code, but omitted therefrom through mistake or oversight, is still of force, unless expressly or by necessary implication repealed by a subsequent statute, or by some provision of the Code.

[Ed. Note.—For other cases, see Statutes. Cent. Dig. §§ 242, 243; Dec. Dig. § 167.*]

3. LIMITATION OF ACTIONS (§ 3*)—REPEAL—ADOPTION OF CODE.

Section 2 of the limitation act approved March 6, 1858, providing that "all suits for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and not after," is still of force, having been omitted from the Code by mistake or oversight, and there being nothing in the Code, or in any subsequent act which

expressly or by necessary implication reveals this section.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 9, 12; Dec. Dig. § 3.*]

4. TROVER AND CONVERSION (§ 9*)—RIGHT OF ACTION—DEMAND AND REFUSAL.

In a trover case, demand and refusal are necessary only as evidence of conversion, and need not be proved where conversion is otherwise shown.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

5. STATUTE OF LIMITATIONS—DISMISSAL OF PETITION.

No facts sufficient to relieve the action from the bar of the statute of limitations are alleged, and the court did not err in dismissing the petition upon a demurrer raising the point that the action was barred.

(Additional Syllabus by Editorial Staff.)

6. TROVER AND CONVERSION (§ 13*)—NATURE AND FORM OF ACTION.

The action of trover in Georgia is purely statutory, and is available in any case in which trover, conversion, or detinue could have been employed at common law.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 103-116; Dec. Dig. § 13.*]

7. LIMITATION OF ACTIONS (§ 178*)—PLEADING—ANTICIPATION OF DEFENSE.

The statute of limitations began to run against an action of trover where the possession of the property had been voluntarily surrendered for an indefinite time from the date of the demand and refusal, and the averment that it was not until the year 1910 that plaintiff discovered the fraudulent removal of his property cannot save the petition as against demurrer setting up limitations, in view of another allegation that in 1905 he examined the trunk, saw that the documents sued for had been removed, demanded their return, and the defendants refused to comply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 667; Dec. Dig. § 178.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Archie Hicks against I. P. Moyer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

L. C. Greer, for plaintiff in error. Moore & Branch, for defendants in error.

POTTLE, J. On February 23, 1911, Hicks filed an action of trover in the city court of Atlanta against Moyer and his wife, seeking to recover possession of certain insurance policies and other documents alleged to be the property of petitioner. The petition averred that about June 15, 1905, the petitioner left with the defendants for safekeeping a trunk containing the property in question; that about five weeks later he called for the trunk and contents, and, upon inspection, discovered that the property sued for had been removed. "Petitioner then and there demanded the return of the same which said defendants refused, and it was not until the year 1910 that he discovered that the fraudulent removal of the same was perpetrated by said defendants."

The trial judge dismissed the petition on a demurrer raising the point, amongst others, that the action was barred by the statute of limitations, and error is assigned on this judgment.

[6] 1. The action of trover in this state is purely statutory, and is available in any case in which trover, replevin, or detinue could have been employed at common law. *Mitchell v. Georgia & Alabama Railway*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622.

[1] The question is whether the period within which this statutory action may be brought is limited by any statute or law of this state. Section 4172 of the Civil Code (1910) providing that adverse possession of personal property for four years shall give a title by prescription is manifestly not a statute limiting the period within which suit can be brought, since a prescriptive title to personalty by four years possession, like a claim of prescription to realty, must be specifically pleaded as a substantive defense. Section 4496 of the Civil Code (1910) is confined to suits "for injuries" to personalty, and does not limit the right to sue for the recovery of such property. The wrongful conversion of personal property does not necessarily cause injury to the property. On the contrary, property may enhance in value while in the hands of one who tortiously withholds it. See *Blocker v. Boswell*, 109 Ga. 237, 34 S. E. 289. There is in the Code no provision which undertakes to fix a period within which suits to recover personal property must be brought.

[2,3] 2, 3. The act approved March 6, 1856 (Acts 1855-56, p. 233), was a general limitation statute, fixing the periods of time within which suits of various classes must be brought. Section 4 of that act is now embodied in the Civil Code (1910) § 4496. Section 1 provided that suits for the recovery of real estate shall be brought "within seven years after adverse possession commences, and not after." Section 2 provides: "All suits for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and not after." Neither section 1 nor section 2 of this act appears in the Code. The codifiers evidently rightly thought that, in view of other provisions of law in reference to title to land by prescription, it was unnecessary to codify section 1 of the act in the phraseology there set out. It seems that they also thought that the law now embodied in Civil Code (1910) § 4172, in reference to four years' adverse possession of personalty, and in section 4496, in reference to suits for injuries to personalty, rendered proper the omission of section 2 of this act from the Code. That the compilers of the Code of 1895 were of the opinion that the law embraced in these two sections

created a limitation upon the right to sue in trover seems to be clear from the fact that in the index under the title "Trover," and subtitle, "Within what time to be brought," the sections of the Code of 1895, containing the provisions of law now in sections 4172 and 4496 of the Code of 1910 are cited. The same is true of the Codes of 1873 and 1882. It is to be noted that Judge Hopkins in his Code of 1910 omitted this reference, as did the compilers of the first two Codes (1861 and 1867). In *Blocker v. Boswell*, supra, Mr. Justice Lewis called attention to the fact that section 2 of the act of 1856 was omitted from the Code, and said: "We think, therefore, that the codifiers purposely left out the statute of limitations as to trover, considering it was for all practical purposes embodied in the section of the Code on the subject of adverse possession of personalty for four years. There is as much reason in saying that section 3898 of the Civil Code, fixing a limitation for actions of trespass upon or damages to realty, applies to suits for the recovery of realty, as there is to say that the following section, with reference to injuries to personalty, applies to suits for the recovery of personalty. While this court, as above indicated, has recognized that an action of trover is barred in four years, yet none of these decisions were based upon the fact that the question was controlled by the section of the Code relating to injuries to personalty."

It seems to us that the codifiers acted under a misapprehension. The radical difference between the verblage of section 1 of the act of 1856, relating to real property, and section 2, relating to personalty, is apparent. In order for a suit to recover realty to be barred after seven years, the possession must have been adverse; whereas there was no such limitation in reference to suits to recover personalty. The codifiers evidently did not give due weight to the difference in language between these two sections of the act. It does not follow, however, that, because section 2 of the act of 1856 was omitted from the Code, it is not still the law. The codifiers had no authority to omit from the Code a valid existing statute. While every constitutional provision in the Code became law by virtue of the adopting act, nevertheless, a valid statute omitted from the Code, either purposely or by oversight, is still the law, unless expressly or by necessary implication repealed by some provision of the Code or subsequent statute. *Georgia R. Co. v. Wright*, 124 Ga. 608 (5), 53 S. E. 251. As there is nothing in the Code or in any subsequent act which conflicts with section 2 of the act of 1856, we hold that this section is still of force.

[4, 5] 4, 5. In a trover case, demand and refusal are necessary only as evidence of a conversion. *Thompson v. Carter*, 6 Ga. App.

606, 65 S. E. 599. [7] In the present case, possession having been voluntarily surrendered for an indefinite time, demand and refusal were necessary to show conversion. The statute began to run from the date of the demand and refusal, and, as the petition was filed more than four years after the date of the demand and refusal, the action was barred. The petition must be construed most strongly against the pleader. The averment that it was not until the year 1910 that the plaintiff discovered the fraudulent removal of his property cannot save the petition, in view of the other allegation that in 1905 he examined the trunk, saw that the documents sued for had been removed, demanded their return, and the defendants refused to comply. Without reference to other grounds of demurrer, the trial judge rightly held that the action was barred.

Judgment affirmed.

(10 Ga. App. 507)

PEAVY v. CLEMONS et al. (No. 3,677.)
(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 513*)
—ACCOUNTING—CONCLUSIVENESS OF RETURN.

The return of an executor, administrator, or guardian, made to the court of ordinary and allowed by that court, is only prima facie evidence, in his favor, of its correctness, and may be impeached by evidence, not only in the court to which it was made, but in any other court having jurisdiction of the parties and of the subject-matter. The burden of proof is upon the party who seeks to impeach the correctness of the return.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

2. EXECUTORS AND ADMINISTRATORS (§ 513*)
—ACCOUNTING—CONCLUSIVENESS OF RETURN.

Where, on appeal to the superior court from the court of ordinary, a paper probated in solemn form as the will of the decedent is declared not to be his will, and by a consent verdict and decree the executor named in the paper purporting to be the will is permitted to make a final return to the court of ordinary as such executor, and, in pursuance of the consent verdict and decree, he does so, and no objection is made to the return, and it is approved and allowed by the court of ordinary, the correctness of the return can nevertheless be subsequently attacked and impeached by evidence, not only in that court, but in any other court in this state having jurisdiction of the subject-matter and the parties. The consent verdict and decree in no sense changes the rule of law as announced in the foregoing headnote.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

3. TRIAL (§§ 314, 193*)—APPEAL AND ERROR (§ 1069*)—DELIBERATIONS OF JURORS—COERCING AGREEMENT—INSTRUCTIONS—INTIMATION OF OPINION—PREJUDICE FROM ERROR.

On the trial of this case, the jury, having been charged by the judge, had remained out several hours, considering their verdict. They were brought into court by direction of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judge, for the purpose of ascertaining whether a verdict could be reached, and the following colloquy occurred: "The Court: Mr. Foreman, have you reached a verdict? Foreman: No, sir. The Court: How do you stand as to numbers? Foreman: Ten to two. The Court: How long have you stood that way? Foreman: Some half an hour, I reckon. The Court: How did you stand previously to that time? Foreman: About seven to five. The Court: That is encouraging. You seem to be making progress towards a conclusion of the case, and I am glad to hear that you are. Of course, gentlemen, you realize the importance of making verdicts. While I understand at the same time that occasions may arise when jurors are honestly unable to agree, it is the duty, however, of the court, wherever the court has a reasonable hope that you may arrive at a unanimous conclusion, to give you all reasonable opportunity to do that; and that I am glad to do in this case. You can retire, gentlemen." *Held*, error: (1) The tendency of the language used by the judge was to encourage the ten jurors to adhere to their view of the evidence, and to discourage the two jurors in adhering to their view. (2) The two jurors might reasonably have inferred from the language used that in the opinion of the judge it would be their duty to surrender their individual convictions and agree with the majority. (3) Its tendency was to suggest that the jurors might arbitrarily compromise, divide, and yield, merely for the sake of agreement. (4) It amounted to an undue pressure by the judge upon the jury to agree to a verdict. (5) It was a violation of the spirit of the statute which mandatorily prohibits the trial judge from expressing or intimating any opinion on the facts. (6) The evidence was in conflict and about equally balanced on the issues of fact, and a verdict would have been authorized for either party. Hence the error is of sufficient gravity to require another trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 747; Dec. Dig. §§ 814, 193; Appeal and Error, Dec. Dig. § 1039.*]

Error from City Court of Vienna; E. F. Strozler, Judge.

Action by J. T. Clemons and another, administrators, against W. B. Peavy. Judgment for plaintiffs, and defendant brings error. Reversed.

This was a suit by the administrators of the estate of D. C. Clemons, deceased, to recover from W. B. Peavy money and property which they allege he received from the estate of D. C. Clemons while acting as an executor under the will of the decedent, and which it is alleged he had not, as executor, accounted for. A verdict was returned in favor of the plaintiffs for a portion of the money sued for, and the defendant's motion for a new trial was overruled, and he excepted. It appears, from the evidence, that, soon after the death of D. C. Clemons, the defendant produced an alleged will and probated it in solemn form as the will of D. C. Clemons. On a caveat filed to the probate of this will, there was an appeal from the court of ordinary to the superior court, and in the superior court a consent verdict was taken, finding that the paper offered for probate as the will of D. C. Clemons, de-

ceased, was not the will of D. C. Clemons; and, after allowing certain commissions and expenses to Peavy as executor of the will, it was further found that "said W. B. Peavy, executor as aforesaid, shall make out a final return to the ordinary of Houston county, showing the money and property that has come into his hands as such executor, together with vouchers for all moneys expended and allowed by this verdict." And a decree was entered accordingly. Peavy made his final returns to the ordinary of Houston county in pursuance of this verdict. There were objections filed to the correctness of the returns, and in due time they were formally approved and allowed by the ordinary. The defendant in the present suit sets up the verdict and the returns made by him in pursuance thereof as *res judicata*, and also insists that these returns of his, made to the court of ordinary and allowed by the ordinary, could only be attacked in the court of ordinary, or by bill in equity in the superior court. At the conclusion of the evidence the trial judge submitted to the jury only two items claimed against the defendant, holding that there was no evidence to justify a finding against him as to the other items. The jury found in favor of the plaintiffs as to only one of the items submitted. This item was for \$1,030 alleged to have been paid by the widow of the decedent to Peavy while he was acting as executor of the estate. The evidence as to this item was in direct conflict. The widow testified that, five days after the death of her husband, she turned over to W. B. Peavy, as executor, \$1,030 belonging to the decedent; that this money consisted of "\$1,000 in gold and \$30 in greenbacks," and was in a "shot sack," where she found it after the death of her husband; and that subsequently she saw the same money in the possession of the defendant's wife, who was counting it. In corroboration of this testimony, a grandson of the decedent testified that he "saw a pretty good bulk of gold money in a shot sack" in the possession of the decedent some time before his death. The defendant testified positively that he had never received this money from the widow, and he further proved that the widow had stated to several persons after the death of her husband that she found no money among his effects; that all the money they had in the house had been stolen therefrom previous to his death; and that since this larceny he had not kept his money in his house, but had put it all in the bank at Unadilla. After the jury had received the instructions of the court and had been out for several hours considering of their verdict, the trial judge had them brought into court for the purpose of ascertaining whether or not a verdict was likely to be reached, and there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upon the colloquy quoted above, in the third headnote, took place.

The motion for a new trial, in addition to the usual general grounds relied upon, specially assigns error on the refusal of the court to direct a verdict in favor of the defendant, because, as a consent verdict and a decree thereon were established, the matter was *res judicata*; that the returns of the defendant as executor, made to the court of ordinary in pursuance of the consent verdict and decree, and duly approved and allowed by the ordinary, no defense having been filed thereto, could not now be attacked; that all the heirs, and the plaintiffs as administrators, were parties to this consent verdict and decree, and were estopped from pressing their suit in this court; and that the judge's language, in the colloquy which took place between him and the foreman of the jury, was an improper invasion of the province of the jury, and unduly influenced the jurors in their deliberations.

L. L. Woodward and Crum & Jones, for plaintiff in error. Busbee & Busbee, for defendants in error.

HILL, C. J. (after stating the facts as above). [1, 2] 1. The verdict and decree relied upon as establishing the defense of *res judicata* is manifestly insufficient for that purpose. Its only effect, after the paper offered for probate had been declared not to be the will of the decedent, was a consent that W. B. Peavy, who had been acting as executor, should make his final returns to the ordinary of the county showing the money and property that had come into his possession as such executor. This probably would not only have been his right, but his duty without the consent verdict. There is nothing in this consent verdict which in the remotest degree indicates that these returns were to be accepted as true by the parties at interest. These returns as filed do not show this item of \$1,030 of money which it is alleged the executor had received from the widow, and the executor denied that he had ever received it. The law is well settled that the final return of an executor, guardian, or administrator to the court of ordinary of his county, although it may have been approved and allowed by the ordinary, is only *prima facie* evidence in his favor of its correctness, and may be impeached by evidence, not only in the ordinary's court, but in any other court having jurisdiction of the parties and the subject-matter; the burden of proof being upon the party who seeks to impeach the correctness of the return. Civil Code (1910) § 3994; *Brown v. Wright*, 5 Ga. 29. Judge Warner, in discussing the rule in the *Brown* Case, *supra*, that returns of executors, guardians, and administrators made to the court of ordinary and allowed by that court are to be considered only as *prima facie* evidence in favor of such trustee, de-

clares that "creditors, legatees, distributees and wards may impeach such returns by evidence in other courts, the burden of proof being on the party who seeks to impeach them. This we have no doubt is the safe and correct rule, for it will not do to say that because an executor, administrator, or guardian, by false and fraudulent accounts, supported by *ex parte* acts and statements, and thereupon allowed by the court, shall be held conclusive in his own favor. Such a rule would be allowing the party to protect himself, and derive a benefit to himself, from his own fraudulent conduct. In *Fermere's Case*, Lord Coke said: 'Fraud vitiates all judicial acts, whether ecclesiastical or temporal.' The rule as here announced by the learned judge remains the same in this state, and is in substance embraced in the section of the Code above cited. The consent verdict and decree which is relied upon as proving the defense of *res judicata* and estoppel does not by its terms preclude the right of parties interested to attack the returns made by the executor in the court of ordinary; and this attack could be made, not only in the court of ordinary, but in other courts having jurisdiction of the subject-matter and the parties. *Dowling v. Feeley*, 72 Ga. 557; *Crawford v. Clerk*, 110 Ga. 735, 36 S. E. 404; and *Baber & Wife v. Woods*, Adm'r, 39 Ga. 643.

[3] 2. We come now to discuss the assignment of error based on the colloquy between the judge and the jury which is set out in full in the foregoing statement of the case. It is contended that the language of the judge, and especially the latter part of it, where he said on being informed that although the jury had previously stood seven to five, but then stood ten to two: "That is encouraging. You seem to be making progress towards the conclusion of the case, and I am glad to hear that you are"—was an unwarranted invasion of the exclusive province of the jury to determine all issues of fact and to reach a unanimous verdict without any encouragement or assistance from the judge, except such assistance as might be derived from instructions applicable to the issues made by the evidence; that this statement either influenced, or had a tendency to influence, the minority of the jury to surrender their convictions and accept the opinion of the majority, and tended to impress both minority and majority of the jury with the fact that the judge approved of the conduct of those jurors who previously stood with the minority in going over to the majority; that this statement by the judge not only tended to commend the conduct of those jurors who had left the minority and gone over to the majority, but also tended to discourage the remaining two jurors in holding to their convictions as to what was the truth under the evidence, and to persuade them to abandon their individual convictions and go over to the ten jurors.

We think that the language of the trial judge is justly subject to the criticism made against it. Each case must be determined by its own facts; the true test being that wherever the language of the trial judge reasonably permits any interpretation or construction that could influence any one of the jurors to yield his convictions of the truth for the mere sake of an agreement and accept the views of the majority, or wherever the judge suggests that the jurors might arbitrarily compromise, divide, or yield their individual views in order that a verdict might be found, it constitutes reversible error, since it in some degree detracts from that absolute fairness intended to be secured by jury trials. Neither an individual juror nor the minority of the jury should be unduly pressed to surrender his or its convictions merely for the purpose of unanimous agreement. The verdict should be the result which all the jurors have unanimously come to, unaided and unassisted by the slightest intimation or suggestion by the trial judge; and the measure of the trial judge's discretion in asking for information from the jury in order to enable him to determine the likelihood of an agreement and the proper exercise of discretion in the declaration of a mistrial should be limited to the general inquiry: Is there an agreement, or is there likely to be an agreement? Beyond this formal and general communication between the judge and the jury relating to an agreement "evil cometh." Especially is this true in this state, where, under the mandatory terms of the "dumb act," a trial judge is forbidden to express or intimate any opinion as to the facts of the case. The spirit of this act contemplates that during the progress of the trial, and until the verdict is finally received, the trial judge shall say nothing indicating any opinion as to which side should prevail, and do nothing that could in any manner unduly press the jury to agree upon a verdict. What we here contend for cannot be regarded in the light of a mere technicality. It is a right vital to the value of jury trial, imbedded in the jurisprudence of this state, and secured by the mandatory terms of the statute.

The Supreme Court has on several occasions had before it cases involving the question here discussed. A consideration of some of these cases will demonstrate how zealously that court has guarded the right of a unanimous verdict which should be reached by the jury, uninfluenced by any expression by the trial judge, either of a coercive or a persuasive character. In *Alabama Great Southern Railroad Co. v. Daffron*, 136 Ga. 555, 71 S. E. 799, the following language is used: "The court should not unduly press a jury to agree upon a verdict; and, in the use of any remarks designed to impress the desirability of reaching a verdict, he should be careful to refrain from any expression of a coercive nature or which possibly may mislead them into an erroneous method of reach-

ing a verdict." In that case the language objected to was as follows: "Gentlemen of the jury, have you agreed upon the question as to the right to recover? Juror: We have, but differ as to the amount. The Court: It does look like you might agree upon that. You ought to agree upon the amount. I might be going a little too far, but verdicts are mostly all compromises. No man gets all he wants in things of that kind; and, having agreed upon the essential point, the question of whether or not there should be a recovery, it does look like you all might get together on some amount—that is, you might make a conjunction, as defined by an old rural school teacher, who, when asked what a conjunction was, said, 'A conjunction is the coming together of two or more persons or things, as John and James met.' You may retire and see if you can come together." The Supreme Court held that this language was improper and was prejudicial to the defendant. Its tendency was to suggest that the jury might arbitrarily compromise, divide, and yield for the mere sake of agreement. In the course of the opinion the learned justice, speaking for the court, cites with approval the language of the court in *Goodsell v. Seeley*, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183. In that case, in response to an inquiry by the judge, the jury said that they "had not agreed, but stood eleven to one, and divided on \$200." The judge, in reply, told them: "If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." And he asked them to get together if possible. A new trial was granted upon this ground, and in the opinion Judge Cooley said: "It is no doubt true that juries often compromise in the way here suggested, and that by 'splitting the difference' they sometimes return verdicts with which the judgment of no one of them is satisfied. But it is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring the jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise."

In *Georgia Railroad v. Cole*, 77 Ga. 77, a suit to recover damages on account of personal injuries, which was closely contested on the facts, after the jury had been charged and had retired, the judge had them brought back into the courtroom, and asked them if they were likely to agree upon a verdict. One of the jurors replied that

they were not. The court thereupon inquired whether the trouble was upon a point of law or fact, and the juror responded that it was upon a question of amount, and the judge said: "I cannot aid you in that, as I know of, in any way, further than to say that, upon that matter, the jury ought to make a very earnest effort to agree upon the amount. Of course, a juror ought not to give up his convictions, if they are so strong; but there ought to be an effort to come to an agreement. You can retire and see if you cannot agree upon the amount." It was held that this was error, and a new trial was granted. "The jury might have understood the court as favoring a finding for the plaintiff, and his remarks might have induced some of them to give up an opinion in favor of the defendant." This was a unanimous decision; but one of the judges concurred dubitante. It is apparent, from the opinion of the court, that a new trial would not have been granted in the case if it had not been a close one on the facts, in which a verdict for either party would have been authorized.

In *Parker v. Railway Co.*, 83 Ga. 540, 10 S. E. 233, Mr. Chief Justice Bleckley, speaking for the court, held that while the following language did not unduly press the jury to a verdict, "it went perhaps to the allowable limit": "This jury is, in the eye of the law, as capable of deciding this case and reaching a verdict as any that may be impaneled hereafter, and I am disposed to give you some further opportunity to consider your verdict. Go to your room and make an honest effort to agree on a verdict, and follow the rule I have given you, and I do not think it will trouble you in agreeing." The rule which the trial judge referred to was that they would have no trouble in agreeing, under the law he had given them in charge, that they should reconcile the testimony of conflicting witnesses if they could without imputing perjury to any of them, and that they should find a verdict according to the preponderance of the evidence.

In *White v. Fulton*, 68 Ga. 513, the trial judge stated to the jury substantially the language above quoted, that if the jury would follow the rule as to the preponderance of the testimony, and would endeavor to reconcile the testimony of witnesses, there would never be a necessity for mistrials, and that there had been no mistrial in his circuit for three years. The court held that this was no invasion of the province of the jury, but disapproved the remarks on the subject of mistrials, and used the following language: "Under our view the court should abstain from making any remarks to a jury that would bear even the semblance of coercion to secure a result. Juries should be left free to act without any real or seeming coercion on the part of the court, and the verdict should, as to the facts, be the

result of their own free and voluntary action."

In *Golatt v. State*, 130 Ga. 18, 60 S. E. 107, after the jury had been deliberating for some time, the judge had them brought into the courtroom and asked them if they had agreed on a verdict, and, upon being answered in the negative, stated to them that "it was their duty to agree in the case; that it had been fairly submitted to their consideration; that no juror should "stick out" in a spirit of stubbornness; that it was no credit to a juror to do that; but that if any juror had honest, abiding convictions which he found it impossible to reconcile, after due consultation with the other jurors, let him stand by them; and that it was the duty of the jurors to confer together and make an honest effort to agree. A majority of the court held that this language was very near the limit, or quite to the limit, of what is permissible, and indicated that if the case was one of conflicting evidence or closely contested issues of fact, or of circumstantial evidence, or if there was any error in the charge or rulings of the court on other subjects, it would grant another trial on account of the use of this language; but they declined to do so, because "the case before us is one of shocking murder, with no conflict in the evidence, and no apparent ground for palliation." Justices Atkinson and Holden, however, held that this language was improper and was reversible error, and that it "was of such a character as to mislead the jury as to their duty and press them too hard toward the finding of a verdict."

In the case of *Ball v. State*, 9 Ga. App. 162, 70 S. E. 888, this court held that the principle that a verdict must be the unanimous conviction of all the jurors was imbedded in the jurisprudence of this state, and this unanimity must be the voluntary conclusion of the jurors, uninfluenced by any instruction or suggestion from the judge that might induce one juror to surrender his individual conviction of the truth, and to accept the opinion of the other jurors. In the *Ball Case* a majority of the court held that it was of doubtful propriety for the trial judge ever to inquire how the jury stands numerically, and that it was presumptively hurtful to the defendant for the judge, on information that the jury stood eleven to one, even remotely to suggest to the one juror that he ought to surrender his convictions to that of the majority. The language used by the trial judge to the jury in the *Ball Case* was that: "Usually, where the jury stands eleven to one, the one juror comes to the eleven; but, of course, you must be guided by your own consciences, as the one might be right and the eleven wrong." In that case the majority of the court, entertaining the view that the evidence was doubtful as to the identity of the accused as being the guilty party, re-

versed the judgment refusing a new trial, because of the language used by the judge to the jury, stating, however, that they would not do so for this error if the evidence had demanded the verdict.

We apprehend that there can be little doubt of the soundness of the general rule stated in the foregoing opinions. Doubt arises only on the application of the rule to the particular facts. In the light of the general rule and of analogous cases decided by our Supreme Court herein cited, and in view of the fact that the evidence in this case was almost equally balanced between the plaintiff and the defendant, and that a verdict would have been authorized for either party, we are constrained to grant another trial, because of the presumptively harmful character of the language used by the judge to the jury. The defendant in error relies upon the case of *Winn v. Ingram*, 2 Ga. App. 757, 59 S. E. 7. An examination of the language used by the trial judge in that case does not disclose any material variance from that used by the trial judge in the present case. In so far, however, as the opinion in the case of *Winn v. Ingram*, supra, is in conflict with the views here expressed, that case is overruled.

Judgment reversed.

(10 Ga. App. 496)

W. W. STOVALL CO. v. W. E. SHEPHERD CO. (No. 3,664.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 47*) — TRANSACTIONS INVALID—SALES IN BULK—GENERAL SETTLEMENT WITH CREDITOR.

The purpose of the act approved August 17, 1903 (Civil Code of 1910, § 3226 et seq.), regulating the sale of "goods, wares, and merchandise in bulk," was to protect creditors against fraudulent sales by debtors. It has no application to a general settlement made by a debtor with creditors, where, by the terms of the settlement, all the creditors agree that the debtor's stock of goods, wares, and merchandise shall be turned over to a third person, who shall sell the same solely for the benefit of the creditors, and where the third person, in pursuance of the common agreement, does sell the stock in bulk and pays over to the creditors, according to the agreed pro rata, all the proceeds of the sale.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 47.*]

2. COMPOSITIONS WITH CREDITORS (§ 20*)—EFFECT OF AGREEMENT—ESTOPPEL.

Where a creditor had consented to the agreement set out in the above headnote, and actually aided the common agent of the debtor and creditors in making the sale of the debtor's stock of goods in bulk for the purpose of carrying out the agreement, he could not, after the sale had been made, but before the money arising therefrom had been paid over by the purchaser to the common agent and distributed to the creditors, recede from the agreement and, by process of garnishment, subject to the payment of his debt any part of the proceeds of the sale in the hands of the purchaser. The doctrine of estoppel would apply and forbid the dissatisfied creditor from in any manner interfering with or preventing the consummation of the agreement to which he had been a consenting party.

[Ed. Note.—For other cases, see *Compositions with Creditors*, Dec. Dig. § 20.*]

3. OBJECTIONS TO CONSTITUTIONALITY—DECISION NOT NECESSARY—FORMER DECISIONS CONTROLLING.

A decision upon the constitutional objections raised to the act of 1903 (Acts 1903, p. 92) is not necessary to an adjudication of the case, and, besides, is fully controlled by the previous ruling of the Supreme Court in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1, 62 S. E. 82.

Error from City Court of Madison; K. S. Anderson, Judge.

Action by the W. W. Stovall Company against the Anderson Dry Goods Company and another defendant and the W. E. Shepherd Company, garnishee. Judgment for garnishee, and plaintiff excepts. Affirmed.

The evidence necessary to illustrate the decision of the questions raised is in substance as follows: The Anderson Dry Goods Company was insolvent. By consent of its creditors E. W. Butler took charge of its stock of goods, and, after notice to all the creditors and by their consent, sold the stock of goods to W. E. Shepherd Company, which paid the purchase price to Butler; and he disbursed it, according to an agreed pro rata, among the creditors. After the consummation of the sale, but before the payment of the money to the creditors, W. W. Stovall Company declined to abide by the agreement which it had made with the other creditors to accept 25 cents in the dollar of the proceeds of the sale in settlement of its debt, and brought suit against the Anderson Dry Goods Company and Mrs. Anderson, claiming that she was a member of the partnership, and had summons of garnishment served upon W. W. Shepherd Company. Before the summons of garnishment was served, the garnishee had paid over the money to E. W. Butler for disbursement to the creditors of the Anderson Dry Goods Company and had resold all the goods, and the answer to the summons of garnishment set up these facts. On proof of these facts, the court directed a verdict in favor of the garnishee on a traverse filed to the garnishee's answer, and this judgment is excepted to.

M. C. Few and Wm. H. Fleming, for plaintiff in error. Saml. H. Sibley, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. It will be seen from the evidence as above stated that the Anderson Dry Goods Company was no party to the sale of its stock of goods to Shepherd Company; that this sale was made by Butler acting for the creditors, and by the consent of all the creditors for the purpose of carrying out

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

their agreement in the premises. The Anderson Dry Goods Company was not to receive any part of the proceeds from the sale of its stock of goods, and did not in fact receive \$1 of the money. It was all paid by Shepherd Company to Butler, and he prorated it according to the agreement made with and between the creditors. Stovall Company agreed with the other creditors of the Anderson Dry Goods Company to accept 25 cents in the dollar from the proceeds of the sale in settlement of its debt against the Anderson Dry Goods Company, and not only knew of the sale which Butler made to Shepherd Company of the stock of goods, but assisted him in making the sale. Stovall Company took no steps to stop the sale, and did not actually object to its consummation by Butler, but, after the sale, refused to stand by the agreement as to the general settlement. These facts being true, under the general rule of law applicable to cases of garnishment, there could not have been a recovery against the garnishee, for Stovall Company, as a creditor, could only enforce against Shepherd Company, as garnishee, such rights as the Anderson Dry Goods Company had against Shepherd Company; and certainly the Anderson Dry Goods Company had no claim against Shepherd Company except for the 25 cents in the dollar which the creditors had consented to accept under the agreement in pursuance of which Anderson Dry Goods Company had turned over the stock of goods to Butler as agent and representative of the creditors. And, besides, according to the undisputed evidence, all the money which Shepherd Company had agreed to pay for the stock had been paid to Butler before summons of garnishment was served.

It is said, however, that the sale was fraudulent as to the creditors under the act of 1903 (Civil Code of 1910, §§ 3226, 3227, 3228), and that the garnishee was liable, although it had paid out the funds. The general rule is, as above stated, that the garnishee's liability to the creditor of the principal defendant is conditioned upon his liability to the latter. In other words, a creditor cannot reach by garnishment process any assets which his debtor could not recover from the garnishee. In *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1, 62 S. E. 82, the exception to this rule is said to be where the garnishee is in possession of the effects of the defendant under a transfer fraudulent as to his creditors. "In such a case, though the defendant can maintain no action against the garnishee, yet a creditor of the defendant may subject the effects in the garnishee's hands by garnishment." And it is insisted that, as the sale of the stock of goods belonging to the Anderson Dry Goods Company was "in bulk," it was void for want of compliance with the act of 1903, supra, and therefore Shepherd Company was liable as garnishee. The act of 1903 referred to, being in derogation of the common

law, is to be strictly construed, and is applicable only to cases which fall clearly within its purview. *Taylor v. Folds*, 2 Ga. App. 453, 58 S. E. 683; *Cooney v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758. The purpose of the Legislature in the enactment stated was to protect creditors against a class of sales frequently fraudulent which left the creditors of the vendor without any assets with which to pay his debts; or, as expressed in the case of *Cooney v. Sweat*, supra: "When merchants sell their entire stock of goods to one person, without notice of any kind to their creditors, a fraud is frequently perpetrated upon the creditors; and it was the intention of the Legislature to afford a remedy to the victims of these fraudulent sales." The evil sought to be remedied was the prevention of sales by debtors of their stock in bulk, thus depriving creditors of assets or property out of which to make their claims. The statute is aimed at the fraudulent conduct of the debtor as a vendor. It has no application whatever to an honest bona fide arrangement on the part of the creditors with the debtor to protect themselves by agreeing to a composition of their debts, or to an honest assignment on the part of the debtor for the benefit of his creditors. Under the facts of the present case, the Anderson Dry Goods Company did not make the sale of its stock of goods in bulk to Shepherd Company. By agreement of all the creditors it consented that Butler, acting for the creditors, and in a sense for the debtor, should make the sale of the debtor's stock to Shepherd Company. So far as Shepherd Company, the garnishee, knew, Butler was alone the vendor. The Shepherd Company dealt with him alone. There is no evidence that he owed any one, and, as Shepherd Company, in the rôle of purchaser, dealt exclusively with him, there was no creditor to be notified of the sale. But even if the Anderson Dry Goods Company is regarded as a vendor, although unknown to the Shepherd Company as a purchaser, the case is not within the terms of the statute that "It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, for cash or credit, before paying or delivering to the vendor any part of the purchase price therefor, to demand and receive from the vendor thereof * * * a written statement under oath of the names and addresses of all the creditors of said vendor," etc. Civil Code 1910, § 3226. And in section 3228 it is provided that: "Whenever any person shall purchase any stock of goods, wares, or merchandise in bulk, and shall pay the price or any part thereof, or execute or deliver, to the vendor thereof * * * any promissory note or other evidence of indebtedness for said purchase price," without complying with the act, "such sale or transfer shall as to any and all creditors of the vendor, be conclusively presumed to be fraudulent."

Under the facts of this case no part of the purchase price was to be paid to the Anderson Dry Goods Company, or was in fact ever paid to it as a vendor, and it is undisputed that there was no collusion between any creditor and the debtor. The purchase price was paid to the creditors of the Anderson Dry Goods Company who were entitled to receive it under the agreement made by them as to a general settlement. To hold that a sale thus made was within the terms of the act would be equivalent to holding that a sale made substantially by creditors, where they had actually received the proceeds of the sale of the stock of goods, would be in conflict with the only purpose of the act—to protect creditors—and this, too, at the instance of one of the creditors who had agreed with all the other creditors as to the terms of settlement with the debtor, and who had actively co-operated in carrying out these terms. As stated, the purpose of the act is to protect creditors from fraudulent sales of debtors, and not to prevent creditors from making a general settlement with their debtors, nor to protect one creditor at the expense of all the other creditors. Such construction of the act would render void any bona fide general settlement of creditors with their debtors, and would make invalid any lawful assignment made by a merchant of all of his assets in good faith for the benefit of his creditors.

[2] 2. Besides, we think that Stovall Company by every principle of estoppel was precluded from setting aside the sale made by Butler to Shepherd Company, or from breaking up the general settlement with the creditors. It had agreed to the sale. According to the evidence, it had aided Butler in making the sale as the representative of all the creditors. It had agreed to accept 25 cents in the dollar in settlement of its claim against the Anderson Dry Goods Company, and had also agreed that the sale should be made of the stock of goods through Butler to the Shepherd Company, and should mutually bind all the creditors. One creditor could not, in the absence of fraud or mistake, recede from this agreement to the injury of other creditors, or for the purpose of breaking up the arrangement which had been accepted and agreed to by all of them. *Stewart v. Langston*, 103 Ga. 290, 30 S. E. 35. To permit Stovall Company, after entering into the agreement, to recede from it, would not only injure the other creditors by breaking up the settlement, which was presumably to their interest, but would probably leave Butler, who represented Stovall Company and the other creditors, under some legal obligation to Shepherd Company and it certainly would be inequitable and unfair to Butler to permit Stovall Company to leave him in this position after having agreed to the entire transaction and aided him in making the sale of the

goods to Shepherd Company. It would be equally unfair to Shepherd Company to require it to pay in full as garnishee the debt of Stovall Company against the Anderson Dry Goods Company in view of the fact that Stovall Company had been instrumental in inducing Shepherd Company to buy the stock of goods. The doctrine of estoppel is fully applicable to the facts of this case. Civil Code 1910, § 5736.

[3] 3. The views entertained as above expressed render immaterial the objections raised to the constitutionality of the act of 1903. Civil Code 1910, § 8226 et seq.

Besides, this court has previously certified to the Supreme Court the same constitutional objection, and the act has been fully sustained (*Jaques & Tinsley v. Carstarphen*, 131 Ga. 1, 62 S. E. 82), and there is nothing in the decision in the Supreme Court of the United States in the case of *Bailey v. Alabama*, 219 U. S. 239, 31 Sup. Ct. 145, 55 L. Ed. 191, which contravenes the ruling of the Supreme Court of this state in upholding the act in question.

Judgment affirmed.

(10 Ga. App. 531)

SOUTHERN RY. CO. et al. v. PARHAM.
(No. 3,704.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 347*)—INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN.

It is not negligence as a matter of law to leave a moving train, unless it clearly appears that the danger in attempting to do so is obvious to a person of common prudence and ordinary intelligence; and whether the attempt to get off, or the alighting from a moving train, is negligence, is generally a question of fact for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397; Dec. Dig. § 347.*]

2. CARRIERS (§ 304*)—LICENSES—PERSONS ACCOMPANYING PASSENGERS—DUTY OF EMPLOYEES.

One who goes upon a train for the purpose of assisting a lady and her young children, who intend to become passengers thereon, is in no sense a trespasser, but a licensee; and when his presence thereon and his purpose to get off become known to the employees of the railroad company in charge of the train, he is entitled to the duty of ordinary diligence on their part.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114; Dec. Dig. § 304.*]

3. EVIDENCE (§ 572*)—EXPERTS—IMPEACHMENT.

A witness who testifies as a medical expert cannot be impeached by showing that in other cases he had made mistakes in his diagnosis. Testimony as to his general reputation, and not as to his success or failure in special cases, is admissible for the purpose of impeachment.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2395-2398; Dec. Dig. § 572.*]

4. TRIAL (§ 251*) — APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—APPLICATION TO ISSUES.

The trial judge should only charge principles of law applicable to the issues made by the pleadings and evidence; but where the judge charged a correct abstract principle of law, not required by the pleadings, but injected into the case by the defendant, on which evidence had been introduced by both sides without objection, and in this connection distinctly instructed the jury that the plaintiff could only recover on the allegations of the petition, the error was immaterial and harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.* Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

In a suit brought against a railroad company to recover damages for personal injuries caused by the running of its "locomotives or cars," where an employe was joined as codefendant, it was not erroneous for the trial judge to charge the jury on the statutory presumption against the railroad company, and to fail to charge that such statutory presumption did not arise against the individual codefendant, in the absence of a specific timely request to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. DAMAGES (§ 205*) — ASSESSMENT—DELIBERATIONS OF JURY.

As a general rule no exact method of measuring damages is laid down. In cases of permanent injuries the jury may, but are not compelled to, adopt and use the mortality tables as a basis of calculation. The jury should give such compensation by their verdict as would be just and reasonable to both parties, and in arriving at this standard may consider the evidence on the subject in the light of experience and common sense.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 530; Dec. Dig. § 205.*]

7. TRIAL (§ 247*) — INSTRUCTIONS — CORRECTION BY JUDGE.

Trial courts have not only the right, but it is their duty, to correct any erroneous instructions, and court and counsel should co-operate to prevent injustice through erroneous instructions. It cannot be erroneous for the court, after having charged the jury, to call attention to certain parts of the charge as incorrect and to withdraw them from their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 568; Dec. Dig. § 247.*]

8. EVIDENCE (§ 127*)—RES GESTÆ—EXCLAMATIONS OF PAIN—ADMISSIBILITY.

Testimony as to involuntary exclamations manifesting the existence of pain is admissible. Such exclamations are symptomatic, a part of the res gestæ, and not self-serving declarations, and the evidence relied upon to prove them is not hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

9. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—EVIDENCE.

No material error of law appears, and the evidence supports the verdict.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Error from City Court of Elberton; D. W. Meadow, Judge.

Action by G. W. J. Parham against the Southern Railway Company and another.

Judgment for plaintiff, and defendants bring error. Affirmed.

Thos. J. Brown and A. G. & Julian McCurry, for plaintiffs in error. Smith, Hastings & Ransom, for defendant in error.

HILL, C. J. Parham sued the Southern Railway Company, joining as codefendant the conductor of the train, and recovered a verdict for \$3,750. The defendants' motion for a new trial was overruled, and the case is here for review.

The evidence in behalf of the plaintiff is in substance as follows: On the date alleged in the petition the plaintiff went to the depot of the railway company at Dewyrose, a station in Elbert county, for the purpose of assisting a lady and her two little children, who intended to take passage on the train. It was night, and one of the children was asleep, and the plaintiff took the child in his arms into the car. The train stopped a shorter length of time than usual, and before the plaintiff could place the sleeping child on a seat the train started, although the plaintiff acted with all possible promptness. When the train started, the plaintiff, after placing the child on a seat, hurried to the platform of the coach to get off. A negro porter of the railway company was standing on the steps of the coach from which the plaintiff expected to alight, and was blocking the steps, so that the plaintiff could not get off at that point. The conductor of the train, the individual defendant in the case, cursed the porter for blocking the steps, and called to the plaintiff to cross over to the platform of the next coach and to leave the train from that point. At the depot at Dewyrose there was no wood platform, but the ground between the adjoining tracks was leveled up even with the rails, forming a smooth dirt landing, extending a little on each side of the depot. Beyond this dirt landing in the direction in which the train was going there was a ditch on each side of the railroad, and an embankment across the ditch. The plaintiff attempted to leave the train under the direction of the conductor and at the point where the conductor directed him to get off. It was dark at the time, and the plaintiff could not see that the train had passed the dirt platform, and could not tell the speed that the train had acquired. He relied upon the directions given to him by the conductor, assuming, because of such directions, that it was safe to leave the train at that point. The train had passed the dirt platform above described, and was running faster than the plaintiff had supposed. The train was behind time, was a light train, consisting of only two coaches and an engine, and because of being behind in its schedule acquired considerable speed in a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

short space of time and could move very much farther than an ordinary railroad train in the time taken by the plaintiff. When the plaintiff attempted to alight he stepped into the ditch above referred to, and because of so stepping into the ditch, and because of the speed of the train, was given a violent wrench, and was thrown against the embankment, and received the injuries stated in the petition, and for which he sought to recover damages.

The evidence of the defendant conflicts sharply with the evidence of the plaintiff, both as to how the accident occurred and as to the extent of the injuries received. The conductor testified that he did not see the plaintiff, did not know that he had gotten on the train for the purpose of assisting passengers, did not give the plaintiff any direction to cross from the platform of one coach to the platform of another, or to get off at that point, and did not curse the negro porter, and, in short, contradicted every statement made by the plaintiff as to the manner in which he had received his injuries, and also denied the existence of any ditch at that place, and said that the train had stopped an unusual length of time that night at Dewyrose, and that the plaintiff had ample time in which to go into the coach and get off without injury by the exercise of ordinary diligence. The conductor's evidence is corroborated by other employes of the defendant.

According to the evidence of the plaintiff, and expert testimony in his behalf, he received very severe and probably permanent injuries. According to the testimony for the defendant, both lay and expert, he received very slight, if any, injuries. This court will not discuss the evidence, except as it may be necessary to do so to illustrate the decisions on special assignments of errors of law. The verdict of the jury settles the conflicts in the evidence, and so far as this court is concerned establishes the truth of the testimony in behalf of the plaintiff, not only as to the manner in which he was injured, but also as to the extent of his injuries, and unless the trial judge committed a material error on some question of law, which was presumptively prejudicial to the defendant, the verdict will not be disturbed.

[1] 1. It is insisted by the plaintiff in error that, even conceding the truth of the evidence in behalf of the plaintiff, the verdict is contrary to law, because it shows such negligence on his part as would preclude him from a recovery; that his act in getting off a moving train in the dark was so obviously dangerous that he was not relieved from negligence in attempting to do so, even under the directions given him by the conductor. It is contended that to get off a moving train in the dark, and at a place other than the platform or regular place of getting off, is per se such an act of negligence as would in any event prevent a recovery.

Many cases are cited from the Supreme Court of this state in the elaborate brief of counsel for plaintiff in error which it is claimed sustain this view of the law, some of them being *Jones v. Georgia, Carolina & Northern Ry. Co.*, 108 Ga. 570, 29 S. E. 927, *Barnett v. East Tenn., Va. & Ga. Ry. Co.*, 87 Ga. 766, 13 S. E. 904, *W. & A. R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913, *Whatley v. Macon & Northern Ry. Co.*, 104 Ga. 764, 30 S. E. 1003, *Roul v. East Tenn., Va. & Ga. Ry. Co.*, 85 Ga. 197, 11 S. E. 558, and many others. It would be unprofitable to consider each one of these cases. It is sufficient to say that we have examined each one, and find that none of them sustain the view urged by learned counsel. Nowhere does the Supreme Court lay down the proposition of law that, regardless of the facts, it is such negligence on the part of a passenger or licensee to leave a moving train as would preclude a recovery. The question of negligence in each particular case is one of fact, which must be determined by the jury alone, and the court cannot as a matter of law lay down any inflexible rule on the subject.

[2] In the present case the negligence on which a recovery is predicated is the negligence of the conductor in telling the plaintiff to get off a moving train under the circumstances proved by the plaintiff. It must be remembered in this connection that, while the plaintiff was not a passenger, neither was he a trespasser. He was lawfully on the train for the purpose of assisting a woman with two infant children, who were passengers thereon. Conceding that the defendant was under no duty to anticipate his presence on the train, or to foresee his purpose to leave the train, yet when his presence and his intention became known to the employes of the defendant company, it was their duty to exercise ordinary care to prevent his injury. The principles of law embraced in the foregoing statement are well settled by repeated decisions of the Supreme Court of this state. In *Suber v. G. C. & N. Ry. Co.*, 96 Ga. 42, 23 S. E. 387, it is held that a person going upon a train to assist his sister and children, who expected to become passengers, was lawfully on the train, and when his presence was known was entitled to the duty of ordinary care on the part of the employes of the railway company. And in the case of *Macon, Dublin & Savannah R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889, the *Suber Case*, supra, is cited with approval, and the doctrine reaffirmed that a person on a train under such circumstances is there lawfully, and is entitled to ordinary care by the employes of the railway company when his presence becomes known. In the case of *S. A. L. Ry. Co. v. Bradley*, 125 Ga. 193, 54 S. E. 69, 114 Am. St. Rep. 196, the *Suber Case* is again approved, and the doctrine therein stated reaffirmed. These decisions establish the rule that the plaintiff was lawfully upon the train, and that, when the conductor discov-

ered his presence and his purpose to leave the train, the duty of exercising ordinary care devolved upon him to prevent injury to the plaintiff. Whether the conductor did so under the facts proved in behalf of the plaintiff was a question for the determination of the jury.

Under these facts it was the province of the jury to say whether the act of the conductor in directing the plaintiff to leave the train at that time and place was or was not an act of negligence, or whether under the circumstances the danger of doing so was so manifest and clear that, notwithstanding the directions of the conductor, the plaintiff was guilty of such negligence in attempting to alight at that time and place as would prevent a recovery. If the conduct of the conductor was negligent, and if the obedience to the directions of the conductor was not negligence of a culpable character, then these facts under the law would have authorized a recovery. This proposition is conclusively established by repeated decisions of the Supreme Court. *W. & A. Ry. Co. v. Wilson*, 71 Ga. 22; *Southwestern R. Co. v. Singleton*, 67 Ga. 306; *Coursey v. Southern Ry. Co.*, 113 Ga. 297, 38 S. E. 866. In the *Coursey Case* the plaintiff had by mistake gotten upon the wrong train. Upon discovering that fact she told the conductor of her mistake, and after the train was leaving she was directed by him to get off. Obeying this direction, she was hurt. The sole negligence alleged in the petition was the negligence of the conductor in telling her to get off. The court below granted a nonsuit and the Supreme Court reversed this judgment, holding that it was a question of fact. In *Turley v. A., K. & N. R. Co.*, 127 Ga. 594, 56 S. E. 748, 8 L. R. A. (N. S.) 695, it is held in effect that it is not negligence as a matter of law to leave a moving train, unless it appears that the danger attending the attempt to alight is so great as to be obvious to a person of common prudence and ordinary intelligence, and that ordinarily in cases of this kind the question of what is or is not negligence is a question for the jury. In the *Turley Case*, Mr. Justice Beck, speaking for the court, says: "We cannot agree with counsel for the defendant, who insists that the plaintiff 'knew the train was running at a speed that made it hazardous to attempt to alight therefrom in the prevailing darkness,' and 'knew more than this, that the train was not stopping, but was increasing its speed, and with this situation clearly before him, chose not to avoid, but to risk, the danger,' and that consequently the plaintiff's injury was not the result of the defendant's negligence, but of his own recklessness."

The case of *Simmons v. S. A. L. Ry. Co.*, 120 Ga. 225, 47 S. E. 570, which apparently supported the proposition here contended for by the plaintiff in error, was expressly overruled, and it was announced that the *Suber Case*, supra, stated the correct rule, on the

subject. We conclude that the contention of the plaintiff in error on the point above discussed is not supported by the decisions of the Supreme Court, and the proper rule on the subject, deduced from all the decisions, is that the question of negligence is one of fact, to be determined by the jury under the circumstances of each particular case.

[3] 2. A medical expert, introduced by the plaintiff, testified as to the character and extent of the plaintiff's injuries. The defendants introduced a witness by whom they sought to impeach and discredit this medical expert, by showing that on a previous occasion he had examined this witness and had stated that the witness was suffering from spinal concussion or "railway spine," the same diagnosis which the expert had made of the plaintiff's injuries, when in fact the witness had never been in a railroad accident and had never suffered from any spinal trouble. This testimony was excluded by the court. We hardly think that the value of the testimony of a medical expert can be impeached by instances of special cases in which he might have been mistaken in his diagnosis. To so hold, it seems to us, would bring in issue the question as to whether or not in each particular case the diagnosis was correct or incorrect. The correct rule is laid down by Mr. Wigmore in his work on Evidence (volume 2, p. 1148): "Proof of such particular instances of error by other witnesses is generally regarded as inadmissible, and for reasons analogous to those of the character rule, namely, confusion of issues by the introduction of numerous subordinate matters, controversies involving comparatively trivial matters and unfair surprises, by leaving the impeached witness unable to surmise the tenor or the time of the supposed conduct which might be attributed to him by false testimony." While it might strike the ordinary mind that a medical expert could not be safely relied upon in his diagnosis, where he had stated upon an examination that a person was suffering from spinal concussion, or "railway spine," when in fact the person had never been the victim of any railroad accident, or had never suffered from any spinal complaint, and while it might be argued that this medical expert, in making a similar diagnosis of the plaintiff's injuries, was indulging somewhat in a fad or a favorite theory, yet it must be manifest to any thinking mind that it would be unsafe, as well as unjust to the medical expert, to allow such special method of attack, unless at the same time the expert thus attacked were allowed an opportunity of meeting the attack, by showing that the witness who testified that he was not injured had been in fact injured and was testifying falsely, and that as a matter of fact his diagnosis of the witness' condition was correct. In the administration of practical justice by the courts, this method of impeachment should not be permitted.

3. In support of the medical expert who

testified in behalf of the plaintiff, testimony was admitted in evidence that the expert had held many positions in different sanitariums and hospitals, where he had had extensive experience in medicine and surgery. This testimony was objected to. One method of proving expert knowledge is to show expert opportunities and experience, and clearly the testimony was admissible for this purpose.

[4] 4. Two of the grounds in the amended motion for a new trial assign error upon the charge of the court to the effect that the railway company was under a legal duty to allow the plaintiff a sufficient time in which to get off the train after his intention to leave had become known to the conductor. It is contended that this charge was hurtful to the defendant, and was not on any one of the issues made by the pleading, as no negligence was alleged in this respect. An inspection of the brief of evidence discloses the fact that the defendant contended that the plaintiff did have time to get off the train and that the railroad company in this respect had performed its duty; and this testimony was met by the plaintiff by showing that he was not given sufficient time in which to get off. No objection was made by either side to the introduction of this evidence on the ground that it was not covered by the pleading. The judge stated a correct abstract principle of law, and while not required by the pleading, it was covered by the evidence introduced on both sides. Consequently it was not reversible error to charge on the subject, and certainly the defendant should not be heard to complain of the charge covering an issue which it had injected by its evidence. However, the court subsequently instructed the jury that the plaintiff could only recover under the allegations of negligence charged in the petition.

[5] 5. Objections are made to instructions of the court as to the presumption against a railroad company on proof of injury, and to the failure to charge that this presumption did not arise against the individual defendant. As to the railroad company, the charge on this subject is based upon the statutory presumption. Civil Code 1910, § 2780. It is insisted that, even as against the railroad company, this charge was improper, as the plaintiff was not hurt by "the running of the locomotive, cars, or machinery of the railroad company." We do not concur in this opinion. It would be entirely too restricted a view to take of the statute, and would limit its application to cases where persons were hit or run over, or came in physical contact in some other way with the locomotive, cars, or machinery of the defendant while they are actually in movement. The statutory presumption applies to injuries received by persons alighting from trains or locomotives. The momentum imparted to the body of a person alighting from a moving train, which throws him against an ob-

stacle on the outside, is as much a cause of the injury as the violent contact with the obstacle or obstruction.

The case of Georgia Ry. & Electric Co. v. McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177, relied upon by plaintiff in error, is not in point. In the McAllister Case plaintiff had actually left the car, had crossed to the sidewalk, and was walking home when the injury occurred. In other words, he had entirely severed all connection with the operation of the street car when he was hurt. In Georgia Railway & Electric Co. v. Reeves, 123 Ga. 697, 51 S. E. 610, and S. A. L. Ry. Co. v. Bishop, 132 Ga. 71, 63 S. E. 1103, it is clearly ruled that a person injured in alighting from a moving train, or even from a stationary train, by the running of the company's locomotive, cars, or machinery, is entitled to the statutory presumption.

As to the objection that the court did not instruct the jury that this presumption did not apply to the individual defendant: The court did tell the jury that it applied to the railroad company, and under the maxim, "*Expressio unius est exclusio alterius*," this was in effect telling the jury that it did not apply to the individual defendant. In the usual general statement made in the charge on the subject of presumption, the court did charge the jury that the burden was upon the plaintiff to make out his case against the defendant, and the only exception stated to this general rule was the presumption against the railway defendant. Assuming that the jury were men of ordinary intelligence, they must have understood from this statement and the exception that the presumption applied only to the railway company, and not to the individual defendant. However this may be, we think that, if the defendant desired a more specific charge on this subject, he should have requested it in writing.

[6] 6. The following excerpt from the charge is objected to: "If you are in possession of facts that will authorize you to estimate in dollars and cents any branch of injury received, the loss of ability to work or otherwise, you can fix that amount at whatever the testimony authorizes for damages along that line." It is objected that this charge did not present to the jury any fixed and certain rule by which the damages should be estimated, and in elaborating this ground of the motion learned counsel insists that it was the duty of the judge to charge as to the use of the mortality and annuity tables, and that the judge erred in failing to charge as to reducing to its present value the plaintiff's entire future loss. It has been held by the Supreme Court that the jury, in estimating damages, are not compelled to use the mortality and annuity tables, and the court is not required to give them in charge unless requested. In the standard

charge prepared by the Supreme Court in *Florida Central & Peninsular R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730, it is expressly stated therein that these tables "are not binding on the jury." The jury are at liberty to use in estimating the damages the result of their own observation and experience, aided by the testimony as to the extent of the injuries and the resulting damages. *R. & D. R. Co. v. Allison*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43; *Southern Ry. Co. v. Scott*, 128 Ga. 244, 57 S. E. 504. The size of the verdict in the present case would indicate either that the jury did in fact reduce the future damages to present value, or did not consider the question of permanent damages at all. Without a more specific request to charge on the subject of damages, the general charge as given was not prejudicial.

[7] 7. After the court had concluded the charge to the jury, and had directed them to retire and make up their verdict, counsel for the plaintiff arose, and in the presence of the jury suggested that a certain portion of the charge according to the practice in the United States court be corrected, whereupon the court sent the jury out, and, after an argument covering this part of the charge, the court brought the jury back and corrected his charge on the subject of punitive damages, distinctly and expressly withdrawing from their consideration that portion of the charge as not applicable to the case under the evidence. Of course, that portion of the charge referring to punitive damages was inapplicable to any of the issues made by the pleading or the evidence, and the court very properly corrected it on suggestion of counsel for the plaintiff. It is immaterial that in doing so he followed a practice pursued in the United States court, and it is wholly immaterial that counsel for the plaintiff in the presence of the jury asked him to do so, according to the practice in such matters in the United States court. The only material question was: Was this portion of the charge erroneous? If it was, it was the duty of

the court to correct it, and as to that matter it was incidentally the duty of counsel to consent to the correction. Judges rely upon attorneys in a case to aid them in giving proper instructions on the issues submitted and to assist them in preventing as far as possible any injustice through erroneous instructions.

[8] 8. The court admitted, over objection of the defendant, the evidence of the wife of the plaintiff that after his injuries had been received, frequently during his sleep, he was heard to "moan and groan." It is objected that this testimony was irrelevant, and that the moaning and groaning took place long after the accident. It has been held that involuntary exclamations of pain, made soon after an injury has been received, cannot be regarded as self-serving declarations, but as symptoms, and are admissible in evidence. *Georgia Ry. & Electric Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944. It would seem to follow that, as long as the injured person was still suffering from the effect of injuries which he had received, any involuntary exclamation made by him, indicating that he still suffered from the effects of such injuries, would be admissible for what they were worth. Whether the moans and groans of a man in his sleep are caused by pain due to physical injuries or not, it certainly cannot be claimed that they are in any sense self-serving declarations. They would seem to be more in the nature of subjective symptoms of physical suffering. Certainly, where the evidence is clear, irrespective of this moaning and groaning while asleep, that the plaintiff had incurred injuries of a severe character, it would be absurd to grant a new trial on the ground that the court had erred prejudicially in admitting evidence of these involuntary exclamations made by the plaintiff while asleep.

[9] 9. We have examined the record very carefully in connection with all the assignments of error, and we find no reason for reversing the judgment refusing to grant another trial.

Judgment affirmed.

(31 S. C. 118)

McDONALD v. FLOYD et al.

(Supreme Court of South Carolina. Feb. 26, 1912.)

PROCESS (§ 166*)—WAIVER OF DEFECTS—FAILURE TO OBJECT.

Defendant, by not appearing for trial on the day fixed, and objecting to jurisdiction of his person on the ground that the summons required him to answer within less than 20 days after service, contrary to Code Civ. Proc. 1902, § 88, subd. 16, waived his right to object on that ground; the objection not going to the subject-matter of the action, but to the jurisdiction of the person.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 250-255; Dec. Dig. § 166.*]

Appeal from Common Pleas Circuit Court of Richland County; Robt. Aldrich, Judge.

"To be officially reported."

Action by T. C. McDonald against W. A. Floyd and another. From an order denying a motion made in the original cause to set aside a judgment, defendant named appeals. **Affirmed.**

Nelson, Nelson & Gettys, for appellant. Frank G. Tompkins, for respondent.

GARY, C. J. The following statement appears in the record: "This was a motion in the original cause, on behalf of the defendant W. A. Floyd, to stay execution and vacate and set aside a judgment originally rendered against J. W. and W. A. Floyd, on the 1st day of April, 1903, by Robert Moorman, Esq., magistrate for Richland county, a transcript of which was filed, and judgment entered thereon, in the court of common pleas for Richland county, and was heard in open court by his honor, Robert Aldrich, presiding judge, at the summer term, 1911, of the court of common pleas." The motion was refused, whereupon the defendant appealed to this court, and, in the language of the appellant's attorneys, the sole question presented by the exceptions is whether there was error, on the part of his honor, the presiding judge, in refusing the motion on the ground that the judgment was void, because the magistrate was without jurisdiction; the summons being fatally defective, in that it was issued and served on November 26, 1902, and required the defendant to appear and answer on December 16, 1902, less than 20 days after service.

Section 88, subd. 16, of the Code, provides that, "when twenty-five or more dollars is demanded, the complaint shall be served on the defendant not less than twenty days * * * before the day therein fixed for trial." Prior to the decision in the case of *Jenkins v. Railway*, 84 S. C. 343, 66 S. E. 409, the question of jurisdiction as to the person and the subject-matter of the action was in much confusion, arising from the fact that there were numerous decisions which could not be reconciled, as will be seen by reference to the opinion of the court and the

dissenting opinion in said case. In order to settle the law, the circuit judges were called to the assistance of the Supreme Court, and when they sat en banc it was held that "the provision that an action for the recovery of a penalty must be tried in the county where the cause or some part thereof arose is a mere statutory requirement as to procedure; but it cannot be successfully contended that it constitutes the *subject-matter* of the action." And no strong reason can be urged why the time prescribed for the trial of the case should be regarded as the subject-matter of the action. The question of jurisdiction herein relates to the person, and when the defendant was served with a copy of the summons and complaint, and did not even attend, on the day fixed for the trial, for the purpose of objecting to the jurisdiction of the court, he thereby waived the right to interpose such objection. We shall not undertake to review the cases prior to that of *Jenkins v. Railway*, 84 S. C. 343, 66 S. E. 409, as all those that cannot be reconciled with the principles therein stated must be regarded as overruled.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(90 S. C. 412)

STATE ex rel. TAYLOR et al. v. BLEASE et al.

(Supreme Court of South Carolina. Feb. 26, 1912.)

1. COLLEGES AND UNIVERSITIES (§ 9*)—SCHOLARSHIPS—PERSONS ELIGIBLE.

Act Feb. 17, 1911 (27 St. at Large, p. 113), provides for the award of scholarships in the University of South Carolina, Clemson Agricultural College, etc., by the State Board of Education upon the recommendation of the faculties, provided that "no applicant for a scholarship shall be eligible to stand an examination for a scholarship if such applicant has already attended the institution for which the scholarship is intended, or any other institution of higher learning known as a college or university," provided such condition shall not apply where there is no other applicant. *Held*, that an applicant who had been a student in the preparatory classes of Clemson College, which was a department of the college, and received free tuition from the trustees, was not eligible to receive a scholarship in the college.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9.*]

2. STATUTES (§ 184*)—CONSTRUCTION.

The courts will not seek a reason for the enactment of an unambiguous statute, or for failure to make it different from what it is.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

Appeal from Common Pleas Circuit Court of Richland County; Ernest Gary, Judge.

"To be officially reported."

Mandamus by the State, on the relation of W. B. Taylor and another, against Cole

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

L. Blease and others. From a judgment denying the application, relators appeal. Affirmed.

George R. Rembert and C. S. Monteith, for relators. J. Fraser Lyon and W. H. Sharpe, for respondents.

WOODS, J. The statute of February 17, 1911, provides for the award of scholarships in the University of South Carolina, Clemson Agricultural College, the Citadel, and Winthrop Normal and Industrial College "by the State Board of Education upon the recommendation of the faculties of the respective institutions, or of such committees as may be appointed for that purpose by the boards of trustees of those institutions." Among other conditions of eligibility the statute imposes the following: "No applicant for a scholarship shall be eligible to stand an examination for a scholarship if such applicant has already attended the institution for which the scholarship is intended, or any other institution of higher learning known as a college or university: Provided, that this condition shall not apply where there is no other applicant."

The relator Guy B. Taylor stood the examination and was recommended by the faculty of Clemson College for appointment to a scholarship in that institution; but the Board of Education refused to appoint him, on the ground that he had already attended Clemson College, and was therefore ineligible under the terms of the statute. Thereupon a petition was filed, praying for a writ of mandamus requiring the Board of Education to make the appointment. Without stating the pleadings in detail, it is sufficient to state that the cause depends on the admitted fact that Guy B. Taylor was a student in the preparatory class, a department of Clemson College, during the college year of 1910-11, and received free tuition at the hands of the trustees. The appeal is from an order of the circuit judge refusing the writ, on the ground that attendance as a student in a preparatory class at Clemson College fell within the terms of the statute, and that Taylor was therefore ineligible to appointment.

[1] We think there can be no doubt that the State Board of Education and the circuit judge correctly construed the statute. The several state institutions of learning are distinct entities, and the name of one of them, used without limitation in a statute or elsewhere, is understood by everybody to mean the entire institution, including all its departments as organized and conducted under the law. Certainly there is no authority for the Board of Education or the court to undertake to cut Clemson College into parts, and say that the General Assembly, in legislating for "Clemson Agricultural College," meant to exclude its preparatory classes.

[2] The court cannot give such a meaning to the statute on the ground that there was no reason for the General Assembly to make preparatory students ineligible to scholarships, and that therefore their exclusion could not have been intended. When the terms of a statute are perfectly plain, it is not for the court to find reasons for its enactment, or for a failure to make its language less general. Moreover, it would be very bold for the court to say that there was no reason for making the rule of ineligibility so broad as to include attendance in the preparatory department of the college; for it may have been the design of the General Assembly to give the advantage of scholarships exclusively to those boys and girls whose opportunities were limited to the ordinary schools of the state.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDBICK, WATTS, and FRASER, JJ., concur.

(90 S. C. 376)

SUMTER PINE & CYPRESS CO., v. ATLANTIC COAST LINE R. CO.†

(Supreme Court of South Carolina. Feb. 23, 1912.)

CARRIERS (§ 20*)—CARRIAGE OF GOODS—LOSS OF OR INJURY TO GOODS—PENALTY.

Under the statute providing a penalty for failure of a carrier to adjust a claim for loss of goods within a stated time, and requiring the filing of the claim with the agent at the point of destination, the claim may be filed with the nearest agent who keeps the station open during reasonable business hours, and the claimant is not bound to file the claim with a nearer agent who leaves his station closed most of the time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vore, Judge. "To be officially reported."

Action by the Sumter Pine & Cypress Company against the Atlantic Coast Line Railroad Company. From a judgment of the circuit court, affirming a judgment for plaintiff in a magistrate's court, defendant appeals. Affirmed.

Lucian W. McLemore and Mark Reynolds, for appellant. L. D. Jennings, for respondent.

GARY, C. J. The following statement appears in the record: "Action in magistrate's court to recover \$1.75, value of 100 pounds of cabbage, and for \$50 penalty for failure to adjust same within statutory period. The point of destination had no agent there, and the plaintiff filed his claim with the agent at Sumter, S. C. The nearest point to Rocky

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 17, 1912.

Bluff having an agent was Oswego, S. C. The circuit judge held that the agent at Oswego must be a 'regular' agent, and not an agent who stays at depot, and meets the trains, and receives and delivers freight, and who is sometimes absent during the day. He affirmed the judgment for the penalty, holding that the claim was properly filed. This appeal alone involves the penalty awarded, and whether the penal statute was complied with; it being undisputed that Oswego was the nearest station to Rocky Bluff, the point of destination."

His honor the presiding judge found the facts as follows: "I find from testimony, as matter of fact, that the agent at Oswego did not remain at station, but only met trains, and sometimes delivered freight; he being absent from station more than present, and left no one at station in his place, but would lock it up. I find, as matter of fact, that there was no agent at Rocky Bluff, point of destination of goods. I find, as matter of fact, that plaintiff filed its claim with agent at the nearest station to such point of destination having an agent, as contemplated under the statute, which I hold is such an agent as can be found at such station during reasonable business hours."

The first question raised by the exceptions is whether there was any testimony tending to show that the defendant waived the right to insist upon the objection that there was a failure upon the part of the plaintiff to comply with the statutory requirement; that when there is no agent at the point of destination then the claim shall be filed with the agent at the nearest station to such point of destination having an agent. It is only necessary to refer to the testimony set out in the first exception, which raises this question, to show that it cannot be sustained. It is not necessary to say whether there was any competent evidence of waiver, as the judgment must be sustained on other grounds.

The material question is whether his honor the presiding judge erred in ruling that the statute contemplated such an agent as could be found at the station during reasonable business hours. The statute contemplates the filing of the claim with the agent at the point of destination. If he fails to keep reasonable business hours, such conduct would naturally tend to cause great inconvenience and loss of time to the party filing the claim. The defendant has not the right to impose inconvenience and loss of time upon such party, and, if he files his claim with the agent at the nearest station where reasonable business hours are kept, it is estopped from raising the objection that the claim should have been filed at a nearer station.

Judgment affirmed.

WOODS and HYDRICK, JJ., concur.

(30 S. C. 586)

STATE v. BARBER.†

(Supreme Court of South Carolina. Feb. 23, 1912.)

EMBEZZLEMENT (§ 44*) — EVIDENCE — SUFFICIENCY.

Evidence held to support a conviction of a fraudulent misappropriation by accused of a trust fund received for a specified purpose.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

Appeal from General Sessions Circuit Court of Spartanburg County; John S. Wilson, Judge.

"To be officially reported."

Charles H. Barber was convicted of crime, and he appeals. Affirmed.

J. B. Gwynn and John Gary Evans, for appellant. J. Cotts, Sol., for the State.

WOODS, J. The defendant, Charles H. Barber, appeals from the conviction and sentence on an indictment charging that he "did willfully commit a breach of trust, in that he received from one Sallie Harrison the sum of one hundred dollars, good and lawful money of the United States of America, the denominations, issues, and coinage thereof being to the grand jurors aforesaid unknown, for and upon the special trust that he would pay said one hundred dollars in settlement and satisfaction of a commuted fine, which had been imposed by the court of sessions upon one Richard Harrison, and willfully and fraudulently refused to pay said fine, when commuted to the sum of one hundred dollars, by the Governor, in the willful and fraudulent breach of his said trust, and fraudulently misappropriated said one hundred dollars, a trust fund, to his own use."

There are several exceptions, but the single point pressed in argument was that the circuit judge should have directed a verdict of acquittal on the ground that no evidence was introduced tending to prove the charge made in the indictment. Stated more specifically, the position taken by defendant's counsel was that the entire evidence was to the effect that the sum of \$100 was paid to defendant to indemnify him as surety on the bail bond of Richard Harrison pending his appeal from the conviction of some criminal offense in the court of general sessions for Spartanburg county, and not to pay the fine imposed on Harrison, and that the bail bond has been estreated and defendant's liability fixed by the estreat. The deposit with the defendant of \$100 by Mrs. Sallie Harrison came about in this way: After Harrison's conviction and sentence, his counsel, C. P. Sims, Esq., obtained from the solicitor a promise to request the Governor to commute his sentence to a fine of \$100 or service on the chain gang for three months. To prevent the execution of the sentence imposed by the court pending the application to the Governor for commutation, counsel for Harrison gave notice of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Rehearing denied March 11, 1912.

appeal, and induced the defendant to go on his bail bond. After testifying that he explained to the defendant the expected reduction of the fine to \$100, Mr. Sims thus states his arrangement with the defendant: "The agreement was that it was to be cut down to \$100, and with that understanding I turned \$100 over to Mr. Barber, and gave him some chattel mortgages or some kind of papers to secure him for going on this bond for this \$300." We think it was a fair inference from this and other similar evidence, looked at in the light of the circumstances, that, in view of the expected commutation, the \$100 deposit would be a sufficient protection for signing the bond, and that, when the commutation was made, the defendant would pay it and satisfy the sentence and his obligation as surety. Such an inference finds strong support in the admissions of the defendant that, after the sentence of Harrison was commuted, he repeatedly promised to apply the money to the payment of the fine. The testimony of the defendant tended to show, further, that the solicitor made most earnest efforts to get him to pay the \$100 deposited with him in settlement of the whole matter—the bail bond as well as the fine—telling him that he would estreat the bond unless the fine was paid, and still further, that the bail bond was estreated against the defendant only after his long persistence in retaining the money with which he had been intrusted had indicated that he had fraudulently converted it to his own use. It thus appears that there was evidence to support the offense charged.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WATTS, J., did not sit in this case.

(90 S. C. 366)

MILLS v. SOUTHERN RY. CO., CAROLINA DIVISION.

(Supreme Court of South Carolina. Feb. 20, 1912.)

1. CARRIERS (§ 105*)—CARRIAGE OF GOODS—DELAY.

Special damages for delay in shipment of goods are recoverable when the carrier receives notice at the time of the shipment that delay in delivery will result in such damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

2. TRIAL (§ 60*)—ORDER OF PROOF.

Where the complaint, in an action against a carrier for delay in the delivery of goods, alleged special damages, the carrier could not object to proof of such damages, though it was not first shown that the carrier had notice, at the time of shipment, that such damage might result.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141, 145; Dec. Dig. § 60.*]

3. APPEAL AND ERROR (§ 231*)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW.

The admission of evidence cannot be complained of on appeal, where the reason for its rejection, urged on appeal, was not raised by the objections at trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.* Trial, Cent. Dig. §§ 196, 198.]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

The admission of improper evidence is harmless error, where other evidence of the same kind was admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

5. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR.

In an action in the magistrate's court against a connecting carrier for delay in the delivery of goods, the carrier's objection to the admission of plaintiff's bill of lading, on the ground that its execution had not been proved, is too technical to warrant reversal, where defendant does not show prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4544; Dec. Dig. § 1170.*]

6. CARRIERS (§ 134*)—CARRIAGE OF GOODS—DELAY—ACTIONS—PUNITIVE DAMAGES.

In an action against a connecting carrier of goods for delay in delivery, evidence held to show a reckless disregard of the consignee's rights, entitling him to punitive damages.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 134.*]

7. APPEAL AND ERROR (§ 1094*)—REVIEW—DECISION OF INTERMEDIATE COURT.

On appeal from an order of the circuit court dismissing an appeal from a judgment of a magistrate's court, questions of fact cannot be raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

8. APPEAL AND ERROR (§ 1085*)—REVIEW—PRESENTATION OF QUESTIONS OF REVIEW IN COURT BELOW.

On appeal from an order of the circuit court, dismissing an appeal from a magistrate's court, errors not complained of in the magistrate's court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4271, 4272; Dec. Dig. § 1085.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Aiken County.

Action by Julius Mills against the Southern Railway Company, Carolina Division. From an order of the circuit court dismissing defendant's appeal from a judgment for plaintiff in magistrate's court, defendant appeals. Affirmed.

The third exception was as follows:

"(3) It is submitted that his honor, the presiding judge, erred in not sustaining the defendant's third exception, which was as follows, for the reason therein stated: 'That his honor erred in admitting in evidence the alleged bill of lading without having the same properly proven by the party who issued the same in St. Louis, Mo.'"

Hendersons, for appellant. Claude E. Sawyer, for respondent.

GARY, C. J. This action was commenced in a magistrate's court, and is for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendant.

The allegations of the complaint are as follows: "That the plaintiff is, by trade, a barber, and desiring to engage in his trade at Langley he rented a house at a rental of \$5 per month, and announced to the public that he would open a place of business, commonly called a 'barber shop,' on or about the 1st day of April, 1906, and for that purpose he purchased an outfit for his shop, consisting of chairs and mirrors, which was delivered to the defendant by the August Kern Barber Supply Company, in the city of St. Louis, in the state of Missouri, on the 24th day of March, 1906, and reached Langley on the 3d day of April, 1906, and the defendant, through its agents and servants, willfully, maliciously, wantonly, negligently, and in utter disregard and violation of the plaintiff's rights, failed and refused to deliver the said articles to the plaintiff, without any reason whatever, for a long space of time, in consequence of which failure to get possession of his aforesaid appliances he was unable to open his barber shop and engage in his business, and his landlord, the Langley Manufacturing Company, in consequence of such long delay, has rented and let the barber shop to another party, and thus deprived this plaintiff of carrying on his business, because there is no other suitable house which can be obtained in that locality; and plaintiff further alleges that that particular place is the best and most desirable stand for the barber business in the village of Langley, averaging an income of \$15 a week with one chair; by reason of all of which willful, wanton, malicious, and negligent conduct of the defendant this plaintiff has been greatly damaged in the sum of \$100."

The defendant denied generally the allegations of the complaint. The magistrate rendered judgment in favor of the plaintiff for \$100, whereupon the defendant appealed to the circuit court; but the appeal was dismissed, and the defendant again appealed upon exceptions which will be reported.

Section 368 of the Code provides that, upon hearing an appeal from an inferior court, the circuit court shall "give judgment according to the justice of the case, without regard to technical errors, which do not affect the merits." Therefore those exceptions assigning errors that are merely technical and do not affect the merits will be disregarded. We proceed to the consideration of the exceptions, in the light of this provision.

[1-3] First exception:

The following statement appears in the record: "Defendant's counsel objects to any testimony as to what the plaintiff thinks, believes, or calculates that he could have made in his business as barber during the alleged delay in the delivery of the freight in question, on the grounds that the same are both special and speculative damages, and hence inadmissible." Special damages are recoverable when the carrier receives notice at the time of the shipment that the loss of the property or delay in its delivery will result in such damages. The testimony was in response to the allegations of the complaint; and while the magistrate might have objected to proof of such damages, unless it appeared that the carrier had notice thereof at the time of shipment, the appellant had no such right. *Martin v. Railway*, 70 S. C. 8, 48 S. E. 616. Furthermore, the objection to the testimony was not based upon the ground that the carrier did not receive notice of such damages at the time the goods were shipped.

[4] Second exception:

In the first place, there was other testimony of the witness Knox, to which there was no objection; and, in the second place, the testimony was in response to the allegations of the complaint.

[5] Third exception:

In the first place, this ground of objection is too technical, as the question arose in a magistrate's court; and, in the second place, the appellant has failed to show that there was prejudicial error.

[6] The next question that will be considered is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages.

The plaintiff testified as follows: "When I found that my goods were in the depot, I went to see about them, and the agent would not let me have them; said he did not have any freight bill. The agent (Mr. Gaillard) told me just a day or two before I got the goods that I could have the goods if I would give him \$10 to hold. I did not give it to him; he wanted it to hold; did not tell me how much freight was due on them. I thought he had as much right to trust me as I him. I went to see about my goods two or three times a day, to see about them. I worked at carpentering in the meantime. My material stayed in there a month or more. About the last time I went to ask Mr. Gaillard about it, he said he had quit fooling with it all. I paid \$9.88 on these goods; that was May 1st last. The goods came about the 9th day of April, and 'twas May 1st before I got my goods, and the shop was rented at that time. While I was waiting for my goods, Mr. Corley held the key. He was holding the shop for me. Just before I got my goods out, Mr. Corley rented my shop to Mr. Knox. I had the money to pay

freight all the time while I was waiting. I paid rent for the month of April, 1906, \$5."

There was a delay from the 9th of April until the 1st of May. The defendant knew that the plaintiff was being greatly inconvenienced by such delay. The defendant had knowledge of all freight charges, except those due the Terminal Railroad Association for transporting the articles of merchandise from St. Louis city to East St. Louis, just across the Mississippi river—a very inconsiderable portion of the distance between St. Louis city and Langley, S. C. It was the act of the defendant, and not of the plaintiff that caused the delay in the delivery of the goods, the plaintiff merely stood upon his legal rights. When the defendant realized that it was unable to ascertain the amount of the freight charges due the Terminal Railroad Association, it was very unreasonable for it to delay the delivery of the goods. They must have known that such freight charges would be almost unappreciable for so short a distance. Under these circumstances, the testimony tended to show a reckless disregard of the plaintiff's rights.

[7, 8] The remaining exceptions either involve questions of fact, which cannot be reviewed by this court, or were not raised in the magistrate's court.

Judgment affirmed.

HYDRICK, J. (concurring). The character of the shipment was sufficient notice that special damages might result from its delay to admit evidence of such damages. The record shows that defendant issued the bill of lading. Therefore the Terminal Railroad Association must be held to have been defendant's agent (*Salley v. Seaboard*, 76 S. C. 173, 56 S. E. 782), for whose failure to promptly furnish the rate on request defendant is responsible. The long delay in ascertaining the correct freight charges, after defendant's agent at Langley knew of plaintiff's situation, and that loss was daily occurring to him because he could not get his goods, is evidence of negligence so gross as to warrant an inference of indifference to the plaintiff's rights. Therefore punitive damages were properly awarded.

WOODS, J. (dissenting). There was evidence warranting the inference by the magistrate that the defendant's freight agent was mistaken in his duty, and that he should have delivered the plaintiff's goods on payment of the freight charges of his own road, when the connecting carrier, after being allowed a reasonable time, failed to respond to his demand for a statement of its charges. The magistrate's inference of negligence in this respect entitled the plaintiff to recover actual damages. As to the measure of damages, the fact that the shipment was

a single barber's outfit, directed to an individual, was sufficient to warrant the inference that the carrier was put on notice that the outfit was probably for use by a barber, and not for sale, and that delay would injuriously affect the barber's business by causing him to lose the earnings of a barber for a period of delay. The plaintiff was therefore not precluded from the recovery of special damages to this extent by the rule laid down in *Towles & Arnett v. Atlantic C. L. Ry. Co.*, 83 S. C. 501, 65 S. E. 638, and other cases, that there can be no recovery for special damages without notice before shipment to the carrier of the circumstances of the plaintiff and of the special damages which would result to him from delay. But there was nothing to put the defendant on notice that the delay would cause the plaintiff to lose the opportunity to secure a particular shop, which, on account of the delay, was rented to another barber; and hence there could be no recovery for this item.

The earnings of a barber, as shown by the evidence of the plaintiff, were \$15 per week; but the plaintiff testified that during the period of delay in the delivery of his outfit he actually earned, as a laborer, \$1.25 per day. The actual damages were thus definitely shown to be \$15 per week, less \$7.50 per week, earned from April 9th, when the goods arrived, until May 1st, when they were delivered.

I am unable to discover any evidence of willful or wanton disregard of the rights of the plaintiff. When the defendant's agent could not procure promptly the freight charges of a connecting carrier, he made a careful estimate of the freight charges as \$10, and offered to accept the sum so estimated and adjust the difference with the plaintiff when informed of the exact amount, which turned out to be \$9.88. This offer the plaintiff refused. There was no evidence whatever that the plaintiff was responsible, and it would be very harsh judgment to infer that the defendant's agent was guilty of wanton or willful disregard of plaintiff's rights in not crediting him for the amount of the freight charges. Nor is such an inference to be drawn from the remark imputed to the agent that "he was done fooling with it." The evidence is undisputed that he had made diligent effort to ascertain the exact freight charges, and had failed on account of the negligence of a connecting carrier, and, under the circumstances, the remark meant nothing more than that, having exhausted his efforts, he could do nothing more.

The judgment should, in my opinion, be modified by reducing the recovery to \$22.50, the actual damages ascertained in the method above indicated.

(90 S. C. 334)

WHITCOMB v. MANDERVILLE.

(Supreme Court of South Carolina. Feb. 23, 1912.)

1. TRIAL (§ 139*)—NONSUIT—EVIDENCE.

A nonsuit cannot be granted if there is any competent evidence to go to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

2. JUDGMENT (§ 217*)—FINAL JUDGMENT.

A decree was a final judgment where it disposed of the whole case on the merits and left nothing for further consideration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

3. EVIDENCE (§§ 82, 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

It is presumed that a public officer correctly performed his duty, and every reasonable intendment will be made to support such presumption, so that it will be presumed that a receiver ordered by the court to sell goods did so, as directed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 104, 105; Dec. Dig. §§ 82, 83; Receivers, Cent. Dig. § 341.]

4. JUDGMENT (§ 945*)—ACTION ON FOREIGN JUDGMENT—JURY QUESTION.

In an action on a foreign judgment, evidence for plaintiff held sufficient to make a nonsuit erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1784; Dec. Dig. § 945.*]

Appeal from Common Pleas Circuit Court of Kershaw County; R. E. Copes, Judge.

Action by Alice V. Whitcomb against Edward E. Manderville. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded for new trial.

Duncan C. Ray and W. B. De Loach, for appellant. L. A. Wittkowsky and T. J. Kirkland, for respondent.

WATTS, J. This action was commenced in the court of common pleas for Kershaw county in July, 1909, and after issue joined by consent the case came on for a hearing before his honor, Judge Copes, presiding judge, without a jury, in Columbia, upon the pleadings and testimony. The action was on a judgment rendered by the district court of Lancaster county, in the state of Nebraska.

The plaintiff alleges in her complaint that an action was commenced in the district court of Lancaster on July 30, 1884, by Thomas J. Whitcomb, against E. R. Deyo and Edward E. Manderville, and both were duly served, and Deyo made default, and judgment was rendered against him and entered on June 26, 1885; that Manderville duly appeared and filed an answer, and was represented by his attorney; that on June 26, 1885, a decree was duly rendered against the defendant in favor of plaintiff, finding and adjudging "that there was due from defendant, E. E. Manderville, to the plaintiff, Thomas J. Whitcomb, the sum of \$1,700." The said decree also finds that the defendant, Manderville, is insolvent, and

orders Mellick, as sheriff of Lancaster county, Neb., to be appointed receiver to take charge of the assets and property of the firm of Manderville & Whitcomb, and sell the said property in the same manner as if sold on execution, and upon this proceeding plaintiff have judgment against the defendant, Manderville, for the amount unpaid by the sale of the partnership property aforesaid; and it is further adjudged that plaintiff have judgment against each of the defendants for the costs of this action, taxed at \$22.95, and that execution issue accordingly. That, pursuant to said decree, Mellick, as sheriff or receiver, took possession of the assets and property of the firm of Manderville & Whitcomb, and on October 8, 1885, filed his return in the office of the district court in said county and state, reporting the sale of said property, and the amount realized to be applied on the judgment was \$135.05. That on June 23, 1890, an execution upon the judgment was issued to the sheriff of said county, commanding him to cause to be levied upon the goods and chattels of said Manderville the sum of \$1,700, with interest from June 26, 1885, until paid, and the further sum of \$44.70, costs. That said execution was returned wholly unsatisfied on June 26, 1890. That afterwards, on April 2, 1895, an alias execution was issued to enforce payment of the judgment, which was returned unsatisfied on April 6, 1895. That thereafter, on March 21, 1900, a pluries execution, to enforce payment of the judgment, was duly issued and returned wholly unsatisfied on March 24, 1900, and on February 21, 1905, a second pluries execution, to enforce payment of the judgment, was duly issued and returned wholly unsatisfied on February 25, 1905. That the suing out and issuance of said execution within five years from the date of said judgment, and within five years of date of each execution, revived the said judgment, and that said judgment is now in full force, virtue, and effect in the said state of Nebraska, as provided by section 1480 (482) of the 1901 Annotated Code of Nebraska and the law in such cases, as declared by the decisions of the Supreme Court of said state. That plaintiff avers and alleges on information and belief that shortly after rendition of the judgment, and before execution issued, that Manderville left the state of Nebraska and has remained absent ever since, or kept himself concealed, and is now a resident of the state of Pennsylvania, and is seised and possessed of valuable real estate in Kershaw county, S. C., which he purchased some time after the year 1889, and prior to the commencement of this action. That by the law of the state of Nebraska, it is enacted: "If when a cause of action accrues against a person he is out of the state, or shall have absconded or con-

cealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed, and if after the cause of action accrues, he depart from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as a part of the period within which the action must be brought." Annotated Code of Nebraska 1901, § 1019. That by the law of the state of Nebraska the presumption of payment from lapse of time may be overcome by the proof that the judgment has never been paid; and proof of the departure, continued absence, and concealment of the defendant, as alleged in the complaint, will rebut the presumption of payment arising from the lapse of time. That during the year 1899, plaintiff is informed and believes, defendant became a citizen and resident of the state of South Carolina, without any previous residence in said state, and remained a citizen and resident of said state until the year 1905, when he departed from the state and has remained continually absent therefrom ever since. That on April 29, 1885, the aforesaid judgment was duly assigned to plaintiff for value, and he is now the legal owner and holder thereof. That no part of the said \$1,700, decreed to be due Whitcomb by Manderville, has ever been paid, by discount or otherwise, except the sum of \$135.05, as set out in the return of Mellick, sheriff-receiver, October 8, 1885, and there is now due and owing thereon the sum of \$1,596.68, with interest from October 8, 1885; it being provided by laws of Nebraska that judgments and decrees for the payment of money bear interest at the rate of 7 per cent.

Defendant answers complaint, and admits that he was served, appeared, and defended by counsel the cause in court at Lancaster, Neb., alleged in complaint, but specifically denies the allegations that the judgment referred to is in full force, virtue, and effect in the state of Nebraska. He admits that in 1885 he left the state of Nebraska and has been absent therefrom ever since. He alleges he is in business in the state of Pennsylvania, and has been compelled to reside there the greater part of the last three years, but denies that he is a permanent resident of that state. He admits he owns real estate in Kershaw county, S. C., which he purchased in the year 1905. He admits that he became a resident and citizen of South Carolina in 1898, and before that time he was not a resident; that he departed from the state in 1906, but denies that he has been continuously absent therefrom since, and alleges that he has a home in South Carolina, wherein his family resides every winter. All allegations not admitted he denies. He alleges further that as 20 years have elapsed since the alleged date of the alleged judgment the same is presumed paid, and further alleges that, more than 20

years having elapsed since the alleged date of the judgment, all right of action is barred by the statute of South Carolina, in such cases made and provided. At the trial before his honor, Judge Copes, the records of the court of Lancaster county, Neb., alleged in the complaint, and certain sections of the Annotated Code of the state of Nebraska, and volume 17, Nebraska Reports, and certain depositions, were introduced in evidence by the plaintiff.

At close of plaintiff's case, a motion was made for a nonsuit on eight grounds, to wit: (1) Because there is no evidence of any judgment against the defendant, such as alleged. (2) Because the record of the Nebraska court offered to sustain the judgment alleged shows on its face a complete variance from the judgment described in the complaint. (3) Because the record of the Nebraska court offered in evidence and relied on by plaintiff shows on its face that the same was a proceeding in equity, and the decretal order therein authorized future entry of judgment only for such deficiency as remained after sale by receiver of specific property, and no unconditional judgment for an ascertained amount was rendered or entered against defendant. (4) Because the record offered in evidence by plaintiff shows the sale of only a portion of the property ordered to be sold and applied to defendant's debt, and shows no ascertainment of deficiency, as required by decretal order, was arrived at, nor any judgment rendered for such deficiency. (5) Because no evidence has been adduced of judgment against defendant for any ascertained definite amount, but instead the record shows a decretal order for a contingent conditional amount, to be ascertainable by methods which were not pursued or complied with. (6) Because the decretal order of the Nebraska court offered to sustain the allegation of judgment appears to have been rendered in equity, and is not such a judgment as would support an action at common law. (7) Because no proof has been offered of the laws of Nebraska authorizing any action upon a decree, such as that adduced in evidence, upon which, at common law, no action would lie, and the common law will be presumed as applicable, and because, by the very terms of the said decree and the record accompanying the same, it appears that no valid judgment could have been entered thereon, nor has been. (8) Because it appears that the alleged judgment or debt upon which plaintiff seeks to recover has been presumptively paid, as more than 20 years have elapsed since right of action accrued, and there has been no proof of any written promise to pay, or acknowledgment of the debt or entry of payment upon the record of such alleged judgment, and that there is no sufficient evidence that the alleged judgment has not been paid, or that any part thereof remains unsatisfied.

His honor, Judge Copes, passed the follow-

ing order, granting nonsuit: "The above-entitled action was tried before me by consent, without a jury, at my chambers in Columbia, S. C., on March 14, A. D. 1911. After plaintiff had introduced evidence, mainly documentary, and rested, a motion for nonsuit was made, on behalf of defendant, upon various grounds, which were submitted in writing, and which need not here be enumerated, and to which reference is sufficient. After argument and careful consideration, I concluded to grant the nonsuit, upon the grounds that the record of the Nebraska court introduced, upon which plaintiff relies, shows that the terms and conditions provided in the decree therein rendered for ascertaining the amount for which plaintiff therein should have judgment were not complied with, except in part, and the record discloses no account of a considerable portion of the property ordered sold, and specifically described, and the proceeds of sale of which were ordered applied to the defendant's indebtedness. It does not appear from the record that any definite, ascertained amount was legally or properly determined as prescribed by the decree, and for such reasons I hold that the allegations of the complaint are not supported by evidence, and I grant the nonsuit. The other grounds submitted are overruled." From this order plaintiff appeals, questioning the correctness of the court's ruling, and defendant gave notice that he would ask the court to sustain the order of nonsuit upon all the grounds submitted on trial below, in addition to the grounds assigned by his honor in his order of nonsuit.

[1] It has been so often decided by this court that, where there is any competent relevant testimony to go to the jury, nonsuit cannot be granted that citation of authority is unnecessary. Was there any competent relevant testimony to go to the jury in this case?

[2] We find a decree of the Nebraska court which was, in our opinion, a final judgment, because it disposed of the whole merits of the cause, and left nothing for the further consideration of the court. The law of Nebraska introduced in evidence has this: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." *Cobbey's Annotated Statutes of Nebraska*, vol. 2, § 4784. "All presumptions are in favor of the jurisdiction of district court." *Bedford v. Ruby*, 17 Neb. 98, 22 N. W. 76. The decree finds:

"That there is due from defendant, Manderville, to the plaintiff, Thomas J. Whitcomb, the sum of \$1,700. The court further finds the value of the partnership property of the firm of Manderville & Whitcomb is of the value of not to exceed \$1,500.00; that the defendant, Manderville, is insolvent; and that the property of the said firm of Manderville & Whitcomb should be sold by the receiver, hereafter named, upon the same advertise-

ment and terms and in the manner of conducting an execution sale of personal property, and the proceeds of such sale be applied to the payment of the above amount found due from Manderville, the defendant, to plaintiff, Thomas J. Whitcomb. It is further ordered, adjudged, and decreed that the injunction issued in the cause be made perpetual, and that each of the defendants be restrained from in any manner asserting any right or interest in the partnership assets of the firm of Manderville & Whitcomb, and especially this decree applies to the property described in the pretended chattel mortgage, executed by Deyo to Manderville, which said property is described, to wit, etc. It is further ordered that S. M. Mellick, as sheriff of Lancaster county, Neb., be appointed receiver to take charge of the assets and property of the firm of Manderville & Whitcomb wherever the same may be found, and for that purpose to search for, collect, and take possession of the same wherever found, and said receiver is hereby ordered to sell said property in the same manner as if sold on execution, and to give the purchaser a bill of sale of the same, and that upon the return of his proceedings plaintiff have judgment against the defendant, E. E. Manderville, for the amount unpaid by sale of partnership property aforesaid; and it is further adjudged that plaintiff have judgment against each of the defendants for the costs of this action, taxed at \$22.95, and that execution issue accordingly."

[3] On the 8th day of October, 1885, the receiver did make a return, and reported the amount to apply on judgment was \$135.05, and which was applied thereon. By decree immediately upon return of receiver's proceedings, Thomas J. Whitcomb was to have judgment for the amount unpaid by the sale of the partnership property; so by this decree we find that on October 8, 1885, Thomas J. Whitcomb had a judgment for \$1,700, with interest from June 28, 1885, less the sum of \$135.05, applied by receiver. His honor, Judge Copes, holds, however, that the receiver did not sell all of the goods and chattels ordered to be sold, and that the plaintiff was not entitled to judgment until this was done. The record shows instructions to the receiver were that he was to take charge of the assets, property, etc., of the firm of Manderville & Whitcomb wherever the same may be found, and for that purpose search for, collect, and take possession of the same wherever found, and then sell them. Apart from that, the law presumes that "the presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intentment will be made in support of such presumption." *Throop on Public Officers*, § 559. Also by the same author: "The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do, or will omit

aught which his official duty requires to be done." "All persons are presumed to have duly discharged any duty imposed by law." *Douglass v. Owens*, 5 Rich. 536.

By examination of the Nebraska record, it will be found that Whitcomb alleges that Deyo is in possession of the assets, and is about to dispose of the same. Manderville later, under oath, asserts that said chattels specifically described have already been sold, and that officers cannot find them, and again, in his sworn answer, says "that the property has been sold." The Nebraska court recognized the fact that the property and assets of the firm of Manderville & Whitcomb had been taken away and secreted, and the order to recover was to sell what he could find.

[4] Plaintiff introduced the following law from the Nebraska Annotated Code, § 1019, which reads: "If when a cause of action accrues against a person he be out of the state, or should have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of action accrues he departed from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." The complaint in this case alleges that shortly after rendition of judgment in Nebraska defendant left that state and has remained absent ever since. Defendant in his answer herein admits that about the year 1885 he departed from Nebraska and has been absent therefrom ever since. The Nebraska record shows that execution was duly issued upon judgment on June 23, 1890, which was returned wholly unsatisfied on June 26, 1890; that an alias execution was issued on judgment on April 2, 1895, which was returned wholly unsatisfied on April 6, 1895; that on March 21, 1900, a pluries execution was issued on said judgment and returned wholly unsatisfied on March 24, 1900, and on February 21, 1905, a second pluries execution was issued thereon, and was returned wholly unsatisfied on February 25, 1905. From this it will be seen that there was sufficient testimony on the part of the plaintiff to prevent the granting of a nonsuit, and we think his honor, Judge Copes, was in error in so doing. He was in error in granting it on the grounds he based his order on. Neither can his order of nonsuit be sustained on additional grounds relied on by defendant.

It is the judgment of this court that the judgment of nonsuit appealed from be reversed, and the case remanded for trial.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 364)

FIRST NAT. BANK OF RICHMOND, IND.,
v. BADHAM.

(Supreme Court of South Carolina. Feb. 23, 1912.)

1. COSTS (§ 236*)—ON APPEAL—RIGHT OF
CIRCUIT COURT TO VACATE.

Judgment for defendant in an action on notes was reversed on plaintiff's appeal, and a new trial granted, and plaintiff then gave notice of the costs on appeal, and a judgment for such costs was entered. On motion of defendant, the circuit court set aside the judgment to the extent of \$250, on the ground that that amount had been furnished and paid by a party other than the plaintiff. *Held*, that the setting aside of the judgment was erroneous, since, under the statutory provisions as to costs of appeal, it made no difference who advanced the money for costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 900-907; Dec. Dig. § 236.*]

2. APPEAL AND ERROR (§ 162*)—RIGHT TO
APPEAL—ESTOPPEL.

Where the court reduced the amount of a judgment theretofore entered, the acceptance by the judgment creditor of the reduced amount, which was not disputed, was not sufficient to preclude an appeal from the act of the court in reducing the amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 984-991; Dec. Dig. § 162.*]

Appeal from Common Pleas Circuit Court of Richland County; R. E. Copes, Judge.

Action by First National Bank of Richmond, Ind., against V. C. Badham. From an order of the Court of Common Pleas for Richland County, setting aside in part a judgment for plaintiff against defendant for the costs of an appeal to the Supreme Court, plaintiff appeals. Reversed.

Lyles & Lyles, for appellant. D. W. Robinson, for respondent.

WATTS, J. [1] This is an appeal from the order of the court of common pleas for Richland county, setting aside in part a judgment in favor of the plaintiff against the defendant for the costs of an appeal to the Supreme Court. The action was commenced some years ago upon two promissory notes, made by Samuel J. Huffman of Richland county, S. C., and indorsed and delivered by him before maturity to the Richmond City Mill Works of Richmond, Ind., and upon its first trial resulted in a judgment for the defendant. The plaintiff appealed, and said judgment was reversed, and a new trial granted. Plaintiff gave notice of its costs, and a judgment for said costs was duly entered and recorded in the office of the said clerk of court of the court of common pleas for Richland county, with cross-references, as provided in rule 40 of the rules of the circuit court. Said judgment amounted to \$344.40, and was entered on the 4th day of August, 1910, the judgment roll being on said day filed in the office of said clerk of court for said county, and the number of the roll is 9,642.

On the 12th day of December, 1910, the defendant served and filed a notice of motion to set aside said judgment, upon the grounds set forth in the petition and affidavit attached to the notice, which were: "That at the time said judgment was taken and entered the defendant supposed that the said costs and disbursements making up the same had been advanced and paid by the plaintiff, and that the same were due to the plaintiff; that since the entry of said judgment, and within the past few days, to wit, on the 11th day of December, 1910, this defendant has ascertained, through copies of the records of the circuit court of Wayne county, state of Indiana, which has been duly certified in accordance with the acts of Congress, and are in his possession, that the costs of preparing and printing the record on appeal of this action were furnished and paid by Henry S. Burns, receiver of the Richmond City Mill Works, and not by said plaintiff bank; and that said costs and disbursements are not due said plaintiff bank, but, if they are due to any one, are due to the said Richmond City Mill Works." The motion came up before Hon. Robert E. Copes, circuit judge, who thereafter filed his order, finding, among other things, as follows:

"That \$250 of the costs and expenses taxed against the defendant, as part of said Supreme Court costs, and for which judgment was entered against said defendant by the clerk of this court, under rule 40 of the circuit court, on August 4, 1910, being judgment roll No. 9,642, was furnished and paid by the Richmond City Mill Works, and not by the plaintiff. Indeed, the plaintiff has not denied these allegations, or offered anything in reply or explanation thereof; and this seems to be practically an undisputed fact. So far as the Richmond City Mill Works is concerned, the defendant claims he has a good defense as to any claim which might or could be brought against him; and that said Richmond City Mill Works is indebted to said defendant in a much larger sum, but has no assets in this state. The main case was also tried before me, and on that trial an agreement, signed by counsel for both parties, was introduced in evidence, showing that the Richmond City Mill Works went into the hands of a receiver in March, 1907, and that such receiver filed his final report on October 28, 1908.

"I am of the opinion, and so find, that the plaintiff has not expended the said sum of \$250 of said costs, so taxed and entered, and is therefore not entitled to have judgment for, and to receive, the said \$250, under rule 40, of this state; and, further, that the defendant is entitled to relief from so much of said judgment as embraces the said sum of \$250, under section 195 of volume 2, part 1, of the Code; and therefore ordered and adjudged that the judgment heretofore rendered and entered in this court, by the clerk thereof, on August 4, 1910, being judgment

roll No. 9,642, in favor of the plaintiff and against the defendant, be, and the same is hereby, set aside and vacated as to \$250 thereof, but retained in full force and effect as to \$84.40 thereof."

The action in which judgment for costs was rendered was upon two promissory notes, made by Samuel J. Huffman, dated July 12, 1907, payable to order of V. C. Badham, one for \$785, payable on January 1, 1908, and the other for \$790, payable on February 1, 1908. These notes were both indorsed before maturity, and delivered by Badham to the Richmond City Mill Works of Richmond, Ind., and were likewise indorsed before maturity and delivered to the plaintiff, the First National Bank of Richmond, Ind. Both Samuel J. Huffman and V. C. Badham were residents of the state of South Carolina, and the notes sued on contained a reservation to title to the property. The Richmond City Mill Works, not being a resident of South Carolina, could not be made a party to the action here upon these notes. The action in which judgment in question was rendered was commenced in 1905. While action was pending, it appears by proof, furnished by Badham himself, that the Richmond City Mill Works became insolvent, and that the receiver of that corporation, on January 8, 1908, paid to the plaintiff \$800 on account of these claims, and on November 4, 1908, paid a final dividend of, \$279.60. It also appears that on June 10, 1907, the plaintiff made demand on the receiver of the Richmond City Mill Works for \$250, to pay the cost of printing case for appeal to this court, which resulted in the reversal of a judgment for the defendant and a new trial of the cause. This amount was paid over to the plaintiff, the First National Bank, and the plaintiff, having obtained a new trial, in the Supreme Court, duly taxed its costs and entered judgment therefor. The plaintiff appeals from the order of Judge Copes, and questions the right of the circuit judge to vacate the judgment, which has been duly entered up for the plaintiff against the defendant, Badham, to the extent of \$250 referred to.

A few days after the order was made by Judge Copes, on April 19, 1911, the attorney for Badham forwarded to the attorneys for plaintiff a check for \$84.40, given by the Dorchester Lumber Company, by V. C. Badham, treasurer, and indorsed by attorney for the defendant, being the amount specified in the order of Judge Copes to be paid by said defendant. The indorsement on the check showed it was for the payment of costs in this case, and the letter accompanying the same explicitly states that it was "in payment of the balance of the judgment for costs of the Supreme Court in this case, under and in accordance with the order made by Judge Robert E. Copes, on Saturday last, the 15th inst., copy of which you have. I will thank you to mark this judgment satis-

fled in accordance with that order." This check was collected by attorneys for the plaintiff, who subsequently appealed from the order of Judge Copes. Attorney for Badham gave notice that he would move to sustain Judge Copes' order, and dismiss the appeal, on the ground that the attorneys for plaintiff accepted, retained, and used this check after receiving it, with the letter, and by so doing the judgment was satisfied, and plaintiff precluded from appealing from said judgment by said acts.

Did Judge Copes have the right to vacate the judgment, which had been duly entered up for the plaintiff against the defendant, Badham, to the extent of \$250? We think not. It has been distinctly held in *Cunningham v. Cauthen*, 47 S. C. 168, 25 S. E. 87, *Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3, and other decisions of our courts, that the statutory provisions as to costs of appeal to the Supreme Court were intended to allow such costs to the prevailing party in the appeal, without regard to the final result of the action. The plaintiff, having prevailed in the Supreme Court in the appeal, was entitled to tax its costs and disbursements; and it made no difference where it got the money from, or who furnished it. That could not concern the defendant. The plaintiff was entitled to its costs and disbursements, under statutory provisions as to costs of an appeal, and defendant was liable.

[2] As to the acceptance of the check by plaintiff's attorneys, it was for the amount only not vacated by the order of Judge Copes, and was not accepted in accord and satisfaction of the judgment. Judge Copes only undertook to reduce the judgment by \$250, and in express terms provided that "it be retained in full force and effect as to \$84.46 thereof." The judgment was unaffected to that extent, and gave the plaintiff the right to demand that amount from the defendant, and there is no evidence to justify us in holding that the taking of this amount, adjudged and admitted to be due, was a waiver of the additional amount which, it was claimed, had been erroneously stricken from the judgment.

The judgment appealed from is reversed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 378)

KIRBY v. KELLY et al.

(Supreme Court of South Carolina. Feb. 23, 1912.)

1. PLEADING (§§ 11, 354*)—STRIKING OUT PLEADING—ALLEGATION OF EVIDENTIARY MATTER.

In an action for dower, the defendants interposed as a defense that the grand jury had found a true bill against plaintiff and a person named for adultery, and that thereupon the

plaintiff had fled the state, and remained away until after the death of her husband. Held, on motion to strike, that this defense merely contained evidentiary matter, and therefore did not state facts sufficient to constitute a defense, and was properly stricken out.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81, 1092-1095; Dec. Dig. §§ 11, 354.*]

2. APPEAL AND ERROR (§ 103*)—DECISIONS REVIEWABLE—ORDER STRIKING OUT PLEADING.

The striking of a pleading setting up evidentiary matter does not involve the merits, and is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 704; Dec. Dig. § 103.*]

3. APPEAL AND ERROR (§ 460*)—SUPERSEDEAS—OPPORTUNITY OF APPEAL.

The taking of an appeal from an order not appealable does not act as a supersedeas.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 460.*]

4. TRIAL (§ 352*)—SPECIAL INTERROGATORIES—FORM.

In an action for dower, where it was set up in defense that, while her husband was living, plaintiff willingly left him and lived in adultery with a person named, and so continued until the death of her husband, the submission together of the issue as to the plaintiff's adultery and the issue as to whether she had willingly left her husband and lived in adultery into one interrogatory, requiring but one answer by the jury, was not prejudicial to defendants, as it was necessary for the jury to find both issues in favor of the plaintiff before they could render a special verdict in the negative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 840; Dec. Dig. § 352.*]

5. APPEAL AND ERROR (§ 883*)—WAIVER AFFECTING RIGHT—ACQUIESCENCE IN DECISION.

Where defendant in the course of a trial called the attention of the court to the fact that the next day was a legal holiday, and the court, on inquiry and consent of the jurors, ordered the hearing to proceed on that day, at which time defendant appeared without objection, defendant thereby waived the right on appeal to insist upon his objection to the trial on that day.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

6. DOWER (§ 76*)—ACTION—PARTIES.

An action for dower may be brought jointly against all persons who may be in possession of any of the lands out of which dower is claimed.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 267-276; Dec. Dig. § 76.*]

7. VENUE (§ 16*)—ACTION FOR DOWER—LAND IN DIFFERENT COUNTIES.

In an action for dower brought against all persons in possession of the lands in which dower is claimed, the fact that a part of the lands may be in a county other than that in which the action is brought does not deprive the county court of jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 25; Dec. Dig. § 16.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge. "To be officially reported."

Action by Annie E. Kirby against Orlando D. Kelly and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. B. Stuckey, Walter H. Wells, and Lee & Moise, for appellants. J. H. Clifton, for respondent.

GARY, C. J. This is an action for dower. The complaint alleges that the plaintiff was lawfully married to the late Daniel Kirby in 1880, and thereafter lived with him as his wife; that Daniel Kirby died on or about the 6th of November, 1908; that during such coverture Daniel Kirby was seised and possessed of an estate of inheritance, in the following tracts of land (then follows the description of five tracts of land, four of which are situate in the county of Sumter and one in Lee county); that she is entitled to dower in each of said tracts, which are now in the possession of the respective parties, who are made defendants in this action. The defendants, after denying certain allegations of the complaint, set up the defense that some years prior to the death of the said Daniel Kirby the plaintiff willingly left her husband, and lived in adultery with one William Hinson and others, and continued with her said advourter or advourters until the death of her husband; and for these reasons they claim the benefit of section 2387, 1 Code of Laws. They also interposed as a fourth defense that the grand jury for Florence county in 1907 found a true bill against the plaintiff and William Hinson for adultery, and that thereupon the plaintiff fled the state and remained away until after the death of Daniel Kirby. After the filing of the answer, both the plaintiff and the defendants gave notice that they would make motion to submit certain issues to the jury. Thereafter, to wit, on the 5th day of July, 1910, the plaintiff gave notice that, upon the call of the case, she would make a motion to strike out the fourth defense on the ground that it was irrelevant and redundant, which motion was granted. Immediately thereupon the defendants served notice of intention to appeal from said order. When the case was called for trial, the defendants contended that the notice of intention to appeal acted as a supersedeas, and made a motion to stay proceedings, until the case was finally determined, but the motion was overruled. Thereupon the motions to frame issues for trial by a jury were called up, and the defendants formally withdrew their motions.

His honor the presiding judge, upon the plaintiff's motion, then ordered that the following issues be submitted to the jury: "Did the plaintiff prior to the death of her husband, Daniel Kirby, have an advourter, and willingly leave her husband, and go away and continue with him in adultery?" The defendant's attorneys objected to the form of the order, on the ground that the issues as to her having an advourter, and the issue as to her willingly leaving her husband, and going away and continuing with her advourter in adultery, should have been sep-

arately submitted to the jury, but the objection was overruled. The following statement appears in the record: "The trial thereupon proceeded upon the issues set out in the order above stated, which trial began, Tuesday, November 22, 1910. The examination of witnesses consumed all Tuesday, November 22d, Wednesday, November 23d, and still in progress, at the hour for adjournment of the court, on the evening of the 23d of November. Thereupon the defendants' counsel called the attention of the court to the fact that the following day Thursday, November 24th, was Thanksgiving Day, a legal holiday, and suggested that the court adjourn further hearing of the cause until Friday morning, November 25th, upon the ground that Thursday was a legal holiday, and that the court had no right to continue the trial on Thanksgiving Day, and that the proceedings would be null and void. Whereupon the court inquired of the jurors whether they wished the case adjourned over until Friday, and, being by them assured that they unanimously preferred to proceed on Thursday, ordered the further hearing of the case to proceed on Thursday morning, November 24th, to which the defendants did not except. The cause thereupon did proceed on Thursday morning Thanksgiving Day, consuming the entire day, and was concluded on the afternoon of that day, the counsel for the defendants making no further objections." The jury found for the plaintiff upon the issues submitted to it. Thereupon the court proceeded to hear the cause upon the remaining issues, which were decided in favor of the plaintiff. During the hearing of the case, the defendants' attorneys raised the question that the court did not have jurisdiction of the tract of land lying in Lee county, but the objection was overruled.

[1] The defendants appealed upon exceptions, the first of which is as follows: "Because the presiding judge erred in striking out the fourth defense of the answer of the adult defendants, the same being a valid legal defense, based upon a public record, and the ruling of the presiding judge thus precluding the defense from offering any evidence upon the same, or of placing said record in evidence." The so-called fourth defense merely contained evidentiary matter, and therefore did not state facts sufficient to constitute a defense. It was therefore properly struck out. *Bolin v. Railway*, 65 S. C. 222, 43 S. E. 665.

[2] The second exception is as follows: "Because the defendants, having served notice of intention to appeal from the ruling and order of the presiding judge striking out their fourth defense, moved that all further proceedings be stayed pending said appeal, upon the ground that the notice of appeal operated as a supersedeas. His honor erred in not sustaining the motion, and in ordering the trial to proceed."

[3] The striking out of evidentiary matter does not involve the merits, and is not appealable. An appeal in such case does not therefore act as a supersedeas. *Rhodes v. Railway*, 68 S. C. 494, 47 S. E. 639.

[4] The third exception is as follows: "Because the presiding judge erred in combining two separate important issues of fact in one issue, to wit, the issue numbered 'first,' submitting the issue of adultery and the issue of the wife going away and continuing with her advouter in one query, requiring but one answer by the jury, and thereby denied the defendants the right to separate findings upon the separate issues raised by the statute to their inquiry, in that it is not known to which issue the answer 'no' by the jury is responsive." We fail to see wherein the form of the issues was prejudicial to the rights of the appellants, as it was necessary for the jury to find both issues in favor of plaintiff, before they could render a verdict in the negative.

[5] The fourth exception is as follows: "Because the presiding judge erred in not sustaining defendants' motion to adjourn the trial over from November 23, to November 25, 1910, on the ground that the 24th of November 1910, Thanksgiving Day, was a legal holiday, and the further progress of the trial on that day rendered the same null and void under the statute of this state." A careful reading of the statement in the record shows that the intention of the appellants' attorney was merely to call to the attention of the presiding judge the fact that the next day was a legal holiday in order that he might determine whether the trial should then proceed, but it does not appear that they interposed an objection to the trial of the case next day. They therefore waived the right to insist upon such objection.

[6] The fifth exception is as follows: Because the presiding judge erred in holding that he had jurisdiction in this action, to adjudge the rights of the plaintiff and the defendants in a separate tract of land described in the complaint, situate wholly within the county of Lee, in said state, and in making his decree thereon." The court in the case of *Bostick v. Barnes*, 59 S. C. 22, 37 S. E. 24, speaking through Mr. Chief Justice McIver, uses this language: "So far as we are informed, we have no distinct authority upon the subject, though our statutes upon the subject seem to imply that the action for dower may be brought jointly against all persons who may be in possession of any of the lands out of which dower is claimed. * * * The case of *Shelton v. Shelton*, 20 S. C. 560, while not deciding the point which we have been considering, does seem to imply that a widow might bring a joint action against all persons who are in possession of any of the

tracts of land, out of which dower was demanded."

[7] If an action for dower may be brought jointly against all persons who may be in possession of any of the lands out of which dower is claimed, as seems to be the law in this state, then the fact that part of the lands may be in one county and part in another would not deprive the court of jurisdiction. *Barrett v. Watts*, 13 S. C. 441.

Judgment affirmed.

WOODS and HYDRICK, JJ., concur.

(90 S. C. 400)

McDOWELL v. BURNETT, County Sup'r, et al.

(Supreme Court of South Carolina. Feb. 26, 1912.)

1. MANDAMUS (§ 107*)—SALARY OF PUBLIC OFFICER—AWARD TO CONTESTANT.

Where the court issues mandamus to require the salary attached to a public office to be paid to one of the claimants to the office, it necessarily decides against the other claimant, since there is only one salary, and as between two claimants it belongs by law to the rightful claimant, or the de jure officer.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 107.*]

2. MANDAMUS (§ 151*)—PROCEEDINGS—PARTIES DEFENDANT—PARTY CONTESTING CLAIM—PUBLIC OFFICE.

Petitioner was appointed and commissioned to the office of city magistrate, and the incumbent to that office, who had been duly appointed and commissioned by the Governor until his successor was appointed and qualified, claimed to be a magistrate, and continued to exercise the duties of the office. *Held*, on application by petitioner for a writ of mandamus against county officers to compel them to pay to him the salary attached to the office of city magistrate, without making the adverse claimant a party, that the merits of the application would be reserved, and the adverse party be allowed to make his answer thereto.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 151.*]

Gary, C. J., and Watts, J., dissenting.

Application by B. L. McDowell against T. C. Burnett, County Supervisor, and F. Graham Payne, County Treasurer, of Greenwood county for a writ of mandamus to require them to pay to the petitioner the salary attached to the office of magistrate for the city of Greenwood. Ordered that W. H. Kerr be made a party to the proceeding, and that he be allowed to make his answer to the petition within 10 days after the service of the petition on him, and that all questions relating to the merits be in the meantime reserved.

D. H. Magill, for petitioner. Giles & Ouzts, for respondents.

WOODS, J. In this application for a writ of mandamus, requiring the respondents to pay to the petitioner the salary attached to the office of magistrate for the city of Greenwood, the petitioner alleged:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep. Indexes

"That on the — day of —, 1910, W. G. Austin, who was a magistrate duly appointed and qualified for Greenwood, in the county of Greenwood, died, and thereafter, to wit, on the — day of February, 1910, * * * W. H. Kerr was appointed, pursuant to the statute in such case made and provided, to fill the vacancy occasioned by the death of the said W. G. Austin, as magistrate at Greenwood, and entered upon and held such office until the adjournment of the General Assembly at the regular session next after such appointment, to wit, the adjournment of the regular session of the year 1911, when, his term having expired by law, J. W. Canfield was duly appointed and commissioned as magistrate for Greenwood by the Governor, duly qualified and entered upon the duties of said office, and, on the — day of May, 1911, the said J. W. Canfield resigned the office of magistrate at Greenwood, whereupon, on the 8th day of May, 1911, the Governor appointed and commissioned your petitioner to fill the unexpired term of the said J. W. Canfield, as magistrate for Greenwood, and your petitioner duly qualified as such magistrate and entered upon the duties of said office."

An order to show cause having been issued, the respondents made the following return: "That they deny each and every allegation and statement made in said petition, not hereinafter admitted. That W. H. Kerr was duly appointed and commissioned, on January 27, 1910, by the Governor of this state, magistrate at Greenwood for the unexpired term of W. G. Austin, deceased, and until his successor was appointed and qualified. That at the regular session of the General Assembly of this state for the year 1911 W. H. Kerr was duly recommended by the Senate to the Governor for reappointment, and the Governor, in disregard of the advice and consent of the Senate, appointed and commissioned J. W. Canfield magistrate at Greenwood. That the said W. H. Kerr refused to surrender the said office to J. W. Canfield, but held the same office of magistrate, and continued to hold the same and to perform the duties thereof. That subsequently the said J. W. Canfield was appointed by the Governor auditor of Greenwood county, and upon his acceptance of said office the Governor thereupon appointed and commissioned the petitioner, B. L. McDowell, and the said W. H. Kerr refused to surrender the said office to the petitioner, and he has continued to hold the said office and to perform the duties thereof."

The petitioner demurred orally to the return, so that the question is whether, taking as true the allegations of the return, the writ of mandamus should issue, requiring the salary to be paid to the petitioner.

By the return, it appears that W. H. Kerr was the legally appointed magistrate before

the appointment of Canfield and the subsequent appointment of the petitioner by the Governor, and that Kerr still claims to be the magistrate, and is exercising the duties of the office; that the respondents have no interest in the controversy; and that Kerr is not a party to these proceedings.

The first inquiry is whether the court should, in any case, issue its writ of mandamus, requiring the salary attached by law to the office to be paid to one of two claimants of the office, before the right to the office and the salary has been determined by quo warranto, or the statutory action provided by section 424 of the Code of Procedure.

[1] There is no doubt that the writ of mandamus may be issued to compel recognition by one officer of the official character of one in possession of an office as a *de facto* officer. In *Delgado v. Chavez*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. Ed. 578, the petitioners had been adjudged to be *de facto* county commissioners, and the probate clerk, whose duty it was to record the proceedings of the board of county commissioners, refused to record the proceedings of the petitioners, or to recognize them as county commissioners, on the ground that others persons claimed to be *de jure* commissioners. It was held that the petitioners were entitled to the writ of mandamus, requiring recognition of their official character by recording their proceedings. The decision was based on the ground that the public interests require that the duties of an office shall be performed, and that those who are in possession as *de facto* officers must be recognized or entitled to perform such duties until they are legally ousted by other claimants under proper proceedings. The doctrine of the case is obviously sound, and it has been generally recognized. The principle was applied in *State ex rel. Bruce v. Rice*, 66 S. C. 1, 44 S. E. 80, and *Id.*, 67 S. C. 236, 45 S. E. 153, where it was held that the court should not restrain *de facto* public officers in the exercise of public functions on a mere rule to show cause, pending the trial of title to the office.

[2] But a very different principle is involved when the court is asked to issue its writ of mandamus to require the salary attached to a public office to be paid to one of the claimants of the office. There is only one salary, and as between the two claimants it belongs by law to the rightful claimant—the *de jure* officer; and necessarily when the court orders the salary to be paid to one of the claimants it decides against the other claimant. *Hagan v. City of Brooklyn*, 126 N. Y. 643, 27 N. E. 265; *Lee v. Mayor of Wilmington*, 1 Marv. (Del.) 65, 40 Atl. 663.

The courts, in the public interest, may by mandamus require the recognition of the actual incumbent of a public office, in order that the public business may be transacted,

even without requiring an adverse claimant to be made a party, because in doing so it does not adjudicate the right of the adverse claimant, but leaves him to test his right in another proceeding. But it seems perfectly clear that no court should, in a mandamus proceeding, indirectly adjudge one of two claimants to be entitled to an office, by ordering the salary paid to him, without having the other claimant before it as a party to the proceeding. There may be exceptions to this rule, where it is perfectly clear that the adverse claim is merely pretensive, or where the adverse applicant for the writ of mandamus is clearly the actual incumbent and has performed the duties of the office, and the adverse claimant has failed to institute proper proceedings to assert his right after full opportunity to do so. But the court would be going to extreme lengths in holding that a claim to office, based on the action of the state senate, was so clearly pretensive, that the title to the office may be adjudged to be in the petitioner, without allowing the claimant, under the authority of the Senate, an opportunity to be heard in support of the legality of the Senate's action. This is not the case of a person demanding a mandamus for the payment of his salary on a showing that he is the sole incumbent of the office, performing its duties, and having in possession the rooms and records appertaining to the office. On the contrary, it appears by the return that Kerr entered upon the office under a valid appointment; that he has refused to surrender and still holds the office, and performs the duties thereof.

If this were all, it would seem clear that the court should not adjudge the claim of Kerr to be invalid, and practically oust him, as incumbent, from the office, without allowing him an opportunity to be heard. But it not only appears that Kerr is exercising the duties of the office, but the court must, under the demurrer, take as true the denial of the return that the petitioner is exercising the duties of the office of magistrate. The case, then, comes to this inquiry: Will the court, by its writ of mandamus, order the respondents to pay the salary of magistrate to one who claims the office under a commission, but is not exercising its duties, and thus adjudge such claimant to be the lawful magistrate, without giving another claimant, who is the actual incumbent, refusing to surrender the office, and performing the duties, an opportunity to be heard? To this inquiry, we are unable to see how anything but a negative answer could be proposed.

We do not think, however, it follows from this conclusion that the proceedings should be dismissed; on the contrary, Kerr should be made a party, and the whole controversy determined. It is true the general rule is that courts will not adjudge the title to pub-

lic office in a mandamus proceeding, when the parties have another adequate remedy. *Runion v. Latimer*, 6 S. C. 126. Many of the authorities so holding are collected in *High on Extraordinary Legal Remedies*, § 49, and in the note to *State v. Gardner*, 98 Am. St. Rep. 858. There may be sound reason for the rule where the facts are in dispute; for issues of fact might be more conveniently tried by an action instituted under the Code of Procedure to test the title of office. But where the facts do not seem to be in dispute, and the issue is one of law only, no good reason is apparent why the court may not settle the right to an office under proceedings in mandamus, as well as in any other proceeding. To hold otherwise would be to attach too great importance to the mere form in which an issue is presented to the court. It concerns the public peace and safety that this unfortunate controversy should be settled. The preservation of law and order depends in large degree on the office of magistrate, and it is of great public importance that his authority in the community should be unquestioned. The conclusion that the right to the office under such conditions as here exist should be adjudicated in mandamus proceedings is supported by high authority. *Luce v. Board of Examiners*, 153 Mass. 108, 26 N. E. 419; *Keough v. Board of Aldermen*, 156 Mass. 403, 31 N. E. 387; *Lawrence v. Hanley*, 84 Mich. 399, 47 N. W. 753.

It is therefore ordered that W. H. Kerr be made a party to these proceedings, and that he be allowed to make his answer to the petition within 10 days after the service of the petition on him, and that all questions relating to the merits be in the meantime reserved.

HYDRICK, J., concurs.

FRASER, J. I concur, because I do not think this court can pass upon the right of removal in a proceeding to which the officer removed (if he was removed) is not a party.

WATTS, J. (dissenting). This is an application to the court, in the exercise of its original jurisdiction, for a writ of mandamus, requiring the respondents to pay the salary alleged to be due the petitioner as magistrate for Greenwood.

The allegations of the petition, material to the questions involved, are as follows: "That on the — day of —, 1910, W. G. Austin, who was the magistrate duly appointed and qualified for Greenwood, in the county of Greenwood, died, and thereafter, to wit, on the — day of February, 1910, and during the regular session of the General Assembly for the year 1910, W. H. Kerr was appointed, pursuant to the statute in such case made and provided, to fill the vacancy occasioned by the death of the said W. G. Austin, as magistrate at Greenwood,

and entered upon and held said office until the adjournment of the General Assembly at the regular session next after such appointment, to wit, the adjournment of the regular session of the year 1911, when, his term having expired by law, J. W. Canfield was duly appointed and commissioned as magistrate for Greenwood by the Governor, duly qualified and entered upon the duties of said office, and, on the ——— day of May, 1911, the said J. W. Canfield resigned the office of magistrate at Greenwood, whereupon, on the 8th day of May, 1911, the Governor appointed and commissioned your petitioner to fill the unexpired term of the said J. W. Canfield, as magistrate for Greenwood, and your petitioner duly qualified as such magistrate and entered upon the duties of said office."

The return of the respondents is as follows: "That they deny each and every allegation and statement made in the said petition, not hereinafter admitted. That W. H. Kerr was duly appointed and commissioned, on January 27, 1910, by the Governor of this state, magistrate at Greenwood for the unexpired term of W. G. Austin, deceased, and until his successor was appointed and qualified. That at the regular session of the General Assembly of this state for the year 1911 W. H. Kerr was duly recommended by the Senate to the Governor for reappointment, and the Governor, in disregard of the advice and consent of the Senate, appointed and commissioned J. W. Canfield magistrate at Greenwood. That the said W. H. Kerr refused to surrender the said office to J. W. Canfield, but held the same office of magistrate, and continued to hold the same and to perform the duties thereof. That subsequently the said J. W. Canfield was appointed by the Governor auditor for Greenwood county, and upon his acceptance of said office the Governor thereupon appointed and commissioned the petitioner, B. L. McDowell, and the said W. H. Kerr refused to surrender the said office to the petitioner, and he has continued to hold the said office and to perform the duties thereof."

Section 20, art. 5 of the Constitution, contains this provision: "A sufficient number of magistrates shall be appointed and commissioned by the Governor, by and with the advice and consent of the Senate, for each county, who shall hold their office for the term of two years, and until their successors are appointed and qualified."

Section 27, art. 3, of the Constitution, is as follows: "Officers shall be removed for incapacity, misconduct, or neglect of duty, in such manner as may be provided by law, when no mode of trial or removal is provided in this Constitution."

Section 4, art. 15, is as follows: "For any willful neglect of duty, or other reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any executive or judicial officer, on the ad-

dress of two-thirds of each house of the General Assembly: Provided, that the cause or causes for which said removal may be required, shall be stated at length in such address, and entered on the journals of each house; and provided further, that the officer intended to be removed, shall be notified of such cause or causes, and shall be admitted to a hearing in his own defense, or by his counsel, or by both, before any vote for such address; and in all cases the vote shall be taken by yeas and nays, and be entered on the journal of each house respectively."

Conceding that section 4, art. 15, of the Constitution, provides a remedy for the removal of a minor officer, such as a magistrate, it is not inconsistent with the provisions of section 27, art. 3, of the Constitution. If the remedy afforded by section 4, art. 15, had been intended to be exclusive, there would have been no necessity for section 27, art. 3, of the Constitution. The law favors a construction that will give force and effect to all the provisions of a constitution, rather than an interpretation that would render nugatory another part thereof.

After the adoption of the Constitution, a statute was enacted, providing that "the Governor shall have authority, by and with the advice and consent of the Senate, to appoint magistrates in each county of the state, who shall hold their office for the term of two years, and until their successors are appointed and qualified. * * * Such magistrates may be suspended by the Governor for incapacity, misconduct, or neglect of duty; and the Governor shall report any suspension, with the cause thereof to the Senate at its next session, for its approval or disapproval." Code of Laws, § 982. Also that "the Governor shall have authority, by and with the advice and consent of the Senate, to fill any vacancy caused by death, removal, or otherwise, of any magistrate for the unexpired term." Code of Laws, § 983. Also that, "in the event of a vacancy, at any time, in any of the offices of any county of the state, whether from death, resignation, disqualification, refusal or neglect to qualify, of the person elected or appointed thereto, expiration of the term of office, removal from the county, or from any other cause, the Governor shall have full power to appoint some suitable person who shall be an elector of the county, and upon duly qualifying according to law shall be entitled to enter upon and hold the office, to which he has been appointed, if it be an elective office, until the next general election, when an election shall be held to fill the unexpired term, and the officer so appointed or elected, shall hold office for the term of said election or appointment, and until his successor shall qualify; and if it be an office which was filled originally by appointment, until the adjournment of the General Assembly, at the regular session next after such appointment; and

shall be subject to all the duties and liabilities incident to said office during the term of his service therein." Code of Laws, 254. Also that "the Governor, by and with the advice and consent of the Senate, shall appoint the following officers: * * * Magistrates. * * * Any vacancy which may happen in any of the said offices, during the recess of the Senate, may be filled by the Governor, who shall report the appointment to the Senate at its next session, and, if the Senate do not advise and consent thereto, at such session, the office shall be vacant." Code of Laws, § 624.

Also that "the following officers shall be appointed by the Governor: * * * Any vacancy in a county office, by reason of death, resignation, refusal or neglect to qualify, of the person elected or appointed thereto, expiration of the term of office, or any other cause. The person so appointed to hold his office, in all cases in which the office is elective, until the next general election, and until his successor shall qualify; and, in cases of offices which are originally filled by appointment and not by election, until the adjournment of the session of the General Assembly, next after such vacancy has occurred. The Governor may remove for cause any person so appointed by him, to fill such vacancy." Code of Laws, § 625.

Turning to the statutory provisions hereinbefore mentioned, we find, in section 982, that magistrates may be suspended by the Governor for incapacity, misconduct, or neglect of duty; and, in section 625, that the Governor may remove, for cause, any person appointed by him to fill a vacancy. These two sections must be construed together, and confer upon the Governor the power to suspend or remove a magistrate for certain causes, to wit, incapacity, misconduct, or neglect of duty. But there is no statute providing that the magistrate is entitled to a hearing before he can be removed.

In the case of *State v. Ansel*, 78 S. C. 395, 57 S. E. 185, this court had under consideration the power of the Governor to remove certain dispensary commissioners, without affording them an opportunity to be heard before removing them from office. In that case the court used the following language: "Article 3, § 27, of the Constitution, provides: 'Officers shall be removed for incapacity, misconduct, or neglect of duty in such manner, as may be provided by law, when no mode of trial or removal is provided in the Constitution.' As no mode of trial or removal is provided in the Constitution applicable to dispensary officers, it is clear that the Legislature, under the section above quoted, had plenary power to provide for the removal of dispensary officers with or without trial. Section 556, Criminal Code, provided, that 'the term of office of the members of said board [directors of the state dispensary]

shall be for two years, unless sooner removed by the Governor.' In the absence of any direction as to the particular procedure by which removal was to be made, the statute conferred on the Governor the power to remove at his discretion, under such procedure as he chose to adopt, for his own satisfaction. It is not contended that the Governor had no power of removal in this case; but the objections go to the manner in which he exercised his jurisdiction. If, however, he had discretion to remove without a hearing, petitioners were not denied any legal right, but received favor, in so far as they were allowed opportunity to make defense after notice and specification of charges. They accepted their office, subject to the power of summary removal by the Governor." We see no difference in principle between that and the present case touching this question.

Our conclusion is that the petitioner is entitled to the writ of mandamus, and that it should be so adjudged.

GARY, C. J., concurs.

(90 S. C. 435)

ROBERTSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Feb. 29, 1912.)

VERDICT—VALIDITY—TELEGRAPHS AND TELEPHONES.

In an action against a telegraph company for mental anguish sustained by plaintiff because of the delay of the company in transmitting a message in reply to plaintiff's message inquiring when her husband would be home, plaintiff held not entitled to recover.

Appeal from Common Pleas Circuit Court of Edgefield County; R. W. Memminger, Judge.

Action by Sallie Robertson against the Western Union Telegraph Company. From a verdict for plaintiff and an order denying its motion for new trial, defendant appeals, and also appeals from an order denying its motion to set aside the verdict upon newly discovered evidence. Reversed and remanded.

The exceptions referred to in the opinion were as follows:

"I. In that his honor erred in permitting the plaintiff to testify as follows: 'Q. You expected a reply to your telegram about 6:30 that day? A. Yes, sir. Q. Now, from 6:30 on the date you sent your telegram to Edgefield, state, whether or not, were you uneasy? A. Yes, sir. Yes, sir; I suffered a great deal. Q. And you thought you would get a reply to your telegram about 6:30? A. Yes, sir. Q. Now, from 6:30 until 10:30 that night, were you uneasy about your husband? A. Yes, sir. Q. Had you suffered much in your mind? A. Yes, sir. Q. How did you

feel from 6:30 until 10:30 that night? A. I had a severe headache and suffered a great deal. Q. Uneasy about your husband? A. Yes, sir—the reason being that the testimony was irrelevant, the complaint alleging that the plaintiff suffered from 7:00 o'clock p. m., July 18, 1910, until 10:30 o'clock p. m., on the same date, to which hours the testimony should have been confined, and for the further reason that the plaintiff had testified that she had expected her husband on the 8 o'clock train, and her anguish, therefore, could not have commenced until she had been informed that her husband did not arrive on said train.

"II. In that his honor erred in allowing the witness M. A. Taylor to testify as follows: 'I think if the day operator goes off duty at 6 o'clock, that they should have an operator to take messages after 6 o'clock. Q. What would be a reasonable closing time? A. I think 8 o'clock would be a reasonable closing time, in the evening. Q. A regulation closing the office at 6 o'clock, and not sending any telegram after that time, you would consider that an unreasonable rule? A. Yes, sir.'—the reason being that the witness was testifying as to the reasonableness of hours in a town, the conditions existing in which he knew nothing, and that said testimony was the expression of an opinion of the witness without facts being stated upon which to base the same, and it was therefore irrelevant and incompetent.

"III. In that his honor refused to direct a verdict for the defendant on the ground that the office hours of the defendant company in the town of Ninety-Six were proved to be from 8 o'clock in the morning until 6 o'clock in the afternoon and that there was no evidence tending to show that such office hours were unreasonable, and the undisputed testimony shows that the telegram about which complaint is made was not received and could not have been received at the office of Ninety-Six until said office was closed for business and for the further reason that the interstate commerce law prohibits railroads and telegraph companies from keeping their employes in such offices on duty for a longer time than nine consecutive hours.

"IV. In that his honor erred in refusing to direct a verdict for the defendant for the reason that if there was any mental anguish or suffering on the part of the plaintiff, it was not the direct and proximate result of any delict on the part of the defendant company.

"V. In that his honor erred in charging the jury as follows: 'The statute as to mental suffering includes damages for anxiety and for negligence which prolongs anxiety'—the same being the seventh request of plaintiff, the error being that the statute does not allow damages for anxiety, but only for mental anguish or suffering in the absence of bodily injury.

"VI. In that his honor erred in refusing to charge the sixth request of the defendant, which is as follows: 'The undisputed evidence shows that the plaintiff expected her husband to arrive on the 4 o'clock train, or on the 8 o'clock train, and that he actually arrived at 10:30 o'clock, then you are only to consider such suffering as was the direct and proximate result of the failure of the telegraph company to deliver the message that would have relieved her suffering. I charge you thus far, but I refuse to charge you the remainder of that request, which is: 'After the 8 o'clock train until the time her husband actually arrived,' because I charge you gentlemen, that she is entitled to recover any damages by way of mental anguish or suffering that she suffered after a reasonable time had elapsed for the delivery of the telegram which is alleged to have been sent from Edgefield some time around about 6 o'clock'—the error being that said request was the law applicable to the undisputed facts of the case.

"VII. In that his honor erred in refusing to charge the eighth request of the defendant, which is as follows: 'I charge you that the business hours of the telegraph company at Ninety-Six from 8 o'clock a. m. until 6 o'clock p. m., established by the telegraph company, are reasonable; and if you find from all the circumstances and evidence that it was impossible to transmit the message from Edgefield to Ninety-Six, before the office closed in Ninety-Six and before the husband of the plaintiff arrived, then your verdict should be for the defendant'—the error being that the evidence as to reasonableness of the office hours was undisputed.

"VIII. In that his honor erred in refusing to grant the defendant's motion for a new trial upon the following grounds: (1) Because the verdict is absolutely excessive and capricious. (2) Because the verdict is contrary to the evidence adduced. (3) Because it is contrary to the charge of the court as to the law of the case. (4) Because there is no testimony whatever that the suffering was the direct and proximate result of any act or delict on the part of the telegraph company. (5) Because, as to office hours, there is not a scintilla of evidence to contradict the fact, which was proven on the part of the defendant, that the office hours at Ninety-Six from 8 a. m. to 6 p. m. were reasonable hours. (6) On the ground that telephone, railroad and telegraph companies, engaged in interstate commerce, cannot keep their employes in the service over nine hours a day and the testimony is that the office hours were from 8 a. m. to 6 p. m. The testimony is uncontradicted that the office there would not warrant the employment of a night operator. (7) On the further ground that there is no evidence of any waiver as to office hours at Ninety-Six. (8) On the ground that your honor refused to charge our eighth request."

John Gary Evans and N. G. Evans, for appellant. Thurmond & Nicholson, for respondent.

GARY, C. J. This is an action for damages alleged to have been sustained by the plaintiff, through the negligence of the defendant, in failing to deliver a telegram within a reasonable time. The plaintiff and her husband lived at Ninety-Six, S. C., and worked in the factory. The husband went to Edgefield, S. C., on a bicycle, to visit his sister, Mrs. Kate Waits, and, becoming suddenly ill, sent the following telegram to his wife on the 17th of July, 1910, "I am sick we will be home to-morrow on train." He failed to arrive at home on the 18th of July, and his wife on that day sent to him the following message: "When will you be home?" And, in reply thereto, Mrs. Kate Waits (in whose care the telegram was addressed), on the 18th of July, 1910, at 6 o'clock p. m., delivered to the defendant, for transmission, the following telegram: "Jerry is on way on bicycle, left at ten." The said telegram was not delivered to the plaintiff until the next day at 10 o'clock a. m., July 19, 1910, and, as the result of the failure to deliver the last-mentioned telegram, the plaintiff alleges that she suffered mental anguish.

The jury rendered a verdict in favor of the plaintiff for \$500, and the defendant appealed upon exceptions, which will be reported.

First Exception. The ground of objection to the admissibility of the testimony is that it was irrelevant. Even conceding that there was error, the appellant has failed to satisfy this court that it was prejudicial.

Second Exception. The appellant has failed to show that, if there was error, it was prejudicial to its rights.

Third Exception. His honor, the presiding judge, could not have directed a verdict without invading the province of the jury.

Fourth Exception. What was said in disposing of the third exception is conclusive of this question.

Fifth Exception. When the charge is considered in its entirety, it will be seen that this exception cannot be sustained.

Sixth Exception. The presiding judge could not have charged the request as presented, without invading the province of the jury.

Seventh Exception. What was said in considering the sixth exception is conclusive of this question.

Eighth Exception. There was testimony tending to sustain all the material allegations of the complaint, and there does not appear to have been an abuse of discretion on the part of his honor, the presiding judge, in refusing the motion for a new trial.

The second appeal is from the refusal of "a motion before his honor, R. W. Memminger, presiding judge, at the October term of the court of Edgefield, to set aside a verdict

for the plaintiff rendered in this case, upon after-discovered evidence, showing that the foreman of the jury that found the verdict was the uncle of the plaintiff."

The defendant introduced certain affidavits in support of the motion, but it will only be necessary to reproduce the following:

Affidavit of Amos Eubanks, in which he says: "That he sat at a juror and foreman of the same in the case of Mrs. Jerry Robertson against the Western Union Telegraph Company. That he is the uncle of the father of Mrs. Jerry Robertson. That at the time the circuit judge asked if any of the jurors were related to the plaintiff, deponent did not answer, because he did not know who Mrs. Robertson was at that time, and 'the same had no influence on me.'"

Affidavit of Mr. John Gary Evans, which was as follows: "That he is attorney for the Western Union Telegraph Company, defendant in this action, and that his brother, N. G. Evans, was associate counsel. That deponent had no knowledge of any relationship existing between the plaintiff, Mrs. Robertson, and the foreman of the jury, Mr. A. Eubanks. That deponent requested the court to ask the jurors before they were sworn whether they were related by blood or marriage to the plaintiff or her husband in this action. That such question was asked and no response whatever was made by any juror, and that the case went to trial, and A. Eubanks appears upon the record as the foreman of the jury. That, several months after the trial of the case and verdict rendered, deponent was informed that the foreman of the jury was the uncle of the plaintiff, Sallie Robertson, whereupon deponent instituted an inquiry, and ascertained through an affidavit of A. Eubanks himself, which affidavit is herewith submitted to the court, that it was true that he was the great-uncle of the plaintiff. That the Western Union Telegraph Company had no knowledge, so far as this deponent is able to ascertain, of any relationship existing between Mrs. Robertson and the foreman of the jury prior to or at the trial of said cause."

The plaintiff introduced the following affidavits in reply:

Affidavit of Jerry Robertson, who says: "That he is the husband of Mrs. Sallie Robertson, the plaintiff in the above-entitled action, and was present at the trial of said case. That deponent never lived near Mr. Amos Eubanks, but married at Edgefield and moved from there to Ninety-Six, S. C., and didn't know of any relationship whatsoever between his wife and Mr. Eubanks, when the jury was selected, and never heard of any relationship between them until right recently."

Affidavit of Mr. J. W. Thurmond, who says: "That he is a member of the firm of Thurmond & Nicholson who represented the plaintiff in the above-entitled action; and, when said case was tried, he had no

knowledge or information of any relationship between Mr. A. Eubanks, the foreman of the jury in said case, and the plaintiff in the action, and this deponent never heard of any such relationship until since the verdict in said case was rendered. Deponent walked into the office of N. G. Evans, Esq., just as Mr. A. Eubanks had signed the affidavit offered by the defendant on this motion, and Mr. Eubanks remarked to deponent that he thought the affidavit ought to contain the statement that no relationship between him and the plaintiff had any influence on him in agreeing to the verdict in that case, and then deponent suggested to Mr. Eubanks that this statement should be incorporated in the affidavit, and so it substantially was. That deponent has known Mr. A. Eubanks for a number of years, and knows him to be a man of integrity and honor, and is satisfied that his statement is true to the effect that he did not know of the relationship of the plaintiff to him, as mentioned in his affidavit, and, besides, deponent is satisfied that, if it had been otherwise, the said juror would not have been influenced thereby in his verdict in said case."

Affidavit of Mr. B. E. Nicholson, which is to the same effect as that of Mr. J. W. Thurmond.

Section 2944 of the Code of Laws is as follows: "The court shall, on motion of either party in suit, examine, on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence, in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called."

The rule is thus stated in the case of *State v. Brock*, 61 S. C. 141, 39 S. E. 359: "While the circuit judge committed error in stating that jurors related by blood or connected by marriage within the sixth degree to either of the parties were disqualified from sitting as such, and that both consanguinity and affinity, within the sixth degree, were grounds for legal exceptions, under the statutes, still he stated a very salutary rule. Certainly the Legislature has interdicted judges from sitting in cases of such relationship, and it is a good guide to the exercise of a sound discretion by a circuit judge to observe the same degree of relationship."

In the case of *State v. Perry*, 73 S. C. 199, 53 S. E. 169, the principle was announced that the relationship of a jury commissioner

to a party, which would invalidate the finding of a grand jury, must be such as would reasonably lead to the presumption that the commissioner would be thereby affected in such manner as to impair the proper discharge of his duties, and that fact must be determined by the trial judge in the exercise of a sound discretion.

If the practice prevailed of allowing a person related to a party litigant, either by consanguinity or affinity, as a great-uncle, to sit as a juror, especially as foreman, the administration of justice would be brought into disrepute.

The following language of the court, in the case of *State v. McQuaige*, 5 S. C. 429, is applicable to this case: "The obligation resting on one engaged in drawing a jury involves a duty of such a high, important, and delicate character that its exercise must be free even from a suspicion of partiality. It is true that no charge of wrong is imputed to the commissioner. Courts must be governed by general principles. It is better for the community that a definite and established rule should prevail, not affected by any condition or provision, to be applied by any inquiry as to intention or motive, the ascertainment of which is almost impossible, save through the oath of the party, whose act may be the subject of challenge and examination."

The uncontradicted testimony shows that the defendant's attorney requested his honor, the presiding judge, to ask the jurors before they were sworn whether any of them were related by blood or marriage to the plaintiff or her husband, in this action. That the question was asked, and no response whatever was made by any juror.

Although the motion for a new trial, on the ground that the plaintiff and the foreman were related within the sixth degree, was addressed to the discretion of his honor, the presiding judge, nevertheless it was erroneously exercised, and the motion should have been granted.

The case of *Senterfelt v. Shealy*, 71 S. C. 259, 51 S. E. 142, upon which the respondent's attorneys principally rely, was materially different from the present case in the important particular that in the case of *Senterfelt v. Shealy* the presiding judge was not requested to ask the jurors if they were related to any of the parties.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

WOODS and HYDRICK, JJ., concur in the result.

(90 S. C. 436)

DARLINGTON COUNTY FAIR & DRIVING ASS'N v. ATLANTIC COAST LINE
R. CO.†

(Supreme Court of South Carolina. March 1, 1912.)

1. CARRIERS (§ 229*)—DELAY OF FREIGHT—PUNITIVE DAMAGES.

A shipper was not entitled to recover punitive damages for delay in delivering a horse on a special train, hired for the purpose under a special contract, caused by the necessary repair of a trestle, resulting from quicksand filling into the trestle timber holes when timbers were removed to put in new timbers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

2. DAMAGES (§ 91*)—PUNITIVE DAMAGES.

Punitive damages are not recoverable unless defendant was guilty of a conscious failure to observe due care.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

Appeal from Common Pleas Circuit Court of Darlington County.

Action by the Darlington County Fair & Driving Association against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed in part and rendered.

W. F. Dargan and J. B. White, for appellant. J. Monroe Spears and Miller & Lawson, for respondent.

WATTS, J. This action was for actual and punitive damages against defendant for its delay in delivering a horse in Darlington according to an alleged special contract made with plaintiff on July 7 and 8, 1909. The Darlington County Fair & Driving Association held a race meet in Darlington, and as a special attraction had advertised that "Alphonso," a horse noted for his speed, would be entered. It was found to be impossible to get the horse to Darlington by the ordinary means in time to enter the races on the morning of July 8th. The plaintiff, through one of its stockholders, Mr. McLeod, approached defendant's agent, at Darlington, with the request that a special car be run to Bennettsville to bring the horse from there in time to enter the races that afternoon. With respect to the contract made between the parties, one of the issues of fact in the case was whether or not the defendant's agent guaranteed the delivery in Darlington by a certain time; plaintiff alleging that the agreement was an absolute one to have the horse in Darlington by 1 o'clock. It is certain that the sum of \$40 was paid to the defendant as a consideration and a special train, in charge of Mr. Orrell, left Darlington for Bennettsville about 11 o'clock. The horse was taken on board at Bennettsville, and the party started on their return trip to Darlington. Arriving at Swift Creek, about two miles from Darlington, between 12 and 1 o'clock, they found that a force of hands had taken out a span of the trestle across the creek for the purpose of

repairing it, and that it was impossible for the train to cross. Though effort was made, it was several hours before the track was again in shape, and the horse was not delivered until that afternoon, too late for him to enter the races. There was evidence to show that the delay at the creek was caused by a peculiar formation in the bed; it consisting of quicksand which, when decayed timbers were removed, flowed in and rendered it difficult to put in new timbers. But for this the trestle would have been repaired in ample time. On the trial of the cause in the circuit court, at close of plaintiff's testimony, defendant moved for a verdict to be directed in favor of defendant, which motion was refused. The court was then requested to charge the jury the same requests that motion to direct verdict was made on, and later, after verdict was rendered, a motion for a new trial was made on the same grounds. The jury found verdict for plaintiff in the sum of \$500. Defendant appeals and asks for a reversal of verdict as to exemplary or punitive damages on two exceptions. One is that this is an action "ex contractu, based solely upon defendant's violation of its agreement to deliver a horse in Darlington by a certain time; that the contract was a special one entered into voluntarily by both parties, the defendant, in its private, as distinguished from its public, capacity, binding itself to the performance of an act in which the public was not interested or public policy concerned. Defendant for this suit must be regarded as a private and not as a common carrier, and that there is no evidence to sustain a finding by jury of punitive damages."

[1] We think the verdict as to punitive damages must be reversed, on the ground that there is no evidence to sustain it. It is unnecessary to consider the other exception. There is no testimony in the case showing any conduct on the part of the defendant, its agents or servants, to justify a finding of willfulness or wantonness. The testimony shows the delay was caused by the necessary repair of defendant's track, one of the imperative duties imposed upon it by the law to protect the safety and lives of its passengers. The delay was caused solely by an unavoidable accident—something beyond the power of defendant to prevent or control.

[2] Punitive damages are never given unless the evidence shows there was on part of defendant a conscious failure to observe due care. This court, in the case of *Gwynn v. Telegraph Company*, 69 S. C. 444, 48 S. E. 463 (67 L. R. A. 111, 104 Am. St. Rep. 819), quoting from *Southerland on Damages*, says: "If a wrong is done willfully—that is, if a tort is committed deliberately, recklessly, or by willful negligence with a present consciousness of invading a man's rights or of exposing him to injury—a case is presented

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

† Rehearing denied April 17, 1912.

for exemplary damages. There damages are allowable only when there is misconduct and malice or what is equivalent thereto." There is no contention in this case but that plaintiff is entitled to actual damages. That is conceded by defendant. The actual damages proven were \$50, \$40, and \$12.50, aggregating the sum \$102.50. The verdict was for \$500, allowing for punitive damages the sum of \$397.50.

As to punitive damages the judgment of the circuit court is reversed, and plaintiff have judgment only for actual damages, namely, \$102.50.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. FRASER, J., did not hear this case.

(158 N. C. 133)

MIDGETT v. GRAY.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. OFFICERS (§ 55*)—VACANCIES—CONSTITUTIONAL PROVISIONS.

Under Const. art. 14, § 7, which provides that no person who shall already hold an office shall hold any other office, the acceptance and qualification for a second office ipso facto vacates the first.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 79; Dec. Dig. § 55.*]

2. QUO WARRANTO (§ 24*)—ACTION TO TRY RIGHT TO OFFICE—PARTIES.

Under Revisal 1905, § 826 et seq., civil actions in the nature of quo warranto to try title to a public office may be instituted in the name of the state, on the relation of the Attorney General, or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 27; Dec. Dig. § 24.*]

3. QUO WARRANTO (§ 44*)—ACTION TO TRY RIGHT TO PUBLIC OFFICE—USE OF NAME OF STATE.

A civil action in the nature of quo warranto, instituted in the name of the state on the relation of an individual citizen, will not be considered and determined by the Supreme Court, where it does not appear as required by Revisal 1905, §§ 826, 829, that the relator ever obtained the leave of the Attorney General, either to institute or maintain the action.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 37; Dec. Dig. § 44.*]

Appeal from Superior Court, Dare County; Cline, Judge.

Civil action in the nature of quo warranto, instituted in the name of the state, on the relation of S. E. Midgett, against W. R. Gray. Judgment for defendant, and plaintiff appeals. Action dismissed.

There was evidence on the part of plaintiff tending to show that defendant, duly qualified and holding the office of clerk of the superior court of Dare county and during his term of said office, was appointed to the office of school committeeman for public school district No. 15, for said county, and

was qualified and entered upon the discharge of the duties of the last-mentioned office. There was allegation, with evidence, on part of defendant, to the effect that said defendant had not duly qualified as school committeeman, nor had he acted as such officer. On the issue joined, there was verdict for defendant, and plaintiff excepted and appealed, assigning errors.

B. G. Crisp, E. F. Aydtlett, and J. C. B. Ehringhaus, for appellant. Ward & Grimes and D. M. Stringfield, for appellee.

HOKE, J. (after stating the facts as above). [1] Our Constitution (article 14, § 7) provides that, with certain stated exceptions, not applicable to present case, "no person, who shall hold any office, or place of trust or profit, under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office, or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the General Assembly," etc.; and, interpreting the provision, we have held, in reference to officers of this state, that the acceptance and qualification for a second office ipso facto vacates the first. Connor and Cheshire on the Constitution, p. 445; Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720.

[2] Authority, with us, is also to the effect that actions of this character may be instituted in the name of the state on the relation of the Attorney General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. Revisal, § 826 et seq.; Barnhill v. Thompson, supra; Houghtalling v. Taylor, 122 N. C. 141, 29 S. E. 101; Hines v. Vann, 118 N. C. 3, 23 S. E. 932; Foard v. Hall, 111 N. C. 369, 16 S. E. 420; Saunders v. Gatling, 81 N. C. 298.

[3] We are not at liberty, however, to consider and determine the questions principally involved in the present appeal, for the reason that it nowhere appears that the relator has ever obtained the leave of the Attorney General either to institute or maintain the present suit. The statute applicable—Revisal 1905, c. 12, §§ 826-829—clearly provides that, before an action may be instituted or maintained on the relation of a private citizen, such leave shall be obtained, and that satisfactory security must be furnished, indemnifying the state against all costs and expenses which may accrue in consequence of bringing the action. True, the court has held, in Shennonhouse v. Withers, 121 N. C. 376, 28 S. E. 522, that it is not absolutely essential that the leave should be had before suit commenced, provided it is obtained afterwards and supplied; but it must always be made to appear, pending the proceedings, that the leave of the At-

torney General has been given to prosecute the action. An inquiry of this nature primarily concerns the public interests, and we may not overlook an omission in plain disregard of the statutory requirement. This view is strengthened by the subsequent section (830), which provides that, even after leave given and action commenced, the same may, under certain conditions, be withdrawn, and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action.

For the reasons given, we are of opinion that the present action should be dismissed; and it is so ordered.

Action dismissed.

(158 N. C. 121)

FORBES et al. v. BURGESS.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. MARRIAGE (§§ 47, 48*)—EVIDENCE—ADMISSIBILITY.

Evidence of the general reputation in the community that a man and woman were married, and of the statement of the man that he was going on a designated day to be married to the woman, and afterwards that they had been then married, was competent to prove marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 75, 76; Dec. Dig. §§ 47, 48.*]

2. MARRIAGE (§ 42*)—EVIDENCE—ADMISSIBILITY.

On the issue of the marriage, the refusal to admit in evidence the indictment for illegal cohabitation, unless the whole record was admitted to show the disposition of the case, was proper.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 70-78; Dec. Dig. § 42.*]

3. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

Where, on the issue of the marriage, the clerk of the court testified that the entry on the docket showed that a prosecution for illegal cohabitation was dismissed, the error, if any, in excluding the indictment for illegal cohabitation, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—EVIDENCE—MARRIAGE.

Where, on the issue of a marriage, there was evidence that the woman had been previously married, and no direct evidence of divorce between her and her former husband, and a witness testified that the former husband was dead at the time of the alleged second marriage, established by cohabitation and reputation in the community and by statements of the man, the error, if any, in a charge that, if there was a lawful ceremony of marriage, the burden shifted to the party asserting the illegality to prove it, by proving that the woman's former husband was still living and that she had not been divorced from him, was cured by another charge that the presumption of death or divorce would not be indulged in favor of the second marriage.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

Appeal from Superior Court, Camden County; Cline, Judge.

Action by Emmie Forbes and others against J. M. Burgess. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. A. Worth, H. S. Ward, and G. W. Ward, for appellant. E. F. Aydlett and J. O. B. Ehringhaus, for appellees.

CLARK, C. J. This is an action by the children of Nancy and Dempsey Wilson to recover the land described in the complaint. The defendants deny that Dempsey and Nancy were ever married to each other, and claim that they themselves have title to the land by virtue of conveyances to them from the brothers and sisters of Dempsey, who were his heirs at law. It was in evidence that Nancy was married in 1856 to Jarvis Wilson. There was no direct evidence of a divorce between Jarvis Wilson and Nancy, nor any direct evidence of the marriage ceremony having been performed between Nancy and Dempsey.

[1] Several neighbors testified to the general reputation that Dempsey and Nancy were married, and that Dempsey called her his wife and treated her as such. One witness testified that Dempsey told him that he was going down to Elizabeth City that day to be married, and upon his return stated that he had been married. Evidence of the general reputation in the community that Dempsey and Nancy were married, and the above statement made by Dempsey, and that they recognized each other as man and wife, were competent. Long v. Barnes, 87 N. C. 329; State v. Whitford, 86 N. C. 636; Jones v. Reddick, 79 N. C. 291; Archer v. Halthcock, 51 N. C. 421; 28 Cyc. 872. Proof of such reputation may be made by any party having knowledge thereof. 28 Cyc. 877.

[2, 3] The court properly declined to admit the bill of indictment against Dempsey and Nancy for illegal cohabitation, unless the whole record was admitted, to show the disposition of the case. The clerk of the court testified that the entry on the docket showed that the case was dismissed; so, if there had been error, it was harmless.

[4] The court charged the jury "that if they found from the evidence, from its greater weight, that there was a lawful ceremony of marriage entered into between Dempsey and Nancy, then the burden shifted to the defendants to prove the illegality thereof, by showing by a preponderance of the evidence that her first husband was still living at the time the plaintiffs contend that she was married to Dempsey, and that she had not been divorced from her first husband." The court further charged, as prayed by the defendants: "Although, where a marriage is established by a proof of the fact in any competent way, it raises a

presumption that any prior marriage which is relied on to invalidate the second marriage has been dissolved by death or divorce, the presumption of death or divorce will not be indulged in favor of an alleged second marriage, the proof of which rests only on cohabitation and reputation." If there was any error in the paragraph of the charge above given and excepted to, it was cured by this instruction. There was evidence which tended to show that Jarvis Wilson was dead at the time of the alleged second marriage. There was one witness who testified that Jarvis was living at the time of Nancy's death. The prayer and the charge cannot be said to be conflicting, but the charge given in the prayer is explanatory of the previous instruction.

The jury found that the plaintiffs were entitled to the land as the legitimate children of Dempsey Wilson.

No error.

(153 N. C. 139)

CLARK et al. v. EAST LAKE LUMBER CO.
(Supreme Court of North Carolina. Feb. 21, 1912.)

1. PLEADING (§ 21*)—COMPLAINT—INCONSISTENT CAUSES OF ACTION.

A complaint, alleging in one count that plaintiff was entitled to a commission as a real estate broker for finding a purchaser ready, willing, and able to take the land, but that defendants refused to sell, and in another that plaintiff, relying upon defendant's false representations that the title was good, secured a purchaser for the land, who, after examination, refused to buy, because the title was defective, and compelled plaintiff to refund certain expenditures made by him, contains two inconsistent causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.*]

2. BROKERS (§ 63*)—REAL ESTATE BROKERS—COMPENSATION—RIGHT TO COMPENSATION.

Where real estate brokers were given an agency to sell land at certain terms and upon certain notice, they were entitled to their commission upon giving the notice and producing a purchaser able, ready, and willing to buy the land at the terms fixed, since, while the owner can prescribe the terms of sale, plaintiffs cannot be deprived of commission because of the owner's failure to convey.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 81; Dec. Dig. § 63.*]

3. VENDOR AND PURCHASER (§ 16*)—CONTRACTS—OPTION CONTRACTS.

A contract, whereby prospective purchasers were given the right to purchase the land within a stated time on given notice, is no more than a proposition to sell until accepted, and the acceptance must be identical with the offer, in order to give the purchaser any rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 17; Dec. Dig. § 16.*]

4. VENDOR AND PURCHASER (§ 18*)—CONTRACTS—OPTION CONTRACTS—ACCEPTANCE.

Where an option contract provided for the sale of 167,555 acres, "more or less," the vendor to execute a deed with general warranty, and the sale to be closed at a certain place, the purchasers giving the vendor at least five

days notice prior to the date when they would be ready to close, an attempted acceptance by the purchasers of 167,555 acres, provided a clear and undisputed title could be made for the whole, and which did not give the notice provided for, was insufficient to give the purchasers any rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

5. FRAUD (§ 60*)—FALSE REPRESENTATIONS—DAMAGES.

Where an option contract falsely represented that the vendor's title to the land was good, a prospective purchaser cannot recover as damages for such false representations expenses which he incurred in examining the land prior to the time he secured the option.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. § 60.*]

6. FRAUD (§ 20*)—FALSE REPRESENTATIONS—RELIANCE.

In an action for false representations as to title in an option contract, the plaintiff must prove reliance on the representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 17; Dec. Dig. § 20.*]

7. FRAUD (§ 58*)—FALSE REPRESENTATIONS—EVIDENCE.

In an action for damages for false representations in an option contract, evidence held not to show reliance on such representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

8. FRAUD (§ 50*)—BURDEN OF PROOF—AMOUNT OF DAMAGES.

Damages for work done in reliance upon false representations in an option contract cannot be recovered in the absence of proof of the amount or value of the work.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 47; Dec. Dig. § 50.*]

9. FRAUD (§ 25*)—INJURY FROM FRAUD.

Damages for false representations in an option contract cannot be recovered where no connection is shown between the representations and the damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.*]

Appeal from Superior Court, Dare County; Cline, Judge.

Action by O. H. Clark and another against the East Lake Lumber Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

The plaintiffs allege two causes of action. The first is that on or about the 24th of May, 1905, the defendant employed the plaintiffs to sell for it a certain tract of land, particularly described, and agreed to pay them 5 per cent. commission on the purchase price, which should not be less than \$220,000; that they procured a purchaser at said price who was ready, able, and willing to buy; that the defendant was duly notified thereof, and it refused to make title to said purchaser, and refused to pay the plaintiffs their commissions. The second alleges the contract of May 24, 1905; that the defendant represented that they had a perfect title to said lands; that, relying on this representation, the plaintiffs represented to the prospective purchasers that the title was good;

that it became necessary for said purchasers to expend \$9,752 in the examination of said lands, which they did; that after this expense was incurred it was found that the title was not good, and said purchasers would not accept it; and that the plaintiffs had paid to said purchasers the amount expended.

On the 23d of January, 1905, the defendant agreed to pay the plaintiff Silver commissions to negotiate a sale of its Dare county lands, containing 167,555 acres, more or less, and on the same day executed its option to William O'Brien, a prospective buyer, procured by said Silver, which option, unless accepted, expired on February 28, 1905. The plaintiffs offered evidence tending to prove that the plaintiff Clark was equally interested with the said Silver in said commissions, and that F. W. Helmick and M. H. Alworth were equally interested with O'Brien in said option. Also that said option was extended by mutual consent, and was used as a basis for an option given in May, 1905.

On the 24th of May, 1905, the defendant gave an option to buy said lands to said Alworth and Helmick, the material parts of which are as follows: "That for and in consideration of the sum of one dollar (\$1.00) to the party of the first part in hand paid by the parties of the second part, and for other good and valuable considerations, the receipt whereof is hereby acknowledged, the party of the first part has granted unto the parties of the second part the exclusive option or right to purchase from the party of the first part all of the land owned by the party of the second part in Dare county in the state of North Carolina, said lands consisting of one hundred sixty-seven thousand five hundred fifty-five (167,555) acres, more or less, being the same premises particularly described in a deed given to the said party of the first part by the People's Bank of Buffalo et al., and recorded in the office of the register of deeds in Dare county, December 6, 1904; said purchase to be for the sum of two hundred twenty thousand dollars (\$220,000.00), payable in manner as follows, to wit: Forty thousand dollars (\$40,000.00) cash at the date of the deed under this option, the balance of the purchase price to be paid as follows. [Terms omitted.] This agreement or exclusive option is also given to the parties of the second part upon the express condition that the parties of the second part shall at once employ a competent attorney and commence an examination of the title of all of said property without delay. One of the attorneys to be employed by the said parties of the second part shall be W. D. Pruden of Edenton, North Carolina, if possible, and it is expressly agreed by the parties of the second part that if they shall not have notified the said Pruden by telegram or otherwise within three days from the date hereof of their employment of him, the

said Pruden, for such purpose, then this option shall be and become null and void. The purchase when consummated shall be closed at Manteo, North Carolina. It is agreed that the parties of the second part shall give notice by telegram to R. E. Johnston of Greenville, South Carolina, and to G. S. Van Gorder of Buffalo, New York, at least five days prior to the date when they will be ready to close the said purchase, of their election to close the said purchase at that time. It is understood and agreed that the said conveyance to the parties of the second part shall be by general warranty deed, subject only to the said mortgage of one hundred twenty thousand dollars (\$120,000.00) above described."

Mr. Pruden was employed to examine the title, and on the 15th day of June, 1905, the said Helmick and Alworth sent to R. E. Johnston, at Greenville, S. C., and to G. S. Van Gorder, at Buffalo, N. Y., the following telegram: "We elect to exercise the option heretofore granted by the East Lake Lumber Company to M. H. Alworth and F. W. Helmick, dated May twenty-fourth, nineteen hundred and five, and purchase the property described in said option for the sum of two hundred and twenty thousand dollars, under the terms of payment stated therein, provided you can give us a clear and undisputed title to the whole of the one hundred and sixty-seven thousand five hundred and fifty acres of land and timber in Dare county, heretofore represented by you to us to be owned by the East Lake Lumber Company."

F. W. Helmick was examined as a witness, and, among other things, testified as follows: That when he sent the telegram to Van Gorder he was staying at the Atlantic hotel in Norfolk. That he did not stay more than about a day after sending the telegram before he left for home. That the only notice he gave of acceptance was by this telegram. That he never furnished any copy of the estimate made by the timber estimators. That he expected a reply by wire or letter. That he received no reply to his telegram. That he went back to his home in Duluth. That ended the matter until the plaintiffs started this suit. That he did not receive any letter from Johnston or Van Gorder, replying to the telegram sent. Had no conversation with them afterwards. That he got from Mr. Pruden an unsatisfactory report of the title. That Mr. Pruden said there was a great deal of litigation over it, but he thought it could be ultimately cleaned up, and witness told him he was not buying a lawsuit. This is the only reference in the evidence to the result of the investigation of the title.

The plaintiffs also offered evidence that Helmick was worth \$250,000, O'Brien \$6,000,000 and Alworth \$20,000,000. The plaintiffs also offered evidence that the defendant verbally represented the title to said land to be good, and that in consequence

thereof they made the same representation to O'Brien, Alworth, and Helmick, who, after the execution of said option of January 23, 1905, went on said lands with a large number of employes, spent several weeks examining said land and the timber thereon, and incurred much expense therefor, which, the plaintiffs claimed, amounted to \$9,752, and which they offered to prove they had paid. The examination of the property was completed between April 15, 1905, and May 1, 1905. No evidence was offered as to the number employed to examine the lands, or as to the value of the services. Nothing was done between the parties after the telegram of June 15th, and there was evidence that the title to large parts of the land was defective.

At the conclusion of the evidence, there was judgment of nonsuit, and the plaintiffs excepted and appealed.

E. F. Aydtlett and J. C. B. Ehringhaus, for appellants. Pruden & Pruden, Ward & Grimes, and W. M. Bond, for appellee.

ALLEN, J. [1] The two causes of action set out in the complaint are inconsistent, and both cannot be true. In the first, the plaintiffs seek to recover commissions because they contend they found a purchaser for the land of the defendant, who was ready and able to pay the purchase price, and so notified the defendant, who refused to convey, and, in the second, to recover damages because the defendant represented the title to the land to be good; that they relied on these representations and found a purchaser for the land, who, after examination, refused to buy, because the title was defective. We will, however, consider the causes of action separately.

[2] The right of the plaintiffs to recover commissions is dependent upon proof that they had found a purchaser for the land ready, able, and willing to buy upon the terms contained in the paper of May 24, 1905, and that notice of this fact was given to the defendant. The defendant had the right to prescribe the terms of sale, and is not liable for commissions, unless those imposed were complied with, and, on the other hand, the plaintiffs cannot be deprived of compensation because of failure by the defendant to convey, if they found a purchaser who notified the defendant of his readiness and ability to comply with the option. *Martin v. Holly*, 104 N. C. 38, 10 S. E. 83; *Mallonee v. Young*, 119 N. C. 552, 26 S. E. 141; *Trust Co. v. Adams*, 145 N. C. 166, 58 S. E. 1008.

In the last-cited case, Justice Walker, speaking for the court, says: "It is now the established doctrine of the courts that, in the absence of any usage or contract, express or implied, to the contrary, or conduct of the seller preventing a completion of the bargain by the broker, an action by the lat-

ter for his commissions will not lie until it is shown that he has procured and effected a sale of the property upon the terms fixed by the vendor. It is not enough that the broker has devoted his time, labor, or money to advance the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement or contract between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success. If there has been no contract, and the seller is not in default, then there can be no reward. His commissions are based upon the contract of sale."

We must, then, inquire into the terms of the contract of May 24, 1905, and see what was required of the purchaser before the defendant was under any legal obligation to convey.

[3] The contract of May 24th is an option, which is a right acquired by contract to accept or reject a present offer to sell (*Trogden v. Williams*, 144 N. C. 199, 56 S. E. 865, 10 L. R. A. [N. S.] 867), and is no more than a proposition to sell until accepted (*Hardy v. Ward*, 150 N. C. 391, 64 S. E. 171), and the acceptance must be identical with the offer, to be effective. *Gregory v. Bullock*, 120 N. C. 262, 26 S. E. 820; *Tanning Co. v. Telegraph Co.*, 143 N. C. 378, 55 S. E. 777; *Green v. Grocery Co.*, 153 N. C. 412, 69 S. E. 412.

In *Tanning Co. v. Telegraph Co.*, supra, it was held that an acceptance for 1,500 barrels of oil was not good when the offer was to sell *about* 1,500 barrels; and in *Green v. Grocery Co.*, supra, it is said, quoting from the Supreme Court of the United States: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it."

[4] Applying these principles to the evidence, we are of opinion that there has been no acceptance of the offer to sell on the terms contained in the option, and that the plaintiffs are not entitled to recover commissions: (1) The offer is to sell 167,555 acres, more or less; the acceptance is to buy the whole of 167,555 acres. (2) The offer is to sell and to execute a deed with general warranty; the acceptance is to buy, provided a clear and *undisputed* title can be made for the whole. (3) The offer provides that the purchase, when consummated, shall be closed at Manteo, and the purchasers shall give notice to the defendant, at least five days prior to the date when they will be ready to close said purchase, of their elec-

tion to do so at that time, and such notice was not given.

We do not hold that there must be an acceptance in the exact language of the offer, but must recognize the right of parties to impose the terms upon which they will enter into a contract of sale, and, in our opinion, the acceptance of June 15th differed materially from the offer of May 24th. If the defendant had acted upon the acceptance, and had tendered a deed to the purchaser, he might refuse to pay the purchase money, because of a discrepancy in the acreage, as his acceptance was for the whole; or, if the title to the whole was good, he could still decline to pay because of a dispute. There is a vast difference between a good title, and one that is undisputed, and the purchaser had a clear conception of this, as shown by his statement to his attorney that he was not buying a lawsuit, when told by him that the title was in litigation, but he thought it could be cleared up.

The notice was also material, and contemplated that the purchaser should fix a date at Manteo, not less than five days from the time of the notice, when the parties could meet and consummate the sale, which was not done. There is no evidence that the purchasers went to Manteo after June 15th; and one of them testified that he remained in Norfolk one day after sending the telegram, and then went to his home in Minnesota and heard no more of the matter until this action was instituted.

The objections to the maintenance of the second cause of action are equally fatal:

[5] (1) The complaint alleges the execution of the contract of May 24, 1905, and that the damages sought to be recovered were on account of expenses incurred pursuant thereto, while the evidence of the plaintiff is that they finished the work causing the expense by May 1st, before the contract was made.

[6, 7] (2) The cause of action is based upon a false representation as to title, and in any event it was necessary to prove that the representation was relied on. The contract and the evidence offered by the plaintiffs show conclusively that this could not be so. The contract gives time to the prospective purchasers for an examination of the titles, and requires them to employ a competent attorney and commence an examination of the title of all of said property without delay; and one of the purchasers testified that the report of the attorney was unsatisfactory, and that he told him he was not buying a lawsuit.

[8] (3) No evidence was offered to show the amount of work done or the value thereof.

[9] (4) No connection is shown between the representation alleged to have been made by the defendant and the damages claimed.

Upon the whole record, we find no error. Affirmed.

(158 N. C. 153)

ROUNTREE et al. v. COHN-BOCK CO.
(Supreme Court of North Carolina. Feb. 21, 1912.)

1. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—TITLE ACQUIRED.

A deed of standing timber, with a right to cut and remove the same within a specified period, conveys all the timber which the purchaser may remove within the prescribed time, and the timber remaining after that time belongs to the vendor or his grantee of the premises.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—TITLE ACQUIRED.

A clause in a deed of standing timber, with the right to cut and remove the same within a specified period, extending the time to remove the timber, not exceeding a specified time, on the payment of a specified sum, and authorizing the purchaser "during period last aforesaid to enter on the land to cut and remove the timber," requires the purchaser, claiming the privilege, to notify the grantor of his intention to exercise it, and to pay or tender the stipulated amount within the original period; and where no notice is given or payment or tender made before the expiration of the period the purchaser acquires no interest in the timber not removed during the original period.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Superior Court, Gates County; Cline, Judge.

Action by L. A. Rountree and another against the Cohn-Bock Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action to restrain the defendant from entering upon certain land and cutting timber thereon. The defendant claims under a certain timber deed, executed by the plaintiffs on the 9th day of September, 1904, to the Gay Lumber Company, which conveyed certain timber on said land and contained the following provisions: "The said parties of the second part shall cut and remove the timber hereby bargained and sold and conveyed within five years from date of contract. And should said second parties be unable to remove said timber within the time above specified, they shall have further time to remove said timber as they may require, not exceeding three years, upon payment to said parties of the first part of a sum equal to six per cent. per annum for the additional three years of time required on the purchase price as above stated. The said parties of the second part, their heirs or assigns, shall have power, and are hereby authorized at any time during period last aforesaid, to enter upon the lands above described for the purpose of cutting, removing or doing whatsoever they may elect with the timber hereby conveyed, and are hereby authorized and empowered to build and construct such roads, tramroads or railroads over and across the above described lands or any other lands owned by them, and may use such

brush, trees and undergrowth upon said lands as they may need in the construction of said road, tramroads and railroads, and are hereby empowered to exercise full, perfect and absolute ownership and control of the same to prosecute each and every person cutting or removing said timber, or in any manner interfering with it, whereby its growth will be affected, or its value depreciated." There was no tender of any amount to the plaintiffs under the extension clause in the deed until more than five years after the execution thereof. There was a judgment for the plaintiffs, and the defendant excepted and appealed.

L. L. Smith, for appellant. Ward & Grimes, for appellees.

ALLEN, J. [1] It is well settled that the legal effect of the first clause in the deed to the Gay Lumber Company, conveying the timber with the right to remove the same in five years, is to convey all the timber which the vendee should remove within the prescribed time, and that such as remained thereon after that time would belong to the vendor, or to his grantee of the premises. *Hornthal v. Howcott*, 154 N. C. 223, 70 S. E. 171; *Powers v. Lumber Co.*, 154 N. C. 407, 70 S. E. 629.

[2] It was also decided at the last term, in *Bateman v. Kramer Lumber Company*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615, that the correct interpretation of a clause, extending the time within which the timber may be removed, requires of the grantee, claiming the privilege, that he notify the owner of the property of his intention to exercise it, and that he pay or tender the stipulated amount on or before the expiration of the first period, granted for the purpose of removal of the timber. It follows, therefore, from these authorities and upon the admissions that no notice was given to the grantors in the deed to the Gay Lumber Company of an intention to exercise the privilege of extending the time for the removal of the timber, and that no money was paid or tendered on or before the expiration of the first period; that the defendant has no title to nor interest in the timber, unless there is something in the deed which requires the application of a different doctrine.

The defendant contends there is a clause in the deed, not to be found in any of the timber deeds considered by this court, which distinguishes it from the cases cited, and relies upon that part providing that, "The said parties of the second part, their heirs and assigns, shall have power, and are hereby authorized at any time during period last aforesaid to enter upon the lands," etc. In our opinion, that clause does not have the effect of waiving any of the conditions necessary to make the extension clause effective, but does define what may be done under it

after the conditions have been performed. The "period last aforesaid" has never had any existence because of failure to give notice and to pay or tender the stipulated amount, and the defendant cannot justify an entry on the lands thereunder.

We therefore conclude that there is no error in the judgment restraining the defendant from entering on said lands and cutting the timber therefrom.

Affirmed.

(158 N. C. 136)

LAMB v. COPELAND et al.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. EVIDENCE (§ 274*)—DECLARATIONS BY DECEDENT.

Oral declarations as to the particular limits of private tracts of land are admissible when made ante litem motam by declarant, who was disinterested when the declarations were made, and who died before the trial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274; *Boundaries*, Cent. Dig. § 156.]

2. BOUNDARIES (§ 35*)—EVIDENCE—REPUTATION.

Evidence of common reputation, the origin of which is remote and also ante litem motam, is admissible on the question of private boundaries on the principle of necessity, but evidence of common reputation not shown to have originated at such a remote time that direct evidence could not be procured is inadmissible.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 155; Dec. Dig. § 35.*]

3. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The rejection of evidence as to the location of a boundary corner is harmless, though erroneous, where both parties recognized the location of the corner to be as shown by the rejected evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4205; Dec. Dig. § 1057.*]

4. TRESPASS (§ 68*)—TRESPASS ON LAND—ACTIONS—INSTRUCTIONS.

In trespass, where no actual occupation of the locus in quo was shown by plaintiff or those under whom he claimed, and the record does not show that the description in any of his mesne conveyances differed from that of the original conveyance, or that it covered any more land, a charge confining plaintiff to proof of the land covered by the original conveyance was not error.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 151; Dec. Dig. § 68.*]

Appeal from Superior Court, Chowan County; Cline, Judge.

Action by T. M. Lamb against Thomas Copeland and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Civil action, trespass quare clausum, etc., tried fall term, 1911. Plaintiff alleged ownership of the Caleb Winslow farm, and as a part of his proof offered in evidence a deed from Miles Perry to Caleb Winslow bearing date in 1798, a line of mesne conveyances of said farm to plaintiff. Plaintiff offered evidence further tending to show that the

deed of Miles Perry covered the land in controversy, and that defendants through their agents had wrongfully cut some juniper timber on said land. Defendant, admitting ownership of the Winslow farm by plaintiff and the cutting of the timber, alleged and offered evidence tending to show that the Caleb Winslow farm and the deeds under which plaintiff claimed the same by correct location did not cover the land in controversy. On issues submitted there was verdict for defendant, judgment, and plaintiff excepted and appealed.

Aycock & Winston and W. M. Bond, for appellant. Ward & Grimes, for appellees.

HOKE, J. [1, 2] In presenting his evidence a witness testifying for plaintiff said that in 1897 he made a survey of the Winslow farm and began at A, a pine stump, which by common reputation was a corner of the Caleb Winslow land. On objection the court excluded this testimony as to common reputation on the ground that the "same was not ancient," and plaintiff excepted. We are of opinion that his honor made the correct ruling. It is well established with us that, under certain restrictions, evidence of this character will be received on questions of private boundary. Its admission is based on the principle of necessity, and is to a large extent subject to what is sometimes termed the "best evidence rule"; that is, it is competent when from lapse of time or unusual conditions better evidence of a relevant fact is not likely to be attainable. The case of declarations of deceased individuals as to particular corners, etc., is in illustration of the same principle; that is, they are admissible when made ante litem motam by a declarant who was disinterested when they were made, and is dead at the time of trial. Here the lapse of time is not always controlling, but the evidence is held competent by reason of the death of the declarant, and when more direct evidence is not likely to be procurable. *Lumber Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343; *Bullard v. Hollingsworth*, 140 N. C. 634, 53 S. E. 441; *Bland v. Beasley*, 140 N. C. 631, 53 S. E. 443; *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782; *Shutte v. Thompson*, 82 U. S. 151-163, 21 L. Ed. 123; *Stroud v. Springfield*, 28 Tex. 649; 2 *Wigmore*, §§ 1582-1583. In *Bland v. Beasley*, supra, the court said: "In *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42, the court, in speaking of this character of evidence, said: 'It is the law of this state that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary'—citing *Sasser v. Herring*, 14 N. C. 340, *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154, and *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782. And in the same opinion, speaking of the restrictions placed upon evidence of common

reputation, the court said: 'This reputation, whether by parol or otherwise, should have its origin at a time comparatively remote and always ante litem motam; second, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location'—citing *Tate v. Southard*, 8 N. C. 45; *Dobson v. Finley*, 53 N. C. 496; *Mendenhall v. Cassells*, 20 N. C. 43; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154." And in more especial reference to reputation evidence the court further said: "But the decisions are also to the effect that, to justify the reception of such evidence, the time at which the common reputation had its origin should be at a remote period. 'Comparatively remote' is the term used in *Hemphill v. Hemphill*, supra. It was so used for the reason that as the principle was established of necessity, when from changing conditions and the absence of permanent monuments better evidence of boundary could not be procured, so the time may vary to some extent, as the facts and circumstances may show that the necessity does or does not exist. On the admission of such testimony as to the time required, and the test to be applied, it is held in *Nieman v. Ward*, 1 *Watts & S. (Pa.)* 68, that 'reputation and hearsay is such evidence as is entitled to respect when the lapse of time is so great as to render it difficult to prove the existence of original landmarks.' This being the correct principle, there was nothing to show that the common reputation offered in this instance had its origin at any former time or at a period so remote that direct evidence as to the correct placing of this corner in question could not have been procured and the court as we have stated made correct decision in excluding the evidence.

[3] A perusal of the record will disclose, however, that in the development of the case both sides recognized and treated the corner in question as one of the corners of the Caleb Winslow farm, so that, in any event, no harm came to plaintiff by this ruling of the court.

[4] It was objected, further; that the charge of the court confined plaintiff to the correct placing of the deed from Miles Perry to Caleb Winslow, whereas, the plaintiff might have recovered by showing that one of his mesne conveyances covered the land, to wit, that from Caleb Winslow to C. H. Hostetter bearing date January 14, 1890, but we do not see that the objection is open to plaintiff on the evidence. There was no actual occupation of the locus in quo shown by plaintiff, or those under whom he claimed. The issue was made to depend on the correct placing of his boundaries, and there is nothing in the record to show that this deed to Hostetter in any way differed from

that of Miles Perry, or that the one covered more land than the other.

We find no reversible error, and the judgment of the superior court is affirmed.

No error.

(158 N. C. 270)

WESTON v. JOHN L. ROPER LUMBER CO.
(Supreme Court of North Carolina. Feb. 21, 1912.)

1. INJUNCTION (§ 219*)—TEMPORARY INJUNCTION—DEFINITENESS.

Where the complaint in a suit involving the boundary of land described the land in dispute by metes and bounds, and alleged that defendant wrongfully trespassed on the land claimed by plaintiff, a temporary order, restraining defendant from going on the land, except for enumerated purposes, was sufficiently definite to justify the punishment of defendant for contempt for going on the land for a purpose not permitted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 441; Dec. Dig. § 218.*]

2. INJUNCTION (§ 223*)—TEMPORARY INJUNCTION—VIOLATION.

A party restrained by a temporary order must obey it according to its spirit, and may not, directly or indirectly, do anything that will render the order ineffectual.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448-473; Dec. Dig. § 223.*]

3. INJUNCTION (§ 226*)—TEMPORARY INJUNCTION—VIOLATION.

The motive of a party violating a temporary injunction restraining him from trespassing on land in dispute is immaterial in passing on his guilt of contempt for trespassing; and he may not justify a trespass by showing that he honestly believed that the land belonged to him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 478; Dec. Dig. § 226.*]

4. INJUNCTION (§ 223*)—TEMPORARY INJUNCTION—VIOLATION.

The court, in contempt proceedings for the violation of a temporary injunction, will consider the objects for which relief was granted and the circumstances attending it in determining whether there has been an actual breach; and a violation of the spirit of an injunction, though its strict letter may not have been disregarded, justifies punishment for contempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 448; Dec. Dig. § 223.*]

5. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—DEFECTS IN JUDGMENT.

A party adjudged guilty of contempt for violating a temporary injunction may not complain because the finding is not more specific, or more in accordance with the probative force of the evidence; the defect in the finding being favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

6. INJUNCTION (§ 227*)—TEMPORARY INJUNCTION—VIOLATION—ADVICE OF COUNSEL.

Advice of counsel does not justify a party in violating a temporary injunction; but it may be considered in imposing punishment for the violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 479; Dec. Dig. § 227.*]

Appeal from Superior Court, Camden County; Cline, Judge.

Action by Cary P. Weston against the John L. Roper Lumber Company. From a judgment adjudging defendant in contempt for violating a temporary injunction order, it appeals. Affirmed.

This is a proceeding for contempt. Respondents were attached for contempt, convicted, and fined \$250 each for disobeying an injunction order of the court. The complaint alleges ownership by plaintiff of two tracts of land, known as "Lots Nos. 1 and 4," in the division of New Lebanon. It is conceded that the defendant owns lots, designated as "Nos. 2 and 3," in the division, and upon the complaint, used as an affidavit, Judge Whedbee restrained defendant, its servants, agents, and employes, from going upon the land, described in the complaint, for any purpose. It was further ordered that the defendant appear before Judge Ward and show cause why the restraining order should not be continued. At the hearing, the injunction was modified by Judge Ward, as follows: "It is ordered that the temporary restraining order heretofore granted be changed and modified, so that the defendant, its servants and agents, may continue the use and operation of its logging railroad as now located over and upon the land described in the complaint, pending the hearing of this cause upon its merits, and said restraining order is vacated, in so far as it prevents the use and operation of said railroad by the defendant. On motion of the plaintiff, it is ordered that the injunction heretofore granted, as to the cutting and removal of the timber from the land described in the complaint, be continued to the hearing, except the defendant may remove the logs cut and now lying upon the land."

It appears from the case that, upon application of the plaintiff, which was supported by affidavits to the effect that the respondents had violated the injunction order by cutting timber on the land in dispute, Judge Ward issued an order to the respondents to show cause, before Judge E. B. Cline, why they should not be attached for contempt. This order was served, and at the hearing Judge Cline found the facts, and, among others, that the respondents had cut timber on land claimed by the plaintiff, "being the land covered and protected by the former order of injunction; and, further, that they continued to cut the timber on said land after the order of Judge Ward had been served upon them." Judge Cline therefore adjudged them in contempt, and imposed a fine of \$250 upon each of them. Respondents excepted and appealed.

A. D. MacLean, J. K. Wilson, and W. M. Bond, for appellant. Aycock & Winston, for appellee.

WALKER, J. [1] It is apparent from the findings of Judge Cline that the respondents undertook, by themselves, and without the acquiescence of the plaintiff or the sanction of the court, to survey and locate the lines of tract No. 1, and upon their own location of the boundaries to cut timber within what his honor designates in his findings as "disputed territory." There was a contest between the parties as to the location of the land, and the injunction was issued in order to preserve the status quo until the dispute could be settled. It cannot well be questioned that respondents knew that they were cutting timber on the land *claimed* by the plaintiff; that is, on the land in controversy. The plaintiff, in his complaint, alleged that he owned lots 1 and 2 of the land, known as "New Lebanon," and that defendants had entered thereon and cut therefrom a large quantity of timber, and were still engaged in doing so. The land claimed by the plaintiff, if we stop at the complaint, is that described as the land upon which the defendant and its co-respondent and superintendent, at that time, were cutting timber. They were restrained by the order of Judge Whedbee from cutting any more on that land, and, by the modified order of Judge Ward, from cutting any timber from *that* land, or removing any, except that already cut. In the affidavits of J. T. Ansell and J. J. Watson, it was alleged that they were still cutting timber at that place, and upon those affidavits Judge Ward issued his second order, requiring them to show cause why they should not be attached for contempt for disobeying the order in the manner stated in said affidavits. Even after this warning, they continued to cut at the same place. In addition to this, Judge Cline has found, as facts, that they proceeded arbitrarily to locate the line and then cut timber on tract No. 1, as claimed by the plaintiff, and in disregard of the order forbidding them to do so. If such a proceeding should be permitted, the orders of the court could easily be set at naught and the rights of parties litigant greatly prejudiced.

This case is not unlike *Davis v. Fiber Co.*, 150 N. C. 84, 63 S. E. 178, in which, referring to a similar state of facts, Justice Hoke said: "The court finds, and there was ample evidence to sustain the finding, as follows: 'I find that, since the restraining order, made as aforesaid, was duly served upon the said Champion Fiber Company, it and its superintendent of the woods department, Harry Rotha, under the advice of counsel, have undertaken to, arbitrarily locate the Cathcart line to suit their own purposes, and have willfully and intentionally continued to cut and carry away timber trees situate and being on the land claimed by plaintiffs and embraced in the restraining order, just as they were doing before the issuing of said order.' And on this finding we are of opinion that the defendants were properly ad-

judged guilty of contempt. It is contended that the preliminary restraining order is not sufficiently definite in its terms to authorize the judgment; but we cannot take that view of the order, when considered in connection with the evidence in the case and the findings of the judge thereon. The description of the land was fully set forth in the complaint by metes and bounds. The allegations in the complaint, that the 'defendants had wrongfully entered and trespassed upon said lands,' by fair and reasonable intendment could only refer to the location as claimed by plaintiffs."

[2] We have high authority for saying that a party enjoined must not do the prohibited thing, nor permit it to be done by his connivance, nor effect it by trick or evasion. He must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so. The order of the court must be obeyed implicitly, according to its spirit, and in good faith. *Rapalje on Contempt*, § 40.

[3] The motive for violating the order is not considered in passing upon the question of contempt, and the respondent cannot purge himself by a disavowal of any wrong intent. It is the fact of his obedience that alone will be considered. Section 42; *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448.

[4] In deciding whether there has been an actual breach of an injunction, it is important to consider the objects for which relief was granted, as well as the circumstances attending it; and it is to be observed that the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. 2 *High on Injunctions* (4th Ed.) § 1446; *Campbell v. Tarbell*, 55 Vt. 455; *Loder v. Arnold*, 15 Jur. 117. The respondents may have honestly believed that the land upon which they cut the timber belonged to the defendant; but that is not the question. They had been forbidden to cut on land in dispute until the controversy was settled, and this order they violated. Having found this fact, the motive, whether good or bad, for doing the forbidden thing became immaterial.

[5] The court might well have found from the affidavits that the respondents had cut timber on lot No. 1, as described in the complaint; but they cannot complain that the finding was not more specific, or more in accordance with the probative force and full significance of the evidence, as the finding, if thus defective, is, in that respect, favorable to them.

[6] Nor will the advice of counsel avail the respondents in justification of their conduct. It may be considered by the judge in imposing punishment for the disobedience of the order; but it is no defense to the rule. *Rapalje*, § 49. When a party acts upon the advice of his attorney in such a case, he does

so at his peril. It was suggested by plaintiff's counsel that the respondents did not make a full disclosure to their attorney; but, however this may be, they cannot profit by the advice, if they actually violated the order.

No error.

(158 N. C. 128)

MIDGETT v. VANN.

(Supreme Court of North Carolina. Feb. 21, 1912.)

Plaintiff's Appeal.

1. APPEAL AND ERROR (§ 1195*)—DISPOSITION OF CAUSE—JUDGMENT OF APPELLATE COURT—CONCLUSIVENESS.

A judgment of the Supreme Court, on dismissing defendant's appeal, that defendant was liable for certain costs, was final and could only be corrected or reversed by the Supreme Court, and hence the superior court's ruling that defendant was entitled to recover back such costs was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. COSTS (§ 169*)—ITEMS—PERSONAL EXPENSES.

A defendant is not entitled to recover as costs the sum paid as personal expenses in attending the hearing upon an injunction.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 652, 653, 657, 658; Dec. Dig. § 169.*]

3. INJUNCTION (§ 252*)—ACTION ON BOND—DAMAGES.

Under the express provision of Revisal 1905, § 817, the only damages recoverable upon an injunction bond are such damages as may be sustained by the party enjoined, by reason of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 586; Dec. Dig. § 252.*]

Defendant's Appeal.

4. INJUNCTION (§ 188*)—DISMISSAL—COSTS—ATTORNEY'S FEES.

Attorney's fees are not recoverable as costs for damages by defendant in an action for an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 408; Dec. Dig. § 188.*]

Appeal from Superior Court, Dare County; Cline, Judge.

Action for an injunction by S. E. Midgett against Thomas S. Meekins, former fish commissioner, in which C. S. Vann, successor to Meekins, became party defendant. Motion for judgment for damages against sureties on injunction bond, heard upon exceptions to report of referee. Exceptions overruled, and report confirmed, and both parties appeal. Reversed on plaintiff's appeal and affirmed on defendant's appeal.

B. G. Crisp and E. F. Aydlett, for plaintiff.
J. C. B. Ehringhaus, for defendant.

Plaintiff's Appeal.

BROWN, J. There were seven actions brought in the superior court of Dare county against Thomas S. Meekins, former fish com-

missioner, to enjoin him from removing certain fish nets from the waters in which they were set upon the ground that they were not set within prohibited territory. The present defendant, C. S. Vann, succeeded Meekins as fish commissioner and took his place as defendant in said actions. The cases were considered together and heard by his honor Judge Justice, who continued the restraining order to the hearing. Defendant Vann appealed. This appeal was dismissed at August term, 1911, for failure upon part of defendant, appellant, to have the record printed, as required by the rule of this court, and the judgment of the Supreme Court required defendant to pay costs of appeal. At May term, 1911, of the superior court, plaintiff submitted to a judgment of nonsuit. There was a motion for judgment for damages, which was heard by a referee, whose judgment was affirmed by the superior court. The defendant claims damages as shown by the report: (1) For \$6.35, cost in the Supreme Court, and which was adjudged against the defendant by this court at August term, 1911. (2) For \$12.50, expenses of the fish commissioner in attending the hearing of the cases. (3) Two hundred dollars attorney fees in the cases. There were seven of these actions brought, and it was agreed that all should abide the decision of one case. The referee held: First. That the defendant was entitled to recover back the \$6.35 cost. Second. That the defendant is entitled to recover the \$12.50 personal expenses of the defendant in attending the hearings. The court overruled both exceptions and gave judgment against plaintiff. Plaintiff excepted. The referee refused to allow defendant attorney fees. Defendant excepted. Court overruled defendant's exceptions.

[1] 1. The ruling of the court that the defendant is entitled to recover back the costs taxed against the defendant by the judgment of the Supreme Court is erroneous. That judgment was final and could only be corrected or reversed by this court. To permit defendant to recover back costs of his dismissed appeal would in effect nullify the judgment of this court.

[2] 2. The defendant is not entitled to recover the sum paid as personal expenses in attending the hearing upon the injunction before Judge Justice. A party to an action is not entitled to recover his personal expenses in attending court. Hyman v. Devereux, 65 N. C. 589.

[3] The only damages recoverable upon an injunction bond given in pursuance of our statute (Revisal, § 817) are such damages as may be sustained by the party enjoined by reason of the injunction. Hyman v. Devereux, supra.

There is no evidence that defendant Vann has sustained any damages because he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not allowed to remove plaintiff's nets from the disputed waters, and therefore he can recover nothing upon the injunction bond.

Upon plaintiff's appeal his honor's rulings confirming report of referee are reversed.

Defendant's Appeal.

The defendant assigns error because the court below sustained the ruling of the referee refusing to allow counsel fees to defendant.

[4] Attorney's fees are not recoverable as costs or damages in cases like this in our state. Formerly a tax fee of \$5 and in some cases \$10, in the superior court, and \$15 in this court, were taxable as costs in favor of the successful party. But they were abolished by statute in 1871. In many states attorney's fees are allowed to the successful litigant; but it is not so in this state and some others, nor in the federal courts. *Railway Co. v. Elliott*, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673; *Hyman v. Devereux*, supra; *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733. The opinion in this latter case is an elaborate discussion of the subject and gives the states where attorney's fees are recoverable and those where they are not, placing North Carolina in the last-named class. See, also, *Donlan v. Trust Co.*, 139 N. C. 212, 51 S. E. 924.

The judgment on defendant's appeal is affirmed.

(158 N. C. 265)

MIZELL v. BRANNING MFG. CO.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—PRESUMPTIONS—RULING ON MOTION TO NONSUIT.

On appeal from a nonsuit, the evidence will be considered in the view most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

2. APPEAL AND ERROR (§ 928*)—REVIEW—PRESUMPTIONS—INSTRUCTIONS NOT INCLUDED IN RECORD.

Where the charge of the court is not in the record, it will be presumed that it properly submitted the evidence to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

3. NEGLIGENCE (§ 136*)—SETTING FIRES—QUESTION FOR JURY.

On the evidence in an action for burning timber on plaintiff's land, held, that whether defendant acted with ordinary care in setting a fire on its own property, and whether, when the danger to plaintiff's property became imminent, it resorted to such means as the situation presented to prevent the injury, were for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 311; Dec. Dig. § 136.*]

4. NEGLIGENCE (§ 121*)—EVIDENCE—BURDEN OF PROOF.

Where the plaintiff shows damages from an act of the defendant which with proper care does not ordinarily cause damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which makes care useless.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

5. NEGLIGENCE (§ 21*)—FIRES—STATUTORY PROVISIONS—"SET FIRE TO ANY WOODS."

Revisal 1905, § 3346, which provides that if any person shall "set fire to any woods" on his own property, without notice to adjoining landowners, and without taking effectual care to extinguish the fire before it reach adjoining lands, he is liable in an action to any one injured, refers to setting fires upon woodland, and does not apply unless the firing is voluntary or intentional; and hence has no application to the case of a manufacturing company, burning off its right of way, where straw, tree tops, etc., had accumulated, and negligently allowing the fire to escape to land of an adjoining owner.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

For other definitions, see Words and Phrases, vol. 7, p. 6438.]

Appeal from Superior Court, Bertie County; Justice, Judge.

Action by I. M. Mizell against the Branning Manufacturing Company. Judgment for plaintiff, and defendant appeals. No error.

This action was brought to recover damages for burning timber on the plaintiff's land. The defendant's servants, under the instructions of the section master of its railway, were "burning off" the right of way, where much straw, trash, tree tops, and stubble had been allowed to accumulate. It was in March, 1910, when it was very dry, and a high wind arose and swept the fire into the dry tree tops near by, from which and the right of way it was carried to the plaintiff's land, and burned over his land. One of the plaintiff's witnesses testified: "It was very dry, and the wind got up about 12 o'clock. Fire got out from where we were burning. We were firing and whipping out. It got out behind us in tree tops and made a big fire. We tried to put it out, but couldn't. It got out about 12 o'clock and burned till night. This fire burned on plaintiff's land. White and others stopped it by firing against it. White is superintendent of defendant's road. He brought his hands. Foreman was there and three others." He also said that it was a big fire and the wind caused the trouble. There was other evidence in the case not necessary to be stated. The charge of the court is not set out in the record, except the special instructions given at the request of the defendant. Its counsel asked the court to charge the jury as follows: "(1) If they believe the evidence, they will answer this issue in favor of the defendant—that is to say, the second issue—'No.' (2)

Under the evidence the plaintiffs cannot recover in this cause. (3) The defendant is no more liable than any other citizen of Bertie county would be under the same circumstances; and if the defendant was ordinarily careful in burning over its right of way, and the fire got out by reason of an unforeseen wind, then there can be no recovery against the defendant, and you will answer the second issue, 'No.' (4) If the jury find from the evidence in the case that the employees of the defendant exercised reasonable and prudent care in burning off the right of way, and by unexpected rise of wind the fire got beyond their control and burned over the lands of the plaintiffs, you will answer the second issue, 'No.'" The court gave the instructions contained in the third and fourth prayers, and refused the others, and defendant excepted. We find this statement in the case: "The other evidence was as to the amount of damages, and is not pertinent to this appeal, as only one question is presented, and that is the refusal of the judge to nonsuit the plaintiff." The jury returned the following verdict: "(1) Are plaintiffs the owners of the land described in the complaint? Answer: Yes. (2) Did defendant wrongfully and negligently injure the plaintiffs' land, as alleged in the complaint? Answer: Yes. (3) What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: \$750." A motion for a new trial having been overruled and judgment entered upon the verdict, the defendant appealed.

Winston & Matthews, for appellant. Walter R. Johnson and John H. Kerr, for appellee.

WALKER, J. [1] The case does not make it very clear whether the expression, "the other evidence was as to the amount of damages," refers only to the plaintiff's evidence or to the entire evidence. If the former is the true meaning, we could not decide that there is no evidence of negligence, without knowing what was the evidence introduced by the defendant, for, on a motion to nonsuit, the plaintiff has the right to have all of the evidence considered by us in the view most favorable to him. The appellant should have relieved us of any uncertainty in this respect.

[2] But the evidence, as stated in the case on appeal, was properly submitted to the jury, and under proper instructions, as we must assume; the charge of the court not having been made a part of the case. The defendant's counsel seem to have understood that it was necessary for the jury to find, upon the evidence, that the burning on the right of way was done carefully, and that there was no negligence of the defendant in burning the stubble and other combustible material, which contributed to the injury of which the plaintiff complains. The instruc-

tions asked for as regards the rising of the wind, which carried the live sparks into the dry tops of the trees and to the plaintiff's land, where his timber was burned, were given as requested by the defendant, and the court, in the general charge, may have instructed the jury even more favorably for the defendant.

[3, 4] Whether, upon the evidence, the defendant acted with ordinary care and prudence, was a question for the jury, and they could consider all the circumstances, the condition of the right of way, the time of the year, the state of the weather, the fact that defendant's servants left fire behind them that might spread to plaintiff's land by force of the wind or otherwise, and any other fact or circumstance bearing upon the question of due care. The evidence of negligence may have been slight, but we cannot say that there was none. It was the province of the jury to weigh it, under proper instructions of the court as to what would constitute negligence. "When the plaintiff shows damage resulting from the act of the defendant, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless." *Chaffin v. Lawrance*, 50 N. C. 179; *Aycock v. Railroad*, 89 N. C. 321; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; and especially *Moore v. Parker*, 91 N. C. 275. Whether, in dealing with a dangerous agency, the defendant used ordinary precaution to protect adjacent property, and whether, when the danger became imminent, it resorted to such means as the situation suggested to prevent the injury, were questions for the jury. It seems that Superintendent White stopped the conflagration by "firing against it." It might well be argued that had this method been employed in the beginning, or sooner than it was, the spread of the fire would have been prevented, and, at least, the loss to the plaintiff would have been diminished.

[5] We do not think *Revisal*, § 3346, applies to the facts. The defendant did not "set fire to any woods" within the meaning of that statute. The statute refers to woodland. *Averitt v. Murrell*, 49 N. C. 322. It was held in *Achenbach v. Johnston*, 84 N. C. 264, that "a field grown up in broom sedge and wire grass" was not "woods" within the intent of the statute, and it was said that the case of *Hall v. Cranford*, 50 N. C. 3, stretched the doctrine of liberal construction, in order to reach the mischief intended to be remedied, as far as it is safe to follow, and we concur in that view. Nor does the statute apply unless the firing is voluntary or intentional, and not merely accidental or necessary. *Averitt v. Murrell*, 49 N. C. 322; *Tyson v. Rasberry*, 8 N. C. 60; *Lamb v. Sloan*, 94 N. C. 534.

Defendant moved in this court for a new trial, alleging that the jurors were asked if any of them were related to the plaintiff, to which they answered, "No," and that since the trial it has been ascertained that one of the jurors was so related. We will not decide the question as to whether the motion should be made in this court or in the court below, for, assuming that we have jurisdiction, it is addressed to the discretion of the court, as we have so often held, and we would not be disposed, under the facts and circumstances of this case, to exercise our discretion in favor of the defendant and grant a new trial for the reason assigned. *State v. Maultsby*, 130 N. C. 664, 41 S. E. 97; *State v. Lipscomb*, 134 N. C. 689, 47 S. E. 44, and cases cited.

No error.

(158 N. C. 584)

GATES COUNTY v. HILL

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. TRIAL (§ 143*)—NONSUIT—WHEN AUTHORIZED.

Where the issue is one of fact, and the evidence supports both contentions, a nonsuit is properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. TRIAL (§ 252*) — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action by a county for land forming a part of a public square of the county, there was no evidence that the county had willfully abandoned a part of the square, and had established a different line, a charge that, if a part of the square had been willfully abandoned and a different line established, and there had been a continuous possession by defendant, under a deed, for the abandoned part for 20 years, the possession ripened into a title was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

3. LIMITATION OF ACTIONS (§ 6*)—RETROACTIVE OPERATION—LIMITATIONS AS AGAINST COUNTY.

A person who first actually occupied land forming a part of a public square of a county two years before the adoption, in 1891 (Laws 1891, c. 224), of Revisal 1906, § 389, providing that no person shall acquire any exclusive right to any public square by reason of occupancy thereof, could not acquire title by possession.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 6.*]

4. NEW TRIAL (§ 104*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence which is purely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

5. NEW TRIAL (§ 42*)—GROUNDS—DISQUALIFICATION OF JURORS.

A verdict for a county suing for land forming a part of a public square of the county will not be disturbed because some of the jurors were related to the county commissioners, where one juror was the father-in-law of a present commissioner, another juror a stepson of the father of a former commissioner, and

another juror the first cousin of the father-in-law of another present commissioner.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74-79; Dec. Dig. § 42.*]

Appeal from Superior Court, Gates County; Cline, Judge.

Action by Gates County against A. O. Hill. From a judgment for plaintiff, defendant appeals. Affirmed.

L. L. Smith, for appellant. A. P. Godwin, Ward & Grimes, and W. M. Bond, for appellee.

PER CURIAM. The defendant relies on two exceptions in his brief; the first being to the refusal of his motion to nonsuit the plaintiff, and the second to the failure of his honor to instruct the jury, as requested, that the defendant could rely on adverse possession as a defense.

[1] The controversy between the parties is one of fact, the plaintiff contending that the deed under which it claims covers the locus in quo, and the defendant contending to the contrary, and, as evidence was introduced supporting both contentions, the motion to nonsuit was properly denied.

[2, 3] The prayer for instruction was as follows: "Although the law is that possession of any part of a public square or street which has been dedicated to the public cannot ripen into a title, yet, if the proper authorities of a public square or street shall purposely and willfully abandon the use of any part thereof and establish a different line, cutting off such abandoned part, and there is continuous possession under a deed for such abandoned part for 21 years or more, then such possession would ripen into a title and vest the title in the possessor under the deed; and if you find from the preponderance of the testimony that the defendant, and those under whom he claims, have been in possession of the land in controversy, under such circumstances, for more than 21 years, then the title vested in the possessor thereof, and cannot be divested, except by 20 years' possession adverse to him." This was properly refused, because there was no evidence that the plaintiff willfully abandoned a part of the public square and established a different line. Also, the first actual occupation by the defendant of the land in controversy was in 1889, two years before the act of 1891 (Laws 1891, c. 224), now section 389 of the Revisal, which reads as follows: "No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square or public way of any kind by reason of the occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not

be competent for any court to hold that such action is barred by any statute of limitations."

[4] The defendant also moves in this court for a new trial upon the ground of newly discovered evidence, and because some of the jurors were related to members of the board of commissioners of Gates county. An examination of the affidavits on file and a comparison of them with the evidence introduced on the trial show that the new evidence is purely cumulative, and when this is true a new trial will not be granted.

[5] The relationship of the jurors, as stated by the defendant, is as follows: One of the jurors, to wit, Job Freeman, is the father-in-law of T. J. Carter, one of the present county commissioners; another, J. E. Harrell, is the stepson of the father of B. D. Lawrence, one of the commissioners in 1891; and another, J. A. Eason, is first cousin to the father of the wife of E. S. A. Ellenor, one of the present county commissioners. This is a motion addressed to our discretion, and, in our opinion, the interest and bias of the jurors, if any, is too remote to justify us in disturbing the verdict of the jury.

No error.

(158 N. C. 123)

SHIELDS et al. v. FREEMAN et al.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where, in an action to construe a will, there was no allegation and no evidence that a son of the testator, who was named as the beneficiary and charged with the duty of taking care of and supporting his mother and unmarried sisters, had refused to do so, an instruction submitting the issue was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. WILLS (§ 493*)—CONSTRUCTION—INDEFINITENESS.

A will expressing a purpose that a certain son of the testator "shall own the homestead," or, in case he refuses to respond, another son, and committing the family to the care of the son who accepted, "the farm to be his in fee simple, to descend to his heirs," though inartificially drawn, shows a clear intention to devise the property to a son, and to charge him with the care of the family, and is not void on the ground of indefiniteness or uncertainty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1077; Dec. Dig. § 493.*]

3. WILLS (§ 97*)—REQUISITES AND VALIDITY—CONTENTS—SEPARATE PAPERS.

A separate agreement cannot be considered a part of a will, though the words "is an addendum to the agreement made February 15, 1901," are prefixed to the will, where the date of the prefix does not appear, and the will is dated July 15, 1900, as it neither shows the existence of an agreement in writing, nor so describes and identifies it as to designate what paper was meant to be included.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 232, 233; Dec. Dig. § 97.*]

4. APPEAL AND ERROR (§ 105*)—DECISIONS REVIEWABLE—NONSUIT—FRAGMENTARY APPEAL.

Where, in an action to construe a will, there was a dismissal as to a portion of the lands involved, the plaintiff should have noted an exception as to the nonsuit, and have brought the whole case up on appeal from the final judgment of the issue reserved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

5. APPEAL AND ERROR (§ 866*)—REVIEW—EXTENT.

Though an appeal should be dismissed as fragmentary for not presenting a portion of the issues on which there was a nonsuit by exception, the court may, in its discretion, consider and pass on the ruling as to the nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8467-8475; Dec. Dig. § 866.*]

Appeal from Superior Court, Bertie County; Justice, Judge.

Action by R. J. Shields and others against Leon H. Freeman and others. From a judgment for defendants, plaintiffs appeal. Dismissed.

Pruden & Pruden, S. Brown Shepherd, and Gillam & Davenport, for appellants. Winston & Matthews, for appellees.

CLARK, C. J. J. C. Freeman died, leaving a will, of which the following is the only part material to this controversy:

"It is my full purpose that Leon H. Freeman, my son, shall own the old—my father's homestead, or in case he refuses to respond, then my son Joseph W. Freeman may accept or refuse the same offer, with the positive injunction that it may and shall remain and belong in the family as long as any direct male descendant shall issue from our direct bowels for a claimant. I also have in view to purchase other pieces or parts of said homestead which are to be added thereto, and in case of failure to do so, I would have my boy, whichever may be the owner, use lawful endeavor to unite in as large a tract as circumstances will allow. I ask this as a part of the sale to this land, on account of the many old associations, recollections and tender recollections and bygone friends, relatives and friends.

"Now I invest either Lee or otherwise Joe with a full possession of the farm of a one-horse crop, to be selected by himself as an inducement to accept as superintendent the supervision of the farm and family from January 1, 1901, till further separation of the family or until my death, after which I leave them to his best care, and the farm is his in fee simple, to descend to his heirs. The family to remain together, unless torn asunder by natural circumstances. I want everything kept together, and I would have all work together for good, provided it can be so managed. The law is less partial than I can be, and I leave all except this old

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

homestead, which is hereby sold and conveyed, to legal methods; and my prayer shall ever ascend for whole family, the good of my friends and the well-being of all mankind. This July 15, 1900."

To which he added this codicil: "Since writing the above, I have bought the lands herein intimated, containing 206 acres, to be paid for January, 1901, 1902, 1903—one-third amount each year; and if neither L. H. nor J. W. Freeman choose to accept the terms set forth, my wife and girls shall or may fill the wish, and after the death of my wife everything is to be equitably and legally divided. October 5, 1901."

Upon a caveat entered by these plaintiffs, this paper writing was established as the last will and testament of James C. Freeman. This action is brought by the daughters of James C. Freeman, alleging: (1) That they are tenants in common with Leon H. Freeman, and entitled to be let into possession with him and to immediate partition of the land. (2) That the said will confers no title to the premises upon Leon H. Freeman, and his claim is a cloud upon the title, which plaintiffs ask to have removed. (3) That under the will Leon H. Freeman was to hold said premises in trust for the use and benefit of the other children of said J. C. Freeman, and not for his sole use and benefit. (4) That that part of the home place, known as "lot No. 3 in the partition of the land of Sallie M. Freeman," the said J. C. Freeman had bought at a partition sale, but had not paid therefor, and no title had been made to him; and the plaintiffs contend that this part of the land did not pass under said will, but descended upon all the children as tenants in common.

Joseph W. Freeman and W. J. Freeman make no claim to the land, and did not unite with their sisters in this action, and are made parties defendant.

[1] The first exception is that the court refused to submit an issue, "Did Leon H. Freeman fail and refuse to take care of and support the widow and unmarried daughters of James C. Freeman after his death?" There was no allegation and no evidence that he had refused and failed, and the issue was properly refused. *Sprinkle v. Insurance Co.*, 126 N. C. 678, 36 S. E. 112.

[2] The second exception is that the court refused to instruct the jury that Leon H. Freeman took no interest in the land described in the said will, but that James C. Freeman died intestate in regard thereto, upon the ground that the will is too indefinite, is vague and uncertain. But we think that the will, though inartificially drawn, clearly shows that, while the testator desired that his unmarried daughters should

have a home with their mother and brother, and that the family should remain a unit, he devised the homestead to Leon H. Freeman. He put him in charge of the farm before his death, giving him a one-horse crop for his services each year, beginning January 1, 1901, and this was to continue until "my death, after which I leave them to his best care, and the farm is his in fee simple, to descend to his heirs." At this time, the testator did not own a part of his father's old homestead, and he urges his son to acquire as much of that as possible. Later the testator acquired that land, and by codicil added it to the devise. He further says: "It is my full purpose that Leon H. Freeman, my son, shall own the old—my father's homestead." He enjoins him against selling it, and hopes that it will be kept in the male line of inheritance. This last was a mere request, without legal effect. The language is not very formal or accurate, but it is sufficient to show a devise of the property in fee to Leon H. Freeman, who accepted it. Joseph W. Freeman is a party to the action, but sets up no claim to the land.

[3] Prefixed to the will are written these words, "This is written for Lee or Joe Freeman and is an addendum to the agreement made Feb. 15, 1901." This must evidently have been added after the main body of the will set out, which was dated July 15, 1900. The date of such prefix does not appear, and the agreement referred to can have no effect, unless it was in writing, and was "described and identified with such particularity as to designate and clearly show, and so that the court can certainly see, what paper was meant to be part of the will." *Siler v. Dorsett*, 108 N. C. 300, 12 S. E. 988.

[4] The court dismissed the action, except as to "the lands described in the complaint as lot No. 3, and continued the cause for trial upon the issues raised in the pleadings as to that tract of land." The plaintiffs should have noted an exception as to the nonsuit to the other part of the action, and have brought the whole case up on appeal from the final judgment after the determination of the issue reserved. The appeal at this stage must be dismissed as fragmentary. *Rodman v. Calloway*, 117 N. C. 13, 23 S. E. 37; *Rogerson v. Lumber Co.*, 136 N. C. 266, 48 S. E. 647; *Billings v. Observer*, 150 N. C. 542, 64 S. E. 435.

[5] We have, notwithstanding, passed upon and approved the ruling as to the nonsuit, which we have sometimes done in such cases. *State v. Wylde*, 110 N. C. 503, 15 S. E. 5; *Milling Co. v. Finlay*, 110 N. C. 412, 15 S. E. 4, and cases there cited; *Dowdy v. Dowdy*, 154 N. C. 558, 70 S. E. 917.

Appeal dismissed.

(158 N. C. 256)

HODGES v. SMITH.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. SALES (§ 261*)—WARRANTIES — INTENTION OF PARTIES.

Any affirmation of a fact made at the time of the sale of personalty is a warranty, if it was so intended by the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

2. SALES (§ 445*)—WARRANTIES — INTENTION OF PARTIES—QUESTION FOR JURY.

And the determination as to what was the intention of the parties is for the jury from the language used and the circumstances of the case.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

3. SALES (§ 445*)—WARRANTIES — INTENTION OF PARTIES—QUESTION FOR JURY.

Evidence in an action on a warranty of a horse held to warrant its submission to the jury on the question whether the words of the defendant constituted a warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

Appeal from Superior Court, Beaufort County; Cline, Judge.

Action by J. B. Hodges against R. L. Smith. From a judgment on nonsuit for defendant, plaintiff appeals. Reversed, and new trial ordered.

This action was brought to recover damages for deceit and false warranty in the sale of a horse. In his answer the defendant describes himself as "a regular horse and mule dealer; conducting a sales stable at Greenville, N. C." The following is the plaintiff's version of the facts, as given in his testimony: "I live in Beaufort county, and am a farmer and house carpenter. I know R. L. Smith, the defendant. I went to his stables in December, 1907. He has a large stable at Greenville. I saw Mr. Savage before I saw Mr. Smith. Savage was working with Smith. I told Mr. Savage that I wanted a horse, one that my father and mother could drive, and that is gentle and all right. I told him that I had never bought a horse before. He showed me the horse in question, and told me that he was all right. He priced the horse at \$185 cash. I then saw Mr. Smith, and told him about the conversation with Savage. He said he had a horse to sell, that was what he was there for. He said the horse was all right. I told Mr. Smith that I did not know anything about horses, that I wanted a quiet, gentle horse. He said that this one was a quiet gentle horse; that any lady could drive him. I had Mr. Savage to look at my horse, and we traded. I gave \$145 to boot by mortgage on the horse traded for. Mr. Smith had the horse hitched to a break cart and driven a short distance in the stable. He said he had no buggy, but would hitch him to a cart. My brother was with me at the time. I had no experience in buying

horses. I told Mr. Smith that I wanted a quiet, gentle horse that my father and mother could drive. He said this was a gentle horse that any lady could drive. I relied on what he said and did not know, except from what he said, whether the horse was gentle or not. After the trade was made, Mr. Smith had the horse hooked up, and I drove him home a distance of about 25 miles. The next day after that I hitched the horse up again. Lum Whitaker was with me. We hitched him to a good buggy with a good harness, and drove him about two miles. The next day Whitaker and I hooked him up and drove him 125 yards, when he began to run and kick and threw me out of the buggy, breaking my leg. Whitaker stopped the horse by pulling him into a fence. I was laid up nearly all the year. I was in bed six weeks, flat on my back. I was then up and down until October or November. The doctor attended me nearly the whole time. My leg was dislocated and broken together. I was disabled the entire year, and it affects me yet. After I got hurt, John Hodges worked the horse for me beside an old team and broke him for me, and I drove him that fall. The horse was not worth anything to me. I reckon he was worth \$150 or \$175 on the market. I saw the horse after I got hurt. That fall I wrote Mr. Smith a letter, in November, 1908, and told him I could not pay for the horse and the interest on the mortgage, and to send for him, which he did. Before I was hurt, I could do a man's work. At the time of the injury the horse was in the main public road near my house, and threw me out of the buggy. My doctor's bill was \$100. I had to hire a man to work at 50 cents per day and board at 25 cents per day. The horse I traded to Smith was worth \$50. I lost him and lost my crop that year. My time was worth \$1 per day. I have not been able to do a good day's work since. Was about 24 years old when I made this trade." At the close of the testimony for the plaintiff, the court, on motion of the defendant, entered a judgment as of nonsuit, and the plaintiff appealed.

Small, MacLean & McMullan, for appellant. F. G. James & Son, for appellee.

WALKER, J. The defendant, in his answer, denies the plaintiff's allegations, the substance of which have been set out, and avers that he had recently bought the horse when he sold him to the plaintiff, and, not knowing his qualities, he could not have warranted or represented that he was kind and gentle in harness, but told the plaintiff that the person who sold the horse to him represented him to be sound and safe, and he only expressed an opinion to the plaintiff, based upon such knowledge as he had thus

acquired, that the horse would suit him, and that he made no warranty and practiced no deceit. The issue thus raised by the pleadings was not submitted to the jury, and the defendant offered no testimony, so that the case must be considered solely upon the evidence of the plaintiff.

[1, 2] We think the judge erred in ordering a nonsuit. The question involved in this case has frequently been decided by this court against the contention of the defendant. As early as 1805, in *Thompson v. Tate*, 5 N. C. 97, 3 Am. Dec. 678, it was held that a vendor of goods is liable on an express or implied warranty for affirming, at the time of the sale, that they possess a particular quality which would increase their value, if it turns out that the affirmation is not true, although he did not know such affirmation to be false; and with reference to this principle the court said: "Upon this question there can be no doubt. The vendor is clearly liable." This must be read in the light of subsequent decisions. In *Inge v. Bond*, 10 N. C. 101, Taylor, C. J., drew the distinction between an affirmation as to the title of goods where the law implies a warranty, and the affirmation binds the vendor, and an affirmation as to their soundness, which will not amount to a warranty, unless it appears on the evidence to have been so intended. This is but the statement of the general rule that, in order to make a contract, the minds of the parties must agree upon the same thing, the intention or belief of one only not being sufficient for the purpose. The intention of both must be the same. It is for the jury to find what the intention was from the language used and the circumstances of the case. The law was stated by Nash, C. J., in *Foggart v. Blackweller*, 26 N. C. 238, to be well settled, by numerous adjudications, "that there is no word or set form of words required to constitute a warranty in the sale of personal property, but wherever the words used, taken in connection with the attendant circumstances, show that it was a part of the contract with the parties that there should be a warranty, they will suffice. 4 Ad. & E. 473, 31st vol. Com. L. Rep., *Pwon v. Barkham*, 5 B. & A. 240, 7 vol. C. L. R., *Shepherd v. Kain*, 2 Nev. & Mann. 446, 28 vol. C. L. R., *Freeman v. Baker*. These authorities show that every affirmation made at the time of the sale of personals is a warranty, provided it appears to have been so intended by the parties. A bare affirmation, merely expressive of the judgment or opinion of the vendor, will not amount to a warranty; and the reason is a warranty subjects the vendor to all losses arising from its failure, however innocent he may be, and this responsibility the law will not throw upon him by implication, except as to the title of the property. As it respects the value or soundness of the article sold, the law im-

plies no warranty. The leading case in this state upon the subject of the warranty of personals is that of *Erwin v. Maxwell*, 7 N. C. 241, 9 Am. Dec. 602. In that case the plaintiff asked the defendant if the horse he was about to let him have was sound, to which the latter answered that he was. His Honor Chief Justice Taylor in discussing the subject says: "To make an affirmation at the time of the sale a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment or opinion." In the case of *Ayres v. Parks*, 10 N. C. 59, the court says: "An affirmation at the time of the sale is a warranty, provided it appears in evidence to have been so intended. Whether it was so intended is a matter of fact to be left to the jury." The last case on this subject is that of *Baum v. Stevens*, 24 N. C. 411. In its leading features it strongly resembles this." It was stated in *Baum v. Stevens* that the true doctrine was established in *Erwin v. Maxwell*. The cases are collected in *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840, and the rule is thus deduced from them and the other authorities: "The defendant had a right to have the question whether the force and effect of the affirmations of the plaintiff in regard to the quality of the fertilizer did not constitute a warranty of the quality. If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury. *Thompson v. Tate*, 5 N. C. 97 [3 Am. Dec. 678]; *Inge v. Bond*, 10 N. C. 101; *Foggart v. Blackweller*, 26 N. C. 238; *Bell v. Jeffreys*, 35 N. C. 356; *Henson v. King*, 48 N. C. 419; *Lewis v. Rountree*, 78 N. C. 323; *Baum v. Stevens*, 24 N. C. 411." See, also, *Henson v. King*, 48 N. C. 419; *Lewis v. Rountree*, 78 N. C. 323.

The question was presented in *Horton v. Green*, 66 N. C. 596, and the court said that: "A representation simply of soundness does not import absolutely a stipulation of the existence of that quality, but a representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. In *Ayres v. Parks*, 10 N. C. 59, Hall, J., says: 'Whether an affirmation at the time of sale was intended as a warranty is a matter of fact to be left to the judge.' 'Of necessity, in verbal contracts,' says Chief Justice Ruffin, 'greater latitude must be allowed to evidence to establish the words and the meaning of parties. The evidence may consist of everything which tends to establish that the ven-

dor meant to convey the impression that he was binding himself for the soundness of the article and that the vendee relied on what was passing as a stipulation.' Among these circumstances even the tones, looks, gestures, and the whole manner of the transaction, with all the surroundings, would be competent evidence for the jury to consider in making up their verdict. The doctrine upon special contracts of personalty, and whether the question of warranty is to be decided by the court or left to the jury with proper instructions, has been too long and too thoroughly settled in our state to be now overturned by decisions in other courts. We adhere to the decisions of our own court upon these questions." That case was approved in *Beasley v. Surlea*, 140 N. C. 605, 53 S. E. 360, and the following language of Chief Justice Ruffin in *Baum v. Stevens*, supra, was adopted: "It is certain that warrant is not an indispensable term in contracts respecting personalty, as it is in conveyances of freehold. It is also true that a representation simply of soundness does not impart absolutely a stipulation of the existence of that quality. But the representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. * * *

The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation. Among these circumstances would, of course, be the understanding at the time of the bystanders who witnessed the transaction and the facts on which the impression of these persons were founded." After further discussion he concludes: "These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that, if they collected therefrom that the defendant did not merely mean to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty, otherwise not." The same principle was stated and applied in *Wrenn v. Morgan*, 148 N. C. 101, 61 S. E. 641, and *Harris v. Cannady*, 149 N. C. 81, 62 S. E. 771, with a full citation of the cases in this court, and the rule was thus formulated by Justice Hoke: "It is accepted law that, to hold a bargainor in a sale responsible for a warranty, it is not necessary that this should be given in express terms, but that an affirmation of a material fact made by a seller at the time of the sale and as an inducement thereto and accepted and relied on by the buyer will amount to a warranty. *Tiffany on Sales*, 162." We find in *Tiffany on Sales*, at p. 162, a statement of the rule apparently

corresponding with that adopted by this court: "No form of words is necessary to create a warranty. Whether the words amount to a warranty is a question of the intention of the parties. The affirmation of a fact made by the seller as an inducement to the sale, if the buyer relies upon it, will amount to a warranty. A statement of opinion or a mere commendatory expression will not. Whether a statement is an affirmation of fact, or whether it is simply a statement of opinion or a commendatory expression, often depends on the nature of the sale and the circumstances of the case."

[3] Applying the principle as thus gathered from the authorities, the court erred in not submitting the case to the jury to find the facts and to pass upon the question of warranty. The language of the parties, as used at the time of the transaction, is quite as strong to show a warranty as any to be found in the cases we have cited. The defendant was a dealer in horses, and by the testimony as we now have it he, at least, affirmed that the horse he sold to the plaintiff was of the description he wanted—kind and gentle in harness, and so well broken that even a lady could drive him with safety. The plaintiff says that he relied upon that representation and bought the horse believing it to be true, and being induced thereby to buy. The jury must decide whether it was intended and accepted as a warranty, and also, upon the evidence, whether there has been a breach thereof; there being evidence of a breach for them to consider.

We have so recently discussed the law in regard to the question as to the deceit that it will be sufficient merely to refer to the case. *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313. We have also recently considered very fully all the questions now presented—deceit and warranty—in *Halton v. Robertson*, 156 N. C. 215, 72 S. E. 316. See, also, *Unitype Co. v. Aschcraft*, 155 N. C. 63, 71 S. E. 61. The case of *Allen v. Truesdell*, 135 Mass. 75, is much like this one. It was there held that if a person buys a horse in reliance upon a false representation by the seller that the horse is safe and not afraid of the cars, and is injured by reason of the horse being frightened by the cars and running, he may maintain an action against the seller for such injuries; and the facts that the accident did not occur until five weeks after the sale, during which time the horse had been driven safely on several occasions, and that the horse, after being frightened, ran three-fourths of a mile, and then turned from the highway towards a place where it had been accustomed to stand, and in doing so overturned the vehicle in which the buyer was riding, are not as matter of law conclusive that the vice of the horse did not cause the injury, but are for the jury, citing *Langridge v. Levy*, 2 Mees. & Wils. (Exch.) 519. More to the point, upon

facts somewhat similar to those in this case, is *Smith v. Green*, L. R. (1875-6) 1 C. P. Div. 92.

The question of damages is also discussed in *Robertson v. Halton*, *supra*.

The nonsuit is set aside, and a new trial ordered.

New trial.

(158 N. C. 284)

SPENCER v. FISHER.

(Supreme Court of North Carolina. Feb. 28, 1912.)

INTOXICATING LIQUORS (§ 306*) — ILLEGAL SALE OF LIQUOR TO MINORS—CIVIL ACTION—COMPLAINT—REQUISITES.

A complaint in an action under Revisal 1905, § 3525, for exemplary damages for the sale of liquor to a minor in violation of section 3524, which fails to allege that the minor was unmarried, as required by section 3524, is fatally defective, and, in the absence of a request for leave to amend the complaint, the trial court may dismiss the action.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 441, 442; Dec. Dig. § 306.*]

Appeal from Superior Court, Craven County; H. A. Foushee, Judge.

Action by Laura Spencer against John H. Fisher. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. D. McIver, for appellant. Gulon & Gulon, for appellee.

CLARK, C. J. This is an action by Laura Spencer, the mother of Carl Spencer, against a banking company and Fisher, its cashier. The complaint alleges: That Carl Spencer, the son of the plaintiff, who is a widow, is a minor 17 years of age, and that in April, 1911, a wholesale whisky dealer in Richmond, Va., shipped nine cases of whisky to New Bern, N. C., consigned to "order of the shipper," and that said shipper forwarded bills of lading, one for each case, to the defendant bank, with sight draft attached, with the request to "notify Carl Spencer." That the defendant, Fisher, was notified by the uncle of said Carl that he was a minor, and said uncle forbade the delivery to him of said bills of lading, but that notwithstanding, upon payment by said Carl of said drafts, Fisher delivered to him said bills of lading, "whereby the title to the whisky passed to the said Carl Spencer."

The complaint avers that this was a sale of the whisky to said Carl Spencer in violation of Revisal, § 3524, and this action is brought to recover exemplary damages under Rev. § 3525. The court sustained the demurrer that "the complaint did not state a cause of action," and dismissed the action.

The complaint fails to aver that Carl Spencer was "an unmarried person," as required by Rev. § 3524, and hence the judgment dismissing the action must be affirm-

ed. The court, it is true, might have allowed an amendment in this respect in its discretion, but it seems that it was not asked for.

Action dismissed.

(158 N. C. 587)

MINTON v. HUGHES.

(Supreme Court of North Carolina. Feb. 28, 1912.)

JUDGMENT (§§ 143, 145*)—DEFAULT—VACATION—GROUNDS.

To entitle defendant to vacation of a default judgment, existence of a meritorious defense as well as excuse for the neglect to defend is required.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 269-295; Dec. Dig. §§ 143, 145.*]

Appeal from Superior Court, Hertford County; Justice, Judge.

Action by D. L. Minton against J. S. Hughes. Judgment refusing to set aside a judgment for plaintiff, and defendant appeals. Affirmed.

Winston & Matthews, for appellant. John E. Vann and Winborne & Winborne, for appellee.

PER CURIAM. The court is of opinion in this case that it is unnecessary to consider the question of excusable neglect for which his honor declined to set aside the judgment in the court below. Not only must the defendant show excusable neglect as defined by many decisions of this court, but he must also show that he has meritorious defense. *Norton v. McLaurin*, 125 N. C. 189, 34 S. E. 269; *Turner v. Machine Company*, 133 N. C. 384, 45 S. E. 781.

Upon consideration of this feature of the case, we are of the opinion that defendant's petition and affidavits show no defense to the action which could avail him in law. *Pharr v. Russell*, 42 N. C. 222.

Affirmed.

(158 N. C. 119)

SPRING GREEN CHURCH et al. v. THORNTON et al.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. RELIGIOUS SOCIETIES (§ 20*) — SCHOOL PROPERTY—USES FOR WHICH HELD—DEED OF TRUST—"OTHER PURPOSE."

A religious association known as "Shiloh Association" purchased land and established a school called "Shiloh Institute," the deed for the property being executed to trustees appointed by the association, and reciting that it was upon trust to hold such property for the purpose of establishing and maintaining a school of general learning and for any other proper and legal purpose which the association might deem best, and giving the trustees power to sell or mortgage the property whenever requested by the association. Held, that the "other proper and legal purpose" should be construed as of the same general nature and kind as the main object of a school, and that the right to sell or mortgage meant a sale or

mortgage in furtherance of the trust to maintain a school.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 130-143; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

2. TRUSTS (§ 59*)—REVOCATION.

Where a religious association formed of several churches purchased land to be held by trustees for the purpose of establishing and maintaining a school, with power to sell or mortgage, was thereafter joined by other churches, and had the school incorporated by Priv. Laws 1891, c. 321, the property to be held by trustees for the same purpose, and the association having the right under Private Laws 1903, c. 49, to appoint the trustees, the association could not abolish the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78-81; Dec. Dig. § 59.*]

3. PARTITION (§ 13*)—PROPERTY SUBJECT TO PARTITION—COTENANCY.

A religious association formed by a number of churches purchased land, the deed to which was executed to trustees appointed by the association upon trust to hold the property for the purpose of establishing a school and for any other legal purpose which it might deem suitable, with power to sell or mortgage on request of the association. Priv. Laws 1891, c. 321, incorporated the school, and made the trustees a body corporate to hold the property for the same purpose. Other churches joined the association after the land had been purchased. *Held*, in a suit by three of the unincorporated churches in the association for the sale of the school property for partition, that, as it did not appear what sum was raised by each of the respective churches and there was no basis for the allegation of a cotenancy in the property, they had no rights in the property which were the subject of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 36; Dec. Dig. § 13.*]

4. PARTITION (§§ 19, 32*)—COTENANTS—POSSESSION—CESTUIS QUE TRUSTENT.

Tenants in common who are not in possession cannot procure an order for partition, nor can cestuis que trustent compel partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 60, 63, 83-86; Dec. Dig. §§ 19, 32.*]

5. CHARITIES (§ 47*)—ADMINISTRATION BY COURT—STATUTORY PROVISIONS.

On disbandment of an unincorporated religious association, which controlled the property of an incorporated school by its power to elect the trustees of such school, the duty would devolve upon the court in case it was a charity to provide for filling vacancies among the trustees as they should occur so that the trust might not fail, as prescribed by Revisal 1905, § 3923; and, if not a charity, then it would have the same duty under its general equity jurisdiction.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 85; Dec. Dig. § 47.*]

Appeal from Superior Court, Warren County; Cline, Judge.

Action for partition by the Spring Green Church and others against Mansfield Thornton and others. Judgment overruling defendants' demurrer, and they appeal. Action dismissed.

Tasker Polk, Andrew J. Harris, and Thos. M. Pitman, for appellants. T. T. Hicks, for appellees.

CLARK, C. J. In 1871 a voluntary association known as "Shiloh Association" was formed by several missionary Baptist churches for colored people. In 1883 the association purchased land for \$2,500, and established a school called "Shiloh Institute." Considerable additional money from individuals and from the churches composing the association has since been raised by donations from time to time and put in improvements and repairs upon said property. The deed for the property when purchased was executed to certain trustees appointed by said association, and recited "upon the trust that they, the said parties of the second part, and their successors in the said office of trustee aforesaid duly qualified and appointed by the said association, shall hold the said property herein conveyed for said association to be used under the direction and management of the said parties of the second part as trustees aforesaid and their successors, for the purpose of establishing and maintaining a school of general learning, and for any other proper and legal purpose which the association may deem best and the said parties of the second part and their successors to have the right and privilege of selling and mortgaging the property herein conveyed, whenever they are required and requested to do so by the association." Said "Shiloh Institute" was incorporated (Priv. Laws 1891, c. 321), which created said trustees a body politic and corporate, and specified that they are to "have and to hold the buildings, grounds and all appurtenances embraced in the deed." This act was amended (Private Laws 1903, c. 49) by increasing the number of trustees to nine, and by providing that three of these were to be elected by the "Shiloh Association" every year, and they have been so elected ever since. The number of churches belonging to the association has increased to 58, several of which were not members of the association in 1883. In *Kerr v. Hicks*, 154 N. C. 285, 70 S. E. 468, 33 L. R. A. (N. S.) 529, the court held that such trustees elected by the churches present at a meeting held at the regular time and place duly designated by the last regular meeting were the duly elected trustees under the terms of the constitution of this association, and not those elected at a meeting held at a time and place not so authorized, though in the latter meeting a majority of the churches were represented, while at the regular meeting there was a minority of the whole number represented.

[1, 2] This is a proceeding by three of the churches in said association asking for a sale of the property for partition. The other alleged cotenants are not made parties. This misconceives the nature of the tenure of the property which as specifically recited in the terms of the deed above set out is that the property is to be held by said trustees and

their successors "for the purpose of establishing and maintaining a school of general learning and for any other proper and legal purpose which the association may deem best." The "other proper and legal purpose" it would seem should be construed as "of the same general nature and kind" as the main trust recited. It is true that the trustees have the "right and privilege of selling and mortgaging the property herein conveyed whenever they are required and requested to do so by the association." This also means in pursuance and furtherance of the trust to maintain a school of general learning. If, however, the association can change the general nature of the trust, this could be done only by a majority vote at a regular meeting, and the complaint does not aver this. *Kerr v. Hicks*, supra. It could not abolish the trust, to which others have contributed funds.

[3] Under the acts of incorporation of the institute procured by the association, the powers of the latter are limited to the election of the trustees from time to time as therein specified. In effect, the association raised a fund with which it purchased property and appropriated it to be held by trustees to maintain and establish a school of general learning. The unincorporated association held no actual property interest therein, and can exercise no other control over it than through the medium of the election of the trustees, who are to manage said trust. If through such trustees the association should procure the sale of the property, how it could apply the proceeds might then come up for adjudication. But no individual church can ask the courts to order a sale for partition. The individual churches are not incorporated, and have no rights in the property which are the subject of partition among them. It does not appear what sum was raised by each of the respective churches, and there is no basis for the allegation of a cotenancy by the several churches in the property. Certainly one or more of the churches cannot at will defeat the action of the association by calling for a sale and division of the property. That would destroy the trust.

[4] If the individual churches were tenants in common, they could not procure an order for partition, for they are not in possession. *Drew v. Clemmons*, 55 N. C. 814; *Wood v. Sugg*, 91 N. C. 93, 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. C. 207. Even if the individual churches should be held the cestuis que trustent, that would not entitle them to compel partition. *Nichols v. Nichols*, 28 Vt. 228, 67 Am. Dec. 712; 30 Cyc. 190, § 3, and notes. There is no analogy to the sale of a mill for partition because of the inherent difficulties of the cotenants operating it "turn about." *Holmes v. Holmes*, 55 N. C. 336. In that case there was no trust; and the property was run for the division of the profits among

the cotenants. Nor is the case analogous to the division of church property upon a division of the church. *Smith v. Swormstedt*, 16 How. 288, 14 L. Ed. 942; *Diocese v. Diocese*, 102 N. C. 447, 9 S. E. 310, 3 L. R. A. 626. Here the property is held by incorporated trustees, and the association is not the beneficiary of the trust which is for the benefit of the colored youth, but occupies the position of supervising the trust through its power to elect the trustees, and there has been no division of the association calling for a division of the trustees to the respective fragments of a former association.

[5] If the association itself should disband, the duty would devolve upon the courts, under Rev. 3923, to provide, if this is charity (and if not, then under the general equity jurisdiction of the courts), for filling vacancies among the trustees as they shall occur from time to time so that the trust may not fail. Or the General Assembly might, in such case, amend the act of 1903, which provides for the method of electing trustees.

The demurrer that the complaint does not state a cause of action should have been sustained.

Action dismissed.

(158 N. C. 599)

STATE v. WILSON.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. HOMICIDE (§ 158*)—ADMISSION OF EVIDENCE.

Evidence of a remark made to accused about three days before the homicide and of her threats against decedent made in reply thereto was admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

2. WITNESSES (§ 274*)—EVIDENCE—CHARACTER OF ACCUSED—CROSS-EXAMINATION OF WITNESSES.

Witnesses testifying to the good character of female accused may be asked on cross-examination as to accused's reputation as to chastity, but questions as to specific acts of unchastity are not permissible, so that such witnesses were properly asked on the cross-examination whether it was not a fact that they had heard people say that accused was a prostitute.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

A witness testifying to the good character of accused was asked on cross-examination whether he had not heard people say that accused was a prostitute, and stated that he had heard talk of it, but that her character was about as good as the average negro, and another witness stated in reply to a question as to whether he had not frequently heard such talk that he had heard a few times that accused was a prostitute. *Held*, that the answers, if technically improper, could not have prejudiced accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 1163*)—APPEAL—BUREN OF SHOWING ERROR.

It must be shown on appeal that any error committed at trial could have reasonably affected the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

5. CRIMINAL LAW (§ 547*)—EVIDENCE AT FORMER TRIAL.

Revisal 1905, § 8205, provides that all examinations taken pursuant to the chapter shall be certified by the examining magistrate to the court at which the witness is bound to appear, and such examination may be used as evidence on accused's trial, if he were present at the taking thereof, and had opportunity to cross-examine the deposing witness, if such witness be dead, disabled, etc. Accused was first arrested for assault and tried before decedent's death, and the examining justice reduced decedent's testimony to writing and had it signed by him and delivered to the justice, who conducted accused's preliminary trial for murder, with directions to have it forwarded to the superior court for use in accused's trial for murder, and it was identified at trial by the justice who took it. *Held*, that there was a sufficient compliance with the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.*]

6. CRIMINAL LAW (§ 728*)—TRIAL—EXCEPTIONS—TIME OF TAKING.

An exception to improper argument must be taken when the argument is made, and is waived if not taken until the case is settled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1689; Dec. Dig. § 728.*]

7. CRIMINAL LAW (§ 730*)—TRIAL—IMPROPER ARGUMENT—CURING IMPROPRIETY.

Improper remarks by the state's attorney in argument, to the effect that accused was a bad woman, and that people were afraid to testify against her, was cured by the trial court's statement, on objection being made, that the state's attorney could only argue the evidence, and that he recalled no evidence that the people were afraid to testify against accused, and that the jury should disregard the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

8. CRIMINAL LAW (§ 1178*)—APPEAL—ASSIGNMENTS OF ERROR—BRIEF.

Under Supreme Court rule 34 (140 N. C. 666, 66 S. E. ix), assignments of error not appearing in accused's brief are abandoned.

[Ed. Note.—For other cases, see Criminal Law, §§ 3011-3013; Dec. Dig. § 1178.*]

Appeal from Superior Court, Camden County; Cline, Judge.

Mary Ann Wilson was convicted of second-degree murder, and she appeals. Affirmed.

W. M. Bond and E. F. Aydlott, for appellant. The Attorney General and T. H. Calvert, for the State.

CLARK, C. J. [1] The prisoner was convicted of murder in the second degree. It was in evidence that about three days before the homicide a remark was made to the prisoner, in response to which she made threats. The evidence of such threats was competent. *State v. McKay*, 150 N. C. 818, 63 S. E. 1059;

State v. Stratford, 149 N. C. 483, 62 S. E. 882. Evidence of the remark made to the prisoner which brought out the threat was admissible so far as it was connected with the threat. *State v. Williams*, 68 N. C. 60.

[2] Two witnesses for the prisoner testified that her reputation was good or very good. On cross-examination they were allowed to testify as to the general reputation of the prisoner as to a particular trait of character. In *State v. Hairston*, 121 N. C. 582, 28 S. E. 493, the court said: "A party introducing a witness as to character can only prove the general character of the person asked about. The witness of his own motion may say in what respect it is good or bad. He may have to do this in justice to himself—in other words, to tell the truth. As, for instance, if the party spoken of had a general bad character for other things, the witness could not truthfully say it was bad, nor that it was good, without qualification, or the opposite party may, on cross-examination, test the witness by asking him as to what it is bad for, what it is good for," etc. Bad repute as to chastity may be shown, but not specific acts of unchastity. *State v. Effer*, 85 N. C. 585. In the present case the witness Morris was asked on cross-examination, "Is it not a fact that you heard people say she was a prostitute?" to which he replied, "Have heard talk of it, but her character is about as good as the average negro." The other witness, having said her character was good, was asked on cross-examination, "Have you not heard it frequently said that she was a common woman and a prostitute?" to which he replied, "Have heard it, but not frequently; heard it some few times." We do not think these exceptions can be sustained. The answers were not prejudicial, and indeed were not excepted to. These questions come fairly within the rule in *State v. Hairston*, *supra*, which allows a cross-examination as to reputation of a particular trait, but not as to reputation of particular acts, which the state did not ask and which the replies do not give.

[3] If the reply could be held technically improper, we cannot see that it was prejudicial, or could have affected the verdict, and in such cases the tendency of all courts is against giving a new trial.

[4] It should reasonably appear that an error, if any, would have reasonably affected the result. Dr. Sawyer, a witness of the state, was asked the following: "If a person were suffering from heart trouble, would the chance of a fatal result by reason of such disease be increased or diminished from a shock such as you saw Jim Morrisette was suffering from when you visited him?" The question objected to was based upon conditions of heart trouble about which the prisoner and her witnesses had testified, and

the shock which the witness himself had observed and testified to. It does not assume facts not in evidence, which is the ground of the appellant's exception.

[5] The prisoner was first arrested on the charge of an assault, and was tried before the death of the deceased. The justice of the peace reduced the testimony of the deceased at such trial to writing, and it was signed by the deceased. It was in evidence that this paper was delivered to the other justice of the peace on the preliminary trial before him of the prisoner for murder, with directions to deliver to the clerk of the superior court, and on the trial in the superior court the paper was identified by J. E. Cook, the justice of the peace who took down the evidence on the first trial. This was a sufficient compliance with Rev. § 3205. *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

Assistant counsel for the state in his argument commented upon the character of the prisoner, saying that she was a bad woman, and that people were afraid to testify against her. Upon objection by the prisoner, the court told counsel he could only argue the testimony to the jury, and that he recalled no evidence about people being afraid to testify against her, and withdrew the remark from the jury, and directed them not to consider such statement.

[6] It appears that no exception was noted at the time, but the court permitted an exception to be made in stating the case. This was too late. An exception not taken at the time is waived, and the judge should not permit it to be made afterwards in settling the case. 2 Cyc. 714.

[7] Besides, the objectionable remark of counsel was cured by the ruling of the court and the instruction to the jury to disregard it. *State v. Peterson*, 149 N. C. 533, 63 S. E. 87; 4 A. & E. Enc. 450.

[8] The other assignments of error do not appear in the brief of counsel for the prisoner, and are held to be abandoned. Rule 34 (140 N. C. 666, 66 S. E. ix).

No error.

(158 N. C. 147)

GREGORY v. PINNIX et al.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. PARTITION (§ 56*)—PLEADING—DENIAL OF COTENANCY—"NON TENENT INSIMUL."

A denial in the answer in partition of the allegations of the petition that petitioner is a tenant in common with defendant, and is seised in fee, raised an issue of fact, being equivalent to a plea of non tenent insimul by which defendant denies that he and plaintiff are tenants in common.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 160, 161; Dec. Dig. § 56.*]

2. PLEADING (§ 34*)—CONSTRUCTION.

Under the Code, pleadings should be liberally construed, with a view to substantial justice, and not strictly construed against the pleader as at common law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 68-75; Dec. Dig. § 34.*]

3. JUDGMENT (§ 747*)—EFFECT AS ESTOPPEL—PARTITION.

Since, under Revisal 1905, § 2487, only tenants in common may institute partition proceedings, a judgment in partition works an estoppel as to title.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.*]

4. APPEAL AND ERROR (§ 960*)—DISCRETION OF TRIAL COURT—TIME OF FILING PLEADINGS.

The action of the trial court in permitting answers to be filed which had been stricken by the clerk because not filed in time is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 960.*]

Appeal from Superior Court, Camden County; Cline, Judge.

Partition proceedings by J. W. Gregory against Hannah C. Pinnix and others. From an order setting aside an order of sale made by the clerk and directing the issues of fact to be decided, plaintiff appeals. Affirmed:

This is a proceeding to sell lands for partition, heard in the superior court, on appeal from the clerk of Camden county.

The petitioner alleges, among other things:

"(1) That he is a tenant in common, is seised in fee, and is the owner of the following described lands, lying and being in the county and state aforesaid, situated in the jurisdiction of this court and bounded as follows: * * * (17) That the interest of your petitioner in said land is as follows: $\frac{201}{1200}$. (18) That the interests of the defendants are as follows: Mrs. Hannah C. Pinnix, $\frac{100}{1200}$ undivided interest; N. M. Ferebee, $\frac{333}{1200}$ undivided interest. That plaintiff is advised, believes, and alleges that John J. Old, John Hinton, Elizabeth Old, Lovey Grisham, Louisa Old, Hollowell Old, Jr., James Old, the persons named in count 2 as heirs at law of Hollowell Old, are dead, and that their heirs at law jointly own $\frac{422}{1200}$ of said property, viz.: That the heirs at law of John J. Old, who are unknown to your petitioner, jointly own $\frac{9}{1200}$. That the heirs at law or devisees of John Hinton, who are, as your petitioner is informed and believes, Mary F. Hinton, Sophia L. Sawyer, whose husband is Lee Sawyer, Charles L. Hinton, E. V. Hinton, W. E. Hinton, and R. L. Hinton, jointly own $\frac{81}{1200}$. That the heirs at law of Lovey Grisham, who are unknown to your petitioner, jointly own $\frac{9}{1200}$. That the heirs at law of Hollowell Old, who are unknown to your petitioner, jointly own $\frac{81}{1200}$. That the heirs at law of James Old, who, as your petitioner is informed and

believes, are Livius L. Old, Lula J. Walker (whose husband is L. B. Walker), James H. Old, Eva L. Ferebee (whose husband is E. D. Ferebee), Dalsey E. Brooke (whose husband is T. L. Brooke), James E. Smith, James E. Old, Edward J. Smith, Mary M. Smith, Augustus C. Smith, Earl Smith, Roy Smith, Hulda F. Smith (whose husband is ——— Smith), and Samuel F. Old, jointly own ^{81/1296} thereof." These allegations are denied in the answers, and, in addition to a denial, the defendants allege that, if the petitioner had a deed for any part of the land described in the petition, he owned no beneficial interest therein, but held the title, if any he had, for the Richmond Cedar Works.

In this condition of the pleadings his honor held that issues of fact were raised, and directed that the same be tried before a jury, to which the petitioner excepted. His honor also permitted certain answers to be filed, which had been stricken out by the clerk, because not filed within the time prescribed by law, and the petitioner excepted. The appeal is by the petitioner from the order setting aside the order of sale made by the clerk, and directing that the issues of fact be passed on.

J. C. B. Ehringhaus and G. W. Ward, for appellant. J. K. Wilson, W. A. Worth, E. F. Aydllett, and J. C. Biggs, for appellees.

ALLEN, J. [1] The ruling of his honor that the denial in the answer of the allegation in the petition that the petitioner is a tenant in common with the defendants, and is seised in fee, raises an issue of fact would not be questioned, but for certain expressions in several of our decisions, which considered without reference to the facts in the cases and the history of proceedings in partition would render it doubtful. The first of these cases is *Purvis v. Wilson*, 50 N. C. 23, 69 Am. Dec. 773, in which Pearson, C. J., says that the plea by the defendant in partition of non tenant insimul is the plea of sole seisin, and that this raises the general issue, and this is followed by *Wright v. McCormick*, 69 N. C. 15, in which the same judge says: "The plea of 'sole seisin must be put in before the order for partition is made, otherwise it is waived, and the parties are for the purposes of the proceeding taken to be seised as tenants in common." In another case—*Huneycutt v. Brooks*, 118 N. C. 792, 21 S. E. 558—Furches, J., says: "Plaintiffs allege that they are tenants in common with defendants in said lands. The said defendants answer and deny that plaintiffs are the owners of the lands mentioned in their complaint, and plead 'non tenant insimul' (sole seisin in themselves), which is the 'general issue' in a proceeding for partition." And in *Graves v. Barrett*, 126 N. C. 269, 35 S. E. 539, the present Chief Justice makes substantially the same statement: "But in a petition for partition title is not

in issue, unless the defendants put it in issue by pleading 'sole seisin.'" In *Purvis v. Wilson* and in *Huneycutt v. Brooks* sole seisin was pleaded, and the question of the effect of the denial of the allegation that the petitioner and the defendant were tenants in common was not raised. In *Wright v. McCormick* it does not appear that the defendant denied the tenancy in common, and in *Graves v. Barrett* there was no plea of sole seisin, and the court approved the proceeding in which issues were submitted to the jury upon a denial of the cotenancy. It appears, therefore, that the ruling of his honor is not in conflict with the decisions relied on by the petitioner, and the appearance of conflict doubtless arose by treating the plea of non tenant insimul as synonymous with the plea of sole seisin, because it is more comprehensive and includes it.

In 2 Sellon's Practice, p. 314, the author says, speaking of pleadings in partition: "To the declaration there can be no plea in abatement, since Stat. 8 & 9 W. 3, c. 31, f. 3. Nor shall the writ abate by the death of the defendant. And, if he pleads in bar, he can plead no other plea than non tenant insimul, for every other plea in bar is tantamount to non tenant insimul, upon which plea issue may be taken, and the parties proceed to trial as in other cases." The definition of plea non tenant insimul, as given by Bouvier, is: "A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff." And by Black: "A plea to an action in partition, by which the defendant denies that he and the plaintiff are joint tenants of the estate in question." The plea is, in substance, a denial of the tenancy in common, as appears from the following form: "And the said C. D. by G. H., his attorney, comes, and says that he did not hold the premises in said petition of the said A. B. set forth, together with the said A. B. at the time of the commencement of the proceedings in this cause, as alleged in said petition of the said A. B.; and of this he, the said C. D., puts himself upon the country." Tillinghast Forms, 625. It would seem, therefore, that the denial of the cotenancy, while not technically the plea of "non tenant insimul," is substantially the same, and at this day, when substance is not sacrificed to form, would be held to permit the same defenses under it if the question was to be determined at common law.

[2] The construction of the pleadings is not, however, controlled by the rules of the common law, but by the code system, and as was said in *Stokes v. Taylor*, 104 N. C. 395, 10 S. E. 566, and approved in *Brewer v. Wynne*, 154 N. C. 471, 70 S. E. 948: "The rule of the common law was that every pleading should be construed strongly against the pleader. The code system is just the reverse. In the construction of a pleading for,

the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." The difference between the two is so well stated, with reference to the plea under consideration, in 30 Cyc. 225, in an article by Mr. Freeman, the editor of the American Decisions and the American State Reports and the author of a treatise on Cotenancy & Partition: "The plea of non tenant insimul constituted the general issue in actions of partition at common law. Every allowable plea which could be interposed amounted to non tenant insimul. This plea put in issue all the material allegations of the complaint, and seems to have been so adequate as to authorize defendant to place in evidence every conceivable fact which, if proved, would prevent plaintiff's recovery. Under the code rules of pleading, the general issue is made by a general denial. Therefore such a denial or any form, either of allegation or of denial, which necessarily negatives the idea that plaintiff and defendant were cotenants at the commencement of the action, must be sufficient where the only object of the pleader is to defeat plaintiff's claim to partition, and anything less than this must be insufficient." The rules of civil procedure are applicable to special proceedings (Rev. § 710), and one of these rules is that an issue arises on the pleadings when a material fact is maintained by one party and controverted by the other (Rev. § 544).

[3] The materiality of the allegation that the petitioner is a tenant in common with the defendant is apparent, as the right to institute the proceeding for partition is conferred only on tenants in common (Rev. § 2487), and it is upon this ground that judgments in partition are held to estop as to the title. *Armfield v. Moore*, 44 N. C. 164; *Carter v. White*, 134 N. C. 474, 46 S. E. 983, 101 Am. St. Rep. 853; *Buchanan v. Harrington*, 152 N. C. 334, 67 S. E. 747, 136 Am. St. Rep. 828. In the last case Justice Manning says: "We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of the defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would upon a like issue in any other action." We therefore conclude that his honor held correctly that the denial of the cotenancy raised an issue of fact for the determination of the jury.

[4] We are also of opinion that his honor had the power to permit the answers to be filed, and that the exercise of his discretion is not reviewable. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188. In this case the court says: "It is unnecessary to consider whether the judge could reverse the action of the

clerk in refusing leave to amend, for the act of 1887, c. 276 (amending section 255 of the Code), provides that, whenever a cause is sent up to the judge for any ground whatever, the 'judge shall have jurisdiction,' and may either fully determine the cause himself or make orders therein and send it back to be proceeded in by the clerk."

Upon an examination of the record, we find no error.

Affirmed.

(158 N. C. 153)

GREGORY v. PINNIX et al.

(Supreme Court of North Carolina. Feb. 21, 1912.)

Appeal from Superior Court, Camden County; Cline, Judge.

Action by J. N. Gregory against Hannah C. Pinnix and others. From a ruling favorable to defendants, plaintiff appeals. Affirmed.

Ward & Thompson, for appellant. J. R. Wilson, W. A. Worth, E. F. Aydtlett, and J. C. Biggs, for appellees.

ALLEN, J. The decision between the same parties in another case at this term (73 S. E. 814) is controlling in this.

Affirmed.

(158 N. C. 75)

McCULLERS v. BOARD OF COM'RS OF WAKE COUNTY.

(Supreme Court of North Carolina. Feb. 21, 1912.)

1. HEALTH (§ 7*)—COUNTY SUPERINTENDENTS—APPOINTMENT—POWER—"FAIL TO ELECT."

Laws 1911, c. 62, § 9, which provides that, if a county board of health shall "fail to elect" a county superintendent within two months of the time fixed for such election, the secretary of the state board shall appoint, gives the power of appointment to the state secretary when the county board of health permits the office to remain vacant for the two months, and the state secretary properly made an appointment where the only appointee named within that time by the county board declined to qualify; the act requiring a choosing and induction into office of the superintendent within that period.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. OFFICERS (§ 80*)—COUNTY BOARD OF HEALTH—CONSTITUTIONAL LAW.

Laws 1911, c. 62, § 9, which provides that county boards of health shall be composed in part of the chairman of the county commissioners, the mayor, and superintendent of schools, does not violate Const. art. 14, § 7, which forbids the holding of two offices by one person at the same time as it only provides the duties of such boards shall be performed by such persons ex officio.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*]

3. HEALTH (§ 7*)—COUNTY SUPERINTENDENTS—APPOINTMENT—NECESSITY FOR FIXING FEES.

Title to the office of county superintendent of health under appointment by the secretary of the state board of health under Laws 1911, c. 62, § 9, is not affected by the secretary's fail-

ure to fix the appointee's fees as required by the act.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 6; Dec. Dig. § 7.*]

4. MANDAMUS (§ 3*)—WHEN REMEDY LIES—QUO WARRANTO AS REMEDY.

Mandamus, and not quo warranto, is the proper remedy to compel county commissioners to admit plaintiff to the office of county superintendent of health, where no other person has an equitable title to the office.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 10-34; Dec. Dig. § 3.*]

Appeal from Superior Court, Wake County; Peebles, Judge.

Mandamus by J. J. L. McCullers against the Board of Commissioners of Wake County. From a judgment dismissing the proceedings, plaintiff appeals. Reversed.

The judgment appealed from is as follows:

"This cause coming on to be heard by me in chambers at Raleigh Thursday and Friday, November 23 and 24, 1911. After hearing complaint, answer, affidavits, and argument of counsel on both sides, by consent of both sides I took the papers with me in order to give the matter further consideration. Having given the matter further consideration, I render the following judgment:

"(1) I find and hold that the pleadings raise no issue of fact requiring the intervention of a jury, and I therefore overrule the defendant's motion for a trial by jury. To this ruling defendants except.

"(2) I find that the facts contained in sections 1 to 8 of complaint, both included, are true.

"(3) It appearing from the complaint that the county board of health was organized as is required by section 9, c. 62, of the Public Laws of 1911, and elected J. J. L. McCullers county superintendent of health, that the contingency upon which W. S. Rankin as secretary of state board of health was authorized to act never happened, and the appointment of plaintiff by said Rankin was void. I also find and hold that said Rankin did not fix the fees as is directed in section 9 of said chapter 62.

"(3) Article 9, § 2, of state Constitution, forbids the holding of two offices by one man at the same time. If the act had provided that D. T. Johnson, James I. Johnson, and Z. V. Judd should constitute the board of health for Wake county, their acceptance of said office would have rendered vacant the office of chairman of the board of county commissioners, office of mayor of Raleigh, and office of superintendent of public schools for Wake county. The General Assembly seems to have linked the office of superintendent of the board of health for Wake county with the other three offices and made them inseparable, and for that reason I think and hold that section 9 of Public Laws of 1911, c. 62, is unconstitutional and void.

"(4) I find the facts stated in section 11

of the answer to be true. I hold that Dr. R. S. Stevens is not a usurper, but is in the office of superintendent of health for Wake under color of title, and is a de facto officer, and cannot be ousted without a day in court, and hence I hold that mandamus is not the proper remedy. And I therefore dismiss these proceedings at the costs of the plaintiff to be taxed by the clerk."

Aycock & Winston and Bart M. Gatling, for appellant. B. C. Beckwith and R. N. Simms, for appellee.

BROWN, J. The plaintiff derives his title to the office of superintendent of health of Wake county by appointment of the secretary of the state board of health, under chapter 62, § 9, Public Laws of 1911, which provides that, if the county board of health of any county shall fail to elect a county superintendent of health within two calendar months of the time fixed by the statute when such election shall take place, the said secretary of the state board shall appoint. The defendant board of commissioners passed a resolution undertaking to appoint a superintendent of health, and to fix his salary. In consequence of such conflict between the two boards and the failure to fix his compensation, the plaintiff appeared before the board of health at its next meeting, and declined to qualify as superintendent of health for Wake county. The board of health having failed to elect a superintendent for more than two calendar months, the secretary of the state board, W. S. Rankin, on July 17, 1911, appointed plaintiff the superintendent of health and quarantine officer for Wake county, and fixed his fees and compensation, claiming to have done so in accordance with sections 9 and 16 of said act. The plaintiff qualified as such, and the defendant board declined to recognize him and to pass on, audit, and approve his bill for fees as required by section 9. His honor found the facts as stated in sections 1 to 8, inclusive, of the complaint to be true, but it is unnecessary to state them more fully.

[1] 1. It is contended that the contingency had not arisen when the secretary could lawfully appoint. The statute requires the board of health to meet and elect on the second Monday in May, 1911, and thereafter on the second Monday of January in the odd years of the calendar. A majority of the board of health voted for plaintiff, but he refused to qualify. It was the duty of said board to at once elect another person. This it failed to do, so that the office remained vacant for more than two months up to the time the state secretary made the appointment. We think the true intent and meaning of the statute is to give such appointment to the state secretary when the board of health for any reason permits the office to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes
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remain vacant for two calendar months from the date fixed by the statute in this case the second Monday in May. The public interest requires that this particular office shall have an incumbent to discharge its duties and the evident intention of the General Assembly was to prevent the office being unfilled for a longer period than the time named. We think the learned counsel for the defendants place a too restricted construction upon the meaning and purport of the words "shall fail to elect," as used in the statute. We think the General Assembly meant the choosing and induction into office of a superintendent of health within the two calendar months. *State v. Wilroy*, 32 N. C. 329. If this were not so, then a hostile board of health could keep the office vacant by electing a person who would not qualify and the purpose of the General Assembly be entirely defeated.

[2] 2. But the real controversy in this case, which has been argued with much force by counsel on both sides, is the constitutionality of section 9 of the act. The power of the secretary of the state board to make the appointment is conferred by said section, and, if it is void in toto, then it is contended that plaintiff's title to the office fails. The learned judge of the superior court took this view, and in his judgment expressed it in these words: "Article 14, § 7, of state Constitution, forbids the holding of two offices by one man at the same time. If the act had provided that D. T. Johnson, James I. Johnson, and Z. V. Judd should constitute the board of health for Wake county, their acceptance of said office would have rendered vacant the office of chairman of the board of county commissioners, office of mayor of Raleigh, and office of superintendent of public schools for Wake county. The General Assembly seems to have linked the office of superintendent of the board of health for Wake county with the other three offices and made them inseparable and for that reason I think and hold that section 9 of Public Laws of 1911, chapter 62, is unconstitutional and void."

It appears that the persons named above are, respectively, chairman of the board of commissioners of Wake county, mayor of Raleigh, and county superintendent of schools for Wake county. Chapter 62, Laws of 1911, appears to be a comprehensive revisal of all preceding laws. It covers the entire subject of public health, both state and county. It first provides for the establishment of a North Carolina board of health, which is to be made up by the election by the Medical Society of North Carolina of four members, and by the appointment of the Governor of five. Section 9 constitutes the county board of health of the chairman of the board of commissioners, the mayor of the county town, and, when there is no mayor, the clerk of the superior court, the county superintendent of schools, together with two physicians to be elected by those three public officials.

We are unable to concur in the conclusion that the statute is violative of article 14, § 7, of our state Constitution. It is not a case where one person holds two offices at the same time, but rather the case where the duties of a member of the county board of health are to be performed *ex officio* by the chairman of the board of commissioners, the mayor, and the superintendent of schools. These duties cannot be discharged by the individuals named in his honor's judgment any longer than during the period they hold the offices of chairman, mayor, and superintendent. The right to discharge such duties is not conferred upon them as individuals, but is a part of the duties of the one office already held by each.

The case of *Barnhill v. Thompson*, 122 N. C. 493, 29 S. E. 720, does not sustain the contention of the defendants. The facts in that case show that the board of education of Bladen county was elected by the board of commissioners of said county, the clerk of the superior court, and the register of deeds, under the existing law, sitting with them. This body elected the defendant Thompson, who was a member of the board of county commissioners, a member of the board of education, and he undertook to exercise the duties of both offices. This court held that he was ineligible to discharge the duties of county commissioner; that, when he accepted the second office, he thereby vacated the one he already held. His right to act as a member of the board of education was not questioned. In the case at bar the persons named in the judgment have not been elected or appointed to any other office, but the added duties of the county board of health have been placed upon the offices they already held, and, as long as they retain such offices, they must discharge such duties, and, when they vacate such offices, their successors must continue to perform them. By discharging the duties of the board of health and acting as members of that board those gentlemen did not vacate the offices they already held, for the moment they resigned or vacated such offices they at once became ineligible to continue as members of the board of health. For this reason they could have no right to elect which office they would take, the offices they held, or membership on the board of health. This legislation is not novel in North Carolina, nor, indeed, in the other states of the Union. In 1901 the Legislature passed a similar act—section 4444 of the Revisal. That act provides that two physicians shall be selected—one by the chairman of the board of county commissioners, and one by the mayor of the county town, who, together with the board of commissioners, shall constitute the county sanitary committee, of which committee the chairman of the board of county commissioners shall be *ex officio* chairman. We also have the familiar case of the Governor who is made by law a trustee of the university of the state and

chairman of the board, and is required to perform these duties and also act as chairman of the executive committee of the trustees. Similar legislation is to be found in other states having a constitutional provision similar to ours. In West Virginia the law requires the Governor, Auditor, Treasurer, superintendent of schools, and Attorney General to serve on the board of public works, and prescribes the duties of said board. The Court of Appeals in an elaborate opinion held the act valid, saying, in substance, it simply prescribes additional powers and duties to be performed by officers already elected by the people, and that it does not amount to an appointment to an office created by law, but that it only amounts to requiring the officers of the executive department by virtue of their respective offices to which they have been elected by the people to act as members of the board of public works; that it, in substance, simply annexes additional powers and duties to their respective offices. The court goes on to say "that it is a time-honored usage in Virginia, and continued in West Virginia, to cause certain duties which might have been assigned to officers specially appointed or elected for the purpose to be performed by officers already appointed for general service." *Bridges v. Shallcross*, 6 W. Va. 578, citing *Wales v. Belcher*, 3 Pick. (Mass.) 508. The question is considered by the Court of Appeals of Virginia in *Sharpe v. Robertson*, 46 Va. 518. In that case certain duties were assigned the circuit judges to be performed in the Court of Appeals and special compensation fixed by the General Assembly. Judge Baldwin, speaking for the court, says: "But the act in question creates no new judicial offices and appoints no additional judges, but merely attaches new duties for offices existing to be performed by the incumbents within the constitutional power of the Legislature." The subject is discussed by the Supreme Court of Texas in *Powell v. Wilson*, 16 Tex. 59, and the views we have expressed herein are fully supported. The court says: "It cannot be doubted that it is competent for the Legislature to create an office which shall be that of a substitute, or mere auxiliary to another, the duties of which shall commence and consist in performing the duties of the principal office." The subject is elaborately discussed by the Supreme Court of Florida in *Wilkins v. Connors*, 27 Fla. 329, 9 South. 7, and it is held that the statute making it the duty of the sheriff of Escambia county to act as city marshal of Pensacola is not obnoxious to the Constitution of that state, declaring that "no person shall hold or perform the functions of more than one office under the government of this state at the same time." In Louisiana the same view is taken in *State v. Somnier*, 33 La. Ann. 237, where it is held that the act providing that the clerk of the district court shall be ex officio member of the jury commission does

not confer an additional office upon the incumbent of the clerk's office in violation of the constitutional restriction. We could multiply authorities in support of these views, but deem it unnecessary.

It is true, as contended, that section 9 uses this expression, "the term of office of members of the county board of health shall terminate on the first Monday in January in the odd years of the calendar, and while on duty they shall receive \$4 per diem to be paid by the county." The former law declared their term of office to be coterminous with that of the commissioners with whom they serve, and, when on duty, they shall receive the same compensation as is received by county commissioners. Evidently the language of the new act in reference to term of office applies only to the two physicians who are chosen as members of the county board of health by the chairman of the board of county commissioners, by the mayor, and by the superintendent of schools. The change in the verbiage is due to the fact that there is a difference in the terms of the ex officio members of the county board of health. The county superintendent of schools goes out of office on the first Monday in July of each year; the mayor of the county town, as a rule, goes out in May or June; while the terms of the county commissioners expire in December. It evidently was not intended to either leave a vacancy in the health board or to shorten or lengthen the terms of the ex officio members. The person holding the office of county commissioner when his successor is elected as chairman of the board of county commissioners on the first Monday in December would go off the county board of health and the succeeding chairman of the board of county commissioners would eo instanti become a member of the county board of health. The same is true of the mayor and of the superintendent of public schools.

Our conclusion being that the entire section of the act is a valid exercise of legislative power, it is unnecessary to discuss the powers of the health board as a de facto organization with a colorable right to discharge the duties imposed upon it.

[3] 3. It is contended that the secretary of the state board did not fix the fees as required by the act. We fail to see how this affects the plaintiff's title to the office. It is plain that the secretary undertook to fix the fees to which plaintiff would be entitled, but whether he observed the standard laid down by the statute is not for us to determine in this proceeding. The statute (section 9) declares that the compensation of the superintendent of health for the county, when fixed by said secretary, shall be "in proportion to the salaries paid by other counties for the same service, having in view the amount of taxes collected by said county." And the same section declares that "all expenditures shall be approved by the board

of county commissioners before being paid." It thus becomes the duty of the board of commissioners to pass on and audit the plaintiff's accounts for services, and to determine whether they are within the bounds fixed by the statute. The approval of the defendant board is necessary to the payment of plaintiff's account, and, while the courts will not undertake to compel the county commissioners to approve them, they will require them to consider the account and to pass on it in good faith in the exercise of a sound judgment as to whether or not the services as charged are warranted by the statute.

[4] 4. It is contended that mandamus is not the proper remedy, but that quo warranto is. This contention is based upon the theory that one Dr. Stevens is in possession of the office of "county superintendent of health" for Wake county, and exercising its functions. We find nothing in the record that gives Dr. Stevens even a colorable title to the office, or indicates that he is in possession of it. The resolution of the county commissioners does not purport to elect him superintendent of health or even to induct him into any office established by law. If he is in the service of the county commissioners under their resolution to employ a "county physician" (the term used in the resolution), then he is merely a contract physician performing services which should be performed by the plaintiff, and is not exercising the functions of a public office. He has not even a colorable title to the office of "county superintendent of health." He is not a party to this proceeding, and was very properly omitted.

That mandamus is a proper remedy to enforce plaintiff's demands is established by abundant authority. *Moore v. Jones*, 76 N. C. 185; *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *Lyon v. Commissioners*, 120 N. C. 239, 26 S. E. 929; *Koonce v. Commissioners*, 106 N. C. 192, 10 S. E. 1038.

We assume that, when this opinion is handed down, it will be unnecessary for plaintiff to sue out the writ, but, in case it is, the plaintiff may apply for a peremptory writ of mandamus to the judge of the superior court residing in or holding the courts of the sixth judicial district.

The costs of this appeal will be paid by defendant board of commissioners.

Reversed.

MCCULLERS v. BOARD OF COM'RS OF WAKE COUNTY.

(Supreme Court of North Carolina. Feb. 21, 1912.)

APPEAL AND ERROR (§ 105*)—DECISION APPEALED FROM—DISMISSAL.

An appeal by county commissioners in proceedings against them will be dismissed where

the proceedings have been dismissed, and no judgment or order was entered against them.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 105.*]

Appeal from Superior Court, Wake County; Peebles, Judge.

Action by J. J. L. McCullers against the Board of Commissioners of Wake County. From the judgment, defendant appeals. Appeal dismissed.

See, also, 73 S. E. 816.

B. C. Beckwith and R. N. Simms, for appellant. Aycock & Winston and Bart M. Gatling, for appellee.

PER CURIAM. It appearing from the judgment of the superior court that these proceedings were dismissed entirely and no judgment or order of any kind entered against the defendant, we see no reason for entertaining this appeal, and it is dismissed at cost of defendant, the board of commissioners of Wake county.

Appeal dismissed.

(70 W. Va. 262)

SPINDLER v. HAMILTON.

(Supreme Court of Appeals of West Virginia. Jan. 31, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 644*)—DISMISSAL—INSUFFICIENCY OF RECORD.

Submission of a case in the appellate court does not bar a motion to dismiss it for lack of bills of exception necessary to bring into the record the subject-matter of the assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 644.*]

2. APPEAL AND ERROR (§ 554*)—DISMISSAL.

On discovery of such defect after submission, the court will dismiss the writ of error sua sponte, as having been improvidently awarded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 554.*]

Error to Circuit Court, Ohio County.

Action by William Spindler against A. M. Hamilton. Judgment for plaintiff, and defendant brings error. Dismissed.

Hubbard & Hubbard, for plaintiff in error. James W. Ewing, for defendant in error.

POFFENBARGER, J. The order, adjourning the term of court at which the judgment in this action was rendered, brought up by a writ of certiorari, at the instance of the defendant in error, proves the adjournment to have occurred more than 30 days before the bill of exceptions, containing the evidence and rulings complained of, was allowed and signed; and the assignments of error relate solely to matters not apparent upon the record otherwise than as shown by the alleged bill of exceptions. Hence, if this paper is

no part of the record, the assignments of error fail for lack of foundation therein.

[1, 2] The application for the writ of certiorari to bring up the adjourning order was resisted on the ground of waiver by submission of the case, without a motion to dismiss; but the objection was overruled and the writ awarded. This ruling, and the dismissal now inevitable, the papers relied upon as a bill of exception having been obtained too late, are justified by numerous precedents of dismissal *sua sponte* on discovery, after submission, of lack of bills of exception necessary to bring into the record the subject-matter of the assignments of error, among which are *Richardson v. McConanghey*, 52 W. Va. 372, 43 S. E. 124; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100.

As to the form of the order of this court, under the circumstances here disclosed, our decisions are in conflict. In some instances the judgments have been affirmed (*Lambert v. Gallipolis*, 64 W. Va. 105, 60 S. E. 1099; *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909), and in others the writs have been dismissed as having been improvidently awarded (*Richardson v. McConanghey*, 52 W. Va. 372, 43 S. E. 124, and *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260). As this court finds, on its examination of the record, no question it can decide has been raised, we think the case is analogous to those in which there is no jurisdiction and those in which jurisdiction has failed, and so falls under the latter rule. In reality, the judgment has not been impeached and is not reviewed in disposing of the writ.

The order will be one of dismissal of the writ as having been improvidently awarded.

NOTE BY BRANNON, P. In my opinion the judgment of this court should be one of affirmance, with the usual damages and costs—not a dismissal without damages and costs. The writ of error is not without jurisdiction. It brought the case into this court to be disposed of on its record. It was submitted, not on any motion, but for decision. The defendant was compelled to defend, and now, because his adversary's bill of execution was made too late, he is denied damages and costs. The fixed rule is that a judgment is free of error, unless error is shown. Error not appearing, that presumption rules. *Todd & Smith v. Gates*, 20 W. Va. 464; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Dudley v. Barrett*, 58 W. Va. 237, 52 S. E. 100; *Furbee v. Shay*, 46 W. Va. 736, 34 S. E. 746. Code of 1906, c. 135, § 26, expressly requires this court, if no error appears, to affirm. If our cases are not harmonious, we should follow the statute. The defendant in error has

by another statute right to damages and costs. It is a property right under Code, c. 135, § 27.

MILLER, J., concurs in this note.

(70 W. Va. 248)

FULLER et al. v. EDENS.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 674*)—TAX SALE OF WIFE'S LANDS—PURCHASE BY HUSBAND.

A husband cannot acquire valid title to his wife's land by becoming a purchaser thereof at tax sale and taking a tax deed therefor.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 674.*]

2. TAXATION (§ 743*)—TAX SALE—TAX TITLE.

One who takes a conveyance of a tax title can claim no benefit from it, if the record shows fatal defects or irregularities pertaining to it, or if he had actual knowledge of facts rendering it invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1485-1488; Dec. Dig. § 743.*]

3. TAXATION (§ 800*)—TAX DEED—ACTION TO SET ASIDE—TENDER OF TAXES.

In a suit to set aside a tax deed, a tender of the taxes is not essential if it was the duty of the purchaser at the tax sale to pay the same.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1586; Dec. Dig. § 800.*]

Appeal from Circuit Court, Kanawha County.

Bill by Fannie J. Fuller and others against Bettie F. Edens. Decree for plaintiffs, and defendant appeals. Affirmed.

S. D. Littlepage and Linn & Byrne, for appellant. A. M. Belcher, for appellees.

ROBINSON, J. This appeal is one from a decree setting aside a tax deed and annulling subsequent conveyances of the real estate to parties having notice of the invalidity of the tax purchase and deed.

[1] The case involves this question: Does the husband acquire good title to the wife's land by becoming a purchaser thereof at tax sale and taking a tax deed therefor? The authorities are unanimous in answering the question in the negative. "It is a general rule that neither husband nor wife can purchase the other's land at a tax sale." 37 Cyc. 1350. The rule is approved by leading authors. *Black on Tax Titles*, § 286; *Minor on Tax Titles*, 66, 67. The adjudicated cases uphold the principle. *Laton v. Balcom*, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381; *Burns v. Byrne*, 45 Iowa, 285; *Herrin v. Henry*, 75 Ark. 273, 87 S. W. 430; *Ward v. Nestell*, 113 Mich. 185, 71 N. W. 593; *Robinson v. Lewis*, 68 Miss. 60, 8 South. 258, 10 L. R. A. 101, 24 Am. St. Rep. 254; *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228; *Peck v. Ayres*, 79 Kan. 457, 100 Pac. 283. Indeed we

are not disposed to deal with the subject further than to quote approvingly the following: "It would be a startling doctrine that a husband may possess and enjoy the profits of his wife's real estate, neglect to pay the taxes, purchase the property at the sale for the delinquency, and acquire a valid title. Such a refusal or neglect to pay taxes would be a fraud upon his wife, and would vitiate the title acquired." *Burns v. Byrne*, supra.

[2] The husband conveyed to his second wife the tax title which he obtained to the land of his first wife before her death. This he accomplished by the use of the father of the second wife as an intermediary. He conveyed to her father, and the latter on the same day conveyed to her. It is submitted that the court could not annul these subsequent conveyances. Clearly, it could do so. The grantees of the invalid tax title had notice of its invalidity. They had notice by the record. Besides the whole transaction reflects an effort by fraud and collusion to put the property of the first wife beyond the reach of her children, so as to be beneficial to the second wife. Under all the circumstances we may reasonably infer that these subsequent grantees had actual notice. "One who takes a conveyance of a tax title can claim no benefit from it if he had actual knowledge of facts which render it invalid, or if the records show on their face fatal defects or irregularities." 87 Cyc. 1485.

[3] This case is not of the character of those in which it is necessary for the bill to tender the taxes. The husband's marital duty was to pay the taxes for the wife. His making the tax purchase was a payment of the taxes by her. After her death it was his legal duty to pay them as tenant by the curtesy. Why should a tender be made under such circumstances? No taxes are due from the plaintiff heirs of the first wife, who inherited the real estate. Then why is a tender essential? The rule requiring tender presupposes an obligation to pay.

The decree is manifestly a proper one in the premises. It will be affirmed.

(137 Ga. 586)

COWART et al. v. FENDER.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. VENUE (§§ 18, 22*)—MONEY RECEIVED (§ 18*)—DOMICILE OF PARTIES—EVIDENCE—ADMISSIBILITY.

Where several persons conspire to defraud one of his money without consideration, but do not jointly receive the money so obtained, but in different amounts and on different dates, suit may be brought in tort jointly against the defendants in the county of the residence of either of the tort-feasors (the act of one being the act of all) to recover the amount of money so secured; or, waiving the tort in such case, the action may be brought in assumpsit for money had and received, in the county where each de-

fendant may reside, and the plaintiff may recover of each defendant the amount received by him. In the latter case the recovery cannot be had against all the defendants jointly, but must be from each separately.

(a) In such case, evidence of conspiracy and fraud is admissible only to show that the person receiving the money is not entitled to keep it, but is bound in good conscience and equity to return it to the person from whom it was received.

[Ed. Note.—For other cases, see *Venue*, Dec. Dig. §§ 18, 22*; *Money Received*, Dec. Dig. § 18.*]

2. SUFFICIENCY OF EVIDENCE—TITLE TO MONEY PAID.

There was sufficient evidence to sustain the finding of the jury that the title to the money paid the firm of Powell & Kendall was in the plaintiff.

3. TRIAL (§ 165*)—NONSUIT—DETERMINATION OF MOTION—CODEFENDANTS.

Where a joint action was brought against two or more persons, in assumpsit for money had and received to the plaintiff's use, and at the close of the plaintiff's testimony the defendants moved for a nonsuit as to all the defendants, it was not error to refuse the nonsuit as to all of the defendants, if the case was made out as to some of the defendants.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 165.*]

4. APPEAL AND ERROR (§ 970*)—REVIEW—DISCRETION OF LOWER COURT—RECEPTION OF EVIDENCE.

It is within the sound discretion of the court to determine when the foundation has been laid for secondary evidence; and the exercise of such discretion will not be controlled, unless it is abused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

5. PARTNERSHIP (§ 44*)—EXISTENCE—BURDEN OF PROOF.

Where, in an action for money had and received, one alleges a partnership as an essential fact necessary to a recovery, the burden is on the party affirming it to prove the existence of the partnership, and it is error in such case for the court to charge the jury: "Where the partnership is denied, the opposite party is only required to present sufficient evidence to raise the presumption of the existence of the partnership."

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 44.*]

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Action by J. F. Fender against J. S. Cowart and others. Judgment for plaintiff, and defendants bring error. Reversed.

Shipp & Kline, W. A. Covington, and J. R. Pottle, for plaintiffs in error. Denmark & Griffin, E. K. Wilcox, and T. H. Parker, for defendant in error.

HILL, J. The plaintiff contracted with the firm of Powell & Kendall, alleged to be composed of Charles J. Kendall, M. M. Kendall, and D. B. L. Powell, to purchase a certain "turpentine farm," and paid to that firm \$12,000 as part of the purchase money. It was alleged that the plaintiff was induced to enter into the trade by false and fraudu-

lent representations of M. M. Kendall and W. C. Cunningham, knowingly made, and that the firm of Cowart & Cunningham (composed of said Cunningham and J. S. Cowart) were simply confederating with Powell and Kendall to obtain money from the plaintiff upon the false and fraudulent pretense that the last-named firm had a valid title and lawful right to sell him the property, which neither firm had; the title to the property being in the Moye Naval Stores Company. The firm of Cowart & Cunningham had an option or contract of purchase with the owners. They contracted to sell to Powell & Kendall, who in turn made an agreement to sell to the plaintiff. The evidence showed that M. M. Kendall, at the request of Powell & Kendall, or one of its members, was requested by that firm to aid them in making the sale to the plaintiff, and was promised for his services one-third of the profits arising from such sale. Of the \$12,000 paid by the plaintiff to Powell & Kendall, \$8,000 was by them turned over to the firm of Cowart & Cunningham, and the remaining \$4,000 Powell & Kendall divided, one-third to each of the members of that firm, and one-third to M. M. Kendall for his services in connection with the sale to the plaintiff. After the failure of the parties to finally consummate the sale, the plaintiff brought a joint suit against the two firms named, in assumpsit for money had and received, to recover the \$12,000 paid out by him. M. M. Kendall, W. C. Cunningham, and J. S. Cowart each filed a special plea, averring that he did not belong to the respective firm of which he was alleged to be a member, and the issues as to partnership were submitted to the jury along with the entire case. The following verdict was returned and made the judgment of the court: "We, the jury, find in favor of the plaintiff, J. F. Fender, against each and all of the defendants, Powell & Kendall, a firm composed of M. M. Kendall, O. J. Kendall, and D. B. L. Powell, and Cunningham & Cowart, a firm composed of W. H. C. Cunningham and J. S. Cowart, the total sum of \$12,000, with interest from November 26, 1905, at the rate of 7 per cent. per annum therefrom." The defendants filed a motion for a new trial, and excepted to the order of the court overruling it, also assigning error in the bill of exceptions on certain pendente lite rulings made by the court. The motion for a new trial contained numerous grounds, and only those material to be considered under the direction we deem proper to give the case are hereinafter referred to.

[1] The main question in this case is: Was the action properly brought against all the defendants jointly, and in the county of the residence of one of the defendants? We think not. The plaintiffs are not suing in tort for damages against all the defendants as joint tort-feasors, where all would be jointly liable; but they waive the tort, and

sue the defendants in assumpsit for money had and received, on the implied contract to refund the money, which in good conscience and equity they are supposed to return. Where an action is brought in tort, every one who participated in the tort is liable as a joint tort-feasor, and the act of one is the act of all. But the plaintiff in this case waives the tort and does not sue for damages, but sues in assumpsit against all the defendants jointly for the recovery of the money alleged to have been paid by him to them. In the latter case, the rule is different from the former, and the act of one is not the act of all; and a joint action can be maintained only against defendants who have jointly received the money. *Limited Inv. Ass'n v. Glendale Inv. Ass'n*, 99 Wis. 54, 74 N. W. 683; *Manahan v. Gibbons*, 19 Johns. (N. Y.) 427; *Ward v. Hood*, 124 Ala. 570, 27 South. 245, 82 Am. St. Rep. 205; *Murphy v. Bidwell*, 52 Mich. 487, 18 N. W. 230; *Nat. Trust Co. v. Gleason*, 77 N. Y. 400, 408, 33 Am. Rep. 632; *Shepardson v. Rowland*, 28 Wis. 108; *Simmons v. Spencer* (C. C.) 9 Fed. 581, 582. If Fender, the plaintiff, had paid over to the two firms and M. M. Kendall the entire sum sued for jointly, not knowing how they divided it, the status would be different. But where he paid it to one firm, Powell & Kendall, as disclosed by the record, the law will not imply a promise on the part of the second firm to refund the whole amount, when it did not receive the whole amount. By what rule does the firm of Cowart & Cunningham impliedly promise to pay back the \$12,000, which they have not received? Bear in mind that we are not now discussing a case of damages growing out of tort, where the rule is different, but the proposition of an implied promise to repay on a quasi contract to return what has been actually received, and no more. The law of tort cannot be carried over into the law of contract (and especially where the tort is waived), and permit the plaintiff to recover against all of the defendants jointly, whether they received the money jointly or not. The action in assumpsit cannot be jointly maintained against all of the defendants, unless the payment was jointly made to the two firms and M. M. Kendall. Where the tort is waived, and the suit is in assumpsit for money had and received, evidence of conspiracy and fraud is admissible only to show that the party who received the money is not entitled to keep it, but is bound in good conscience to return whatever he did receive. If several persons conspire to defraud one out of his money, and succeed in receiving the money jointly, suit can be brought against all who take part in the conspiracy in one action, and in any county where either defendant resides. It is the community of wrong committed that gives the joint right of action. And the law will imply a promise to give back money to the

owner wrongfully taken; and where the wrongful or fraudulent act is joint, they are joint tort-feasors, and jointly liable for their tort. But in a case of conspiracy to defraud one of his money, where the money is not received jointly, but in separate amounts, and the suit to recover is in assumpsit, then each must be sued for the amount received, and in the county of his residence.

Applying the principles above announced to the facts of this case, we do not think there was such a common receipt of the money paid by Fender to the two firms, Powell & Kendall and Cowart & Cunningham, and M. M. Kendall, as would imply a *joint* promise to return it. If Powell & Kendall received all the money paid by the plaintiff, Fender, they would be primarily liable. But the evidence discloses that neither Cowart & Cunningham nor M. M. Kendall received the \$12,000 sued for jointly with the other firm; and therefore, while they are not liable under the ruling here made, under the evidence in this case, for the entire amount of \$12,000, they might be liable severally for whatever portion of it they each did receive, if any. From what has been said above, it follows that Cowart & Cunningham could not be joined in a suit with Powell & Kendall, and therefore a court of a county not of their residence would have no jurisdiction over them. And the same would apply to M. M. Kendall, if he is not a member of the firm of Powell & Kendall. It appears from the record that he had no joint interest in the property sold to the plaintiff, and was not to share in the losses of the transaction, but only in the profits, and was not, therefore, a partner in the firm of Powell & Kendall. Civil Code 1910, § 3153, declares: "A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." See, also, Dawson Nat. Bank v. Ward, 120 Ga. 861, 862, 48 S. E. 313.

The verdict of the jury found, not only for the full amount of principal sued for by the plaintiff against all of the defendants, but interest as well. It is insisted that interest could not be recovered, because no demand was made against the defendants for the sum sued for. Whether interest can be collected without demand in this case need not be determined, as the judgment is to be reversed and the case goes back; but we may remark that, if a demand is necessary, the evidence shows that a demand was made on Powell & Kendall for the return of the money. It does not appear that a demand was made as to Cowart & Cunningham and M. M. Kendall.

[2] 2. The first assignment of error in the amended motion for a new trial is that the verdict of the jury is contrary to the evidence as to all of the defendants, "for that

the evidence demanded a finding that the title to the money sued for was in the partnership of J. B. Fender & Co., and not in the plaintiff." This was a question of fact for the jury to determine; and, while the evidence was somewhat conflicting on this point, the jury found that the money paid to Powell & Kendall was that of the plaintiff, J. F. Fender, and we cannot say that they erred in so finding.

[3] 3. Error is assigned to the overruling by the court of the defendants' motion for a nonsuit, made at the conclusion of the plaintiff's evidence. If the motion for a nonsuit was made as to all of the defendants (and it seems to have been so made), it was not proper to grant the nonsuit as to all the defendants. Under the evidence in the case, we cannot say that no case was made out as to some of the defendants.

[4] 4. Objection is made to the ruling of the court admitting oral evidence as to the contents of an alleged lost schedule of the property of the Moye Naval Stores Company, being the schedule in writing which the plaintiff testified was furnished to him by Powell & Kendall; the plaintiff testifying, over objection, as to what the schedule contained, so as to show what property the defendants had contracted to sell him. It is within the sound discretion of the court to determine when the foundation has been laid for the introduction of secondary evidence. There appears no abuse of the exercise of the court's discretion in the ruling excepted to. Civil Code 1910, § 5829.

[5] 5. The following charge of the court is assigned as error: "Where the partnership is denied, the opposite party is only required to present sufficient evidence to raise the presumption of the existence of the partnership, when the burden will be shifted to the other side to disprove the existence of the partnership. This is so because the persons supposed to constitute the partnership are in possession of the definite information upon the subject, and therefore better able to present it to the court." This charge of the court is inaccurate. Where one alleges a partnership as an essential fact necessary to a recovery, the burden of proof is on the party affirming it. The court's charge that, "where the partnership is denied, the opposite party is only required to present sufficient evidence to raise the presumption of the existence of the partnership," is calculated to mislead the jury, and tends to lessen the duty of the plaintiff to prove his allegation of partnership. The jury might be led to conclude, from the charge as given, that all that is necessary in order to prove the existence of a partnership was to raise a presumption in favor of its existence. The language used is not an apt way of stating the rule. Civil Code 1910, §§ 5746, 5747; Hawkins v. Davie, 136 Ga. 551, 552, 71 S. E. 873; Mobley v. Lyon, 134 Ga. 125, 67 S. E.

668, 137 Am. St. Rep. 213. The only harm the charge could have in this case is as to the defendants other than Powell & Kendall, who denied that they were members of the respective partnerships to which they were alleged to belong.

Judgment reversed. All the Justices concur.

(137 Ga. 555)

MADDEN v. LAMPLEY.

(Supreme Court of Georgia. Feb. 15, 1912.)

(*Syllabus by the Court.*)

1. DEEDS (§ 47*)—EXECUTION—ATTESTATION—COMPETENCY OF WITNESS.

An attorney at law, who drafts and prepares a deed for the signature of the grantor, in which deed the client of such attorney is named as grantee, is not, because of the existence of the relation of attorney and client between him and the grantee, incompetent as an attesting witness to the execution of the instrument. *Austin v. Southern Home Building & Loan Ass'n*, 122 Ga. 440 (6), 50 S. E. 382.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 106; Dec. Dig. § 47.*]

2. APPEAL AND ERROR (§ 302*)—RECORD—SUFFICIENCY.

A ground of a motion for a new trial which complains that a named witness, "having in his hand a purported brief of the testimony," was permitted to state, "She [the plaintiff] testified according to the statement here," but which does not set forth, literally or in substance, the contents of the writing to which the witness made reference, is without merit, inasmuch as it fails to show the materiality of the testimony the admission of which is complained of; and, as has been frequently ruled, this court will not look to other parts of the record to ascertain the contents of the writing referred to, in order to ascertain its materiality.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 302.*]

3. NEW TRIAL (§ 41*)—GROUNDS—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of evidence which, though immaterial and irrelevant, could not injuriously affect the plaintiff's cause, is not a ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

4. REQUESTS TO CHARGE—INSTRUCTIONS ALREADY GIVEN.

The request to charge, in so far as it was legal and pertinent, was fully and appositely covered in the court's instructions to the jury.

5. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict.

Error from Superior Court, Quitman County; W. C. Worrill, Judge.

Action by R. B. Madden against H. Lampley. Judgment for defendant, and plaintiff brings error. Affirmed.

M. C. Edwards, for plaintiff in error. B. T. Castellow, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J. not presiding.

(137 Ga. 545)

BARRETT et al. v. ASHMORE, Ordinary.

(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

1. MANDAMUS (§ 74*)—COUNTY SITE—ELECTION.

When, under Civil Code 1910, § 486, a petition is presented to the ordinary of a county for removal of the county site, and it appears affirmatively that "two-fifths of the poll tax payers (as shown by the tax receiver's digest last made out)" signed the petition, it is the duty of the ordinary to call an election for the purpose of submitting the question of removing the county site to a vote of the people; but if, in order to find that the petition contains the requisite two-fifths, it is necessary for the ordinary to act upon extraneous evidence, explaining that certain names upon the digest, though different from names signed to the petition, refer to the same persons, and that certain names on the digest last made are persons deceased or removed from the county since the digest was made, there would be no absolute duty to call the election, and, after refusal of the ordinary in such case to call the election, as prayed, the writ of mandamus will not issue to compel him to do so.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 151; Dec. Dig. § 74.*]

2. SUFFICIENCY OF PETITION—GENERAL DEMURRER.

Under the ruling announced in the preceding headnote, the petition, as amended, was subject to general demurrer, and the proposed amendment was not sufficient to render it otherwise.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by J. H. Barrett and others for mandamus against C. W. Ashmore, Ordinary. Judgment for defendant, and plaintiffs bring error. Affirmed.

Osborne & Lawrence, for plaintiffs in error. P. W. Meldrim and P. E. Seabrook, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 537)

KNIGHT et al. v. STATE et al.

(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

DEPOSITARIES (§ 10*)—PUBLIC FUNDS—PRIORITIES OF CLAIMS.

The principle ruled in *County of Glynn v. Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604, is controlling in this case. Accordingly, where funds, arising partly from oil inspection fees and partly from private donations, had been turned over to and were in the hands of trustees of a school of agriculture and mechanic arts, established in a particular congressional district, under Civil Code 1910, § 1552 et seq., and were deposited by the treasurer of the board of trustees in his own name, as such, in a bank which was a state depository, and which failed, this did not constitute such a debt due to the state as created a lien in its favor by virtue of its general sovereignty, or

under the law in reference to state depositories, embodied in Civil Code, § 1249 et seq.

[Ed. Note.—For other cases, see Depositories, Cent. Dig. § 26; Dec. Dig. § 10.*]

Error from Superior Court, Ware County; P. E. Seabrook, Judge.

Action between A. M. Knight and others, receivers, and the State of Georgia and others. From the judgment, the receivers bring error. Reversed.

Jos. W. Bennet, Parks & Reed, and Jno. T. Myers, for plaintiffs in error. Lankford & Dickerson, for the State. J. W. Bennet, Parks & Reed, J. T. Myers, Toomer & Reynolds, Shelby Myrick, J. L. Sweat, Willson, Bennet & Lambdin, and Adams & Adams, for other defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 544)

STONE v. MARSHALL & CO.

(Supreme Court of Georgia. Feb. 14, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 534*)—VALIDITY—PROVISION FOR ATTORNEY'S FEES.

The maker of two promissory notes, calling for 8 per cent. interest after maturity, stipulated therein that, if they should be placed in the hands of an attorney for collection or adjustment, 10 per cent. upon the amount due should be paid as attorney's fees, to be included in judgment thereon as part of the principal. To secure the payment of the notes the maker conveyed to the payee land, and in the conveyances gave to the payee the right, in default of payment, to sell the land "at public outcry before the courthouse door of the county where the property is located, after an advertisement of once a week for two or more weeks in the public gazette where the sheriff advertises, and so deduct from the proceeds of such sale the amount due, including interest and attorney's fees, and all expenses incident to such sale, returning the overplus, if any there be, to me [the maker of the notes and deeds] or my legal representatives." The payee, claiming that there had been default in the payment of the notes, advertised the land for sale under the power given in the deeds. The maker of the notes and deeds filed a petition to enjoin such sale, upon the ground that he was not indebted in the amounts claimed. The defendant, in answer to the petition, set up that the amounts due on the notes were due and unpaid, and prayed for judgment against the plaintiff for the amount of the notes and interest thereon, and also for attorney's fees. The answer containing such prayer was filed during the trial term. A verdict was rendered in behalf of the defendant, in the action for injunction against the plaintiff therein, for given amounts as principal and interest on the notes, and 10 per cent. on principal and interest as attorney's fees. *Held* that, under the provisions of Civil Code 1910, § 4252, an obligation in a note to pay attorney's fees, in addition to the rate of interest specified therein, is void, and not enforceable, except in a suit upon the note where the defendant has been given 10 days' written notice by the holder of the note, his agent or attorney, before the institution of the suit, of his intention to bring suit, and also the term

of the court to which it will be brought, and where the defendant fails to pay the note on or before the return day of the court to which the action is returnable. As these statutory provisions were not complied with, it was error, over proper and timely objection of the plaintiff, to admit evidence as to what would be reasonable attorney's fees for the services rendered in the case by defendant's counsel; and the verdict rendered was not authorized, in so far as attorney's fees were found for the defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

2. GROUNDS FOR NEW TRIAL.

There is nothing in the other grounds of the motion for a new trial requiring a reversal.

3. APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—AFFIRMANCE ON CONDITION.

The evidence authorized the verdict, except as to attorney's fees; and a new trial is granted unless the defendant in error, within 20 days after the filing of the remittitur in the trial court, shall write off from the verdict the amount found therein for attorney's fees. If this shall be done, then a new trial is refused; otherwise, the judgment is reversed, and a new trial ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4468; Dec. Dig. § 1140.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by W. L. Stone against Marshall & Co. Judgment for defendants, and plaintiff brings error. Affirmed on condition.

A. V. Sellers and W. W. Bennett, for plaintiff in error. Cann, Barrow & McIntire and F. P. McIntire, for defendants in error.

FISH, C. J. Affirmed, on conditions. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 523)

DICKENS v. STATE.

(Supreme Court of Georgia. Feb. 13, 1912.)

(Syllabus by the Court.)

1. GRAND JURY (§ 20*)—JURY (§ 62*)—IMPANELING JURORS—DUTIES OF JURY COMMISSIONERS.

It is not error to overrule a plea in abatement to the indictment returned against one charged with murder, where the indictment is not only regular on its face, but where it appears that the foreman of the grand jury, and each member thereof who participated in the finding of the indictment, were regularly summoned and impaneled according to law, under the direction and approval of the presiding judge.

(a) The jury commissioners of each county are the proper judges of the qualifications of the citizens to be placed on the jury lists of the county.

(b) And where "all lawyers, ministers of the gospel, doctors, dentists, railroad engineers, and firemen" are left off the jury lists of the county by the jury commissioners, it is no ground for a plea in abatement and challenge to the array in a criminal case.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 56-58; Dec. Dig. § 20;* Jury, Cent. Dig. § 275; Dec. Dig. § 62.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENCE OF WITNESSES.

On the call of the case against one charged with murder, a motion was made to continue it for the purpose of getting the evidence of an absent witness, and it appeared that the witness on account of whose absence the motion was made had died the night previous to the day the case was finally called for trial. *Held*, that it was not error to refuse a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

3. CRIMINAL LAW (§ 1064½*)—WRIT OF ERROR—PRESENTATION OF QUESTIONS.

A ground of a motion for a new trial not approved by the court below will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2687, 2948; Dec. Dig. § 1064½.*]

4. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An excerpt from the charge of the court on the subject of reasonable doubt, which does not contain an essential feature of the law on the subject will not be held to require a new trial, where the general charge on the same subject, immediately preceding and following the excerpt, states the rule correctly, and the whole charge omitted from this ground of the motion for a new trial meets squarely the objection urged against the excerpt complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995; Dec. Dig. § 822.*]

5. CRIMINAL LAW (§ 53*)—DEFENSES—VOLUNTARY DRUNKENNESS.

Voluntary drunkenness is no excuse for crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 65; Dec. Dig. § 53.*]

6, 7. CHARGE OF COURT—NO ERROR.

There was no error in the charges of the court, as set out in the sixth and seventh divisions of the opinion, of which the defendant can rightly complain.

8. CRIMINAL LAW (§ 825*)—TRIAL—INSTRUCTIONS—REQUESTS.

Where the charge of the court to the jury on a given subject is substantially correct, and a fuller charge is desired, a request therefor should be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

9. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence.

(Additional Syllabus by Editorial Staff.)

10. HOMICIDE (§ 309*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

In a prosecution for murder, it is not error as against the defendant to instruct that malice is excluded if the intention to kill grows out of hot blood produced by provocation other than that produced by mere words, menaces, or contemptuous gestures, and if the provocation be induced by an actual assault, by an attempt to commit a serious injury upon the person, or by other equivalent circumstances calculated to excite sudden passion, the fact that defendant shot with the intention to kill would not render the offense murder, but he would be guilty of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

11. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—REASONABLE FEAR.

In a prosecution for murder, it is not error to charge that the doctrine of reasonable fears only applies when the danger is urgent and pressing, or apparently so, at the time of the killing, especially where the court had charged that the defendant is not required to demonstrate that a felony was about to be committed upon him, or that his life was in danger, but only that the circumstances as they appear to him were sufficient to make him so believe.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Error from Superior Court, Walton County; C. H. Brand, Judge.

At Dickens was convicted of murder, and brings error. Affirmed.

Jno. R. Cooper and E. W. Roberts, for plaintiff in error. Clifford Walker, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

HILL, J. [1] 1. At Dickens was tried and convicted of murder and sentenced to life imprisonment in the penitentiary. A motion for a new trial being overruled, he excepted. Before arraignment the defendant filed a plea in abatement to the indictment returned against him and challenged the array, on the ground that the grand jury as first called consisted of 23 men, who were instructed by the court to retire from the courtroom and elect a foreman. They did retire and elected W. H. Nunnally foreman and returned to the courtroom. The court then stated that since the jury had retired one of the absent jurors, Pleas Stanton, had come in. "Wherefore W. H. Nunnally was stricken from the grand jury as foreman, and this juror was added to the list, and the grand jury was again, for the second time, ordered to return to their room and elect another foreman, and therefore they returned to their room and elected John T. Robertson foreman of the grand jury, and when they returned to the courtroom, the jury was sworn by the Solicitor General, according to law." In a note appended to this ground of the motion for a new trial, the presiding judge says: "W. H. Nunnally was never sworn in as a grand juror at said term of the court. He was not sworn in as foreman of said grand jury. He was not selected by the judge or court as such foreman. He did not take the oath of office in either capacity. When the 23 jurors being present answered, the judge instructed them to go to the jury room and select a foreman. As they returned from the jury room, being in there only a minute or two, and before the jury had taken their seats, and before any announcement was made that any one had been selected foreman, the sheriff publicly called the court's attention to the fact that Mr. Stanton, who did not at first respond to his name, and who was on the venire of the grand jury, had just come into court. The court thereupon asked

Mr. Stanton if he had any excuse to render why he should not serve on the grand jury at that term of the court. He said he had none. His name having been drawn, and it appearing on the said list before said Nunnally's name, and the regular time of opening the court, according to custom on Monday morning, not having arrived by a few minutes, Mr. Stanton was instructed to take his place on the grand jury, he making 23, thus excluding Nunnally, who made the twenty-third juror present before said Stanton came into court. The court then told the grand jury, with Nunnally off and Stanton on, to retire to the room and select a foreman, which they did, selecting said Robertson, as aforesaid, which selection was approved by the court. All this occurred without any information on the judge's part from any grand juror or any source whatever that said Nunnally had been selected to act as foreman. Said Stanton's name was No. 6 on said list. Said Nunnally's name was No. 28 on said list. If said Stanton had been present and responded to his name when it was first called, the grand jury would have been impaneled and qualified exactly as it was subsequently impaneled and qualified, because it would have been thus completed before Nunnally's name was ever reached. Anything in said evidence above referred to, in conflict with this statement, is not true. Under these facts and circumstances the said plea in abatement was decided against the defendant."

It is insisted that the indictment is illegal for the following reasons: (1) Because it was found by an illegal grand jury not chosen according to law. (2) Because John T. Robertson was not the legal foreman of the grand jury, but W. H. Nunnally was the legal foreman duly elected by that body. (3) Because the court did not have authority to withdraw from the jury a duly elected foreman, W. H. Nunnally, without cause, and substitute another grand juror who had come in late, and trouble the body to elect another name. (4) Because the court should have put a fine upon the absent juror, if he had no legal excuse. (5) Because the jury commissioners arbitrarily excluded from the grand jury and the petit jury all lawyers, ministers of the gospel, doctors, dentists, railroad engineers, and firemen, there being ten or other large number of each class in the county, who were citizens and residents and possessed the qualifications required by law for grand jurors and petit jurors. "Defendant contends that the arbitrary exclusion of this class without reference to their qualifications was in violation of the statute and Constitution of the state of Georgia, and especially that provision of the Constitution which guarantees due process of law, and that it was in violation of the fourteenth amendment of the Constitution of the United States, as well as other provisions of that instrument, and

had the effect of denying to the prisoner due process of law and the equal protection of the law and alledged [abridged?] his privileges and immunities as citizens of the United States. The arbitrary exclusion of the class of citizens from the grand and petit jury is contrary to the Constitution and laws of the land."

There was no error in deciding the plea in abatement against the defendant's contention on all the grounds stated therein. So far as the record discloses, the grand jury was legally organized. The jury had not been organized when Nunnally was withdrawn, and Stanton, who was regularly drawn as a grand juror, was substituted in his stead. The presiding judge did not know who had been selected as foreman when the juror Stanton was substituted for Nunnally. The oath had not been administered when the substitution was made. *Ridling v. State*, 56 Ga. 601 (1). This case is different from that of *Williams v. State*, 60 Ga. 88, cited by counsel for the plaintiff in error. There some of the jurors who found an indictment, regular on its face, were not regularly summoned and impaneled, and it was held a matter for plea and not for demurrer. But here the juror was regularly drawn, appeared in court in answer to the summons served upon him before the grand jury was organized, and took the oath as prescribed by law with the rest of the jurors. The presiding judge approved the selection of the new foreman, and we think that the jury was a legally organized grand jury, and that the indictment found by the grand jury, so organized, was a legal and valid indictment, so far as this ground of exception is concerned.

The only other ground of the plea in abatement which needs to be considered is the fifth and last; the other grounds being without merit. The fifth ground of the plea in abatement alleges that the indictment is illegal, because the jury commissioners arbitrarily excluded from the grand jury and the petit jury "all lawyers, ministers of the gospel, doctors, dentists, railroad engineers, and firemen." It is insisted by the plaintiff in error that the exclusion of these classes of citizens from the jury box, without reference to their qualifications, was in violation of the statute and the Constitution of the state, "which guarantees due process of law, and that it was also in violation of the fourteenth amendment of the Constitution of the United States, as well as other provisions of that instrument, and had the effect of denying to the prisoner due process of law and the loyal [equal?] protection of the law," etc. We think this assignment is without merit. In the case of *Thomas v. State*, 67 Ga. 460, it was held: "The jury commissioners are the proper judges of the qualifications of citizens to be placed on the jury lists of the county. That witnesses sworn on the trial think that certain names

should have been on the list, and that few colored men were selected (the defendant being colored), is no ground for a challenge to the array in a criminal case." See, also, *Wilson v. State*, 69 Ga. 224 (3 a, b.)

[2] 2. The fourth ground of the motion assigns error on the part of the court in not granting a continuance of the case for the term. In a note to this ground of the motion the trial judge certifies that: "It was shown to the court beyond doubt and without denial that the witness on account of whose absence the matter [motion?] to continue was based died the night previous to the day this case was finally called for trial." We do not see how it would be to the advantage of the defendant to continue his case on account of the absence of a witness who was shown to be dead, and hold, therefore, that it was not error for the court to overrule the motion to continue on that ground. It is insisted, in argument by the counsel for the plaintiff in error, that the continuance should have been granted, for the reason that counsel had been recently employed, and on account of the sudden death of the witness he was not prepared to go on with the trial. If such was the case, a motion on this ground should have been made, directed to the discretion of the court. In the absence of such motion the refusal of the continuance is no cause for a new trial. The motion, which was in writing, was based solely on the ground of the absence of the witness named, and "for the purpose of getting the evidence of this witness." Civil Code 1910, § 5724.

[3] 3. The fifth ground of the motion for a new trial is not approved by the court, and will not be considered.

[4] 4. Complaint is made of the judge's charge on the subject of reasonable doubt. The excerpt from the charge complained of is as follows: "A reasonable doubt is one that grows out of the testimony or from the absence of testimony, or a conflict in the testimony and the defendant's statement, and leaves the reasonable mind wavering and uncertain not satisfied from the evidence. You cannot create for yourself a doubt and act upon it; you cannot raise an artificial or captious doubt in order to acquit." It is insisted that the presiding judge committed error in charging the jury that, if they had a reasonable doubt from a conflict of the evidence and the defendant's statement, they should acquit; as the jury would have a right to acquit if they had a doubt of his guilt from the defendant's statement alone, or from the state's evidence alone. The judge did charge the jury that "if after a fair and impartial consideration of the entire case, including defendant's statement, a reasonable doubt exists, it is the duty of the jury to give the defendant the benefit of it and acquit him." Fairly construed, the charge as a whole was free from the criticism of it. The excerpt complained of gives

only a portion of the charge on this subject. The record shows that the court gave the jury the following instructions: "A reasonable doubt is an actual doubt that you are conscious of after going over in your own minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit. It is essential to a verdict of condemnation that the guilt of the accused shall be fully proved. Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient unless it generates full belief of the fact to the exclusion of a reasonable doubt. A reasonable doubt is one that grows out of the testimony, or from the absence of testimony, or a conflict in the testimony and the defendant's statement, and leaves the reasonable mind wavering and uncertain—not satisfied from the evidence. You cannot create for yourself a doubt and act upon it; you cannot raise an artificial or captious doubt in order to acquit. The doubt should be real and honestly and fairly entertained after all reasonable efforts to find out the facts. And if after a fair and impartial consideration of the entire case, including defendant's statement, a reasonable doubt exists, it is the duty of the jury to give the defendant the benefit of it and acquit him. If, however, you are satisfied of his guilt to the exclusion of such a doubt as this, it would be your duty to convict."

[5] 5. Another ground of alleged error is because of the judge's charge on the subject of drunkenness, which was as follows: "On the subject of drunkenness, I charge you that drunkenness is no excuse for crime. One who voluntarily and in testimony [intentionally] kills must meet the demands of the law with some other excuse than that of drunkenness. To be too drunk to form the intent to kill, the slayer must be too drunk to form the intent to shoot. Still, I charge you that, if the defendant was drunk when he fired the fatal shot which took the life of Roseberry, you may consider this, like any other fact, to illustrate his intent and motive and otherwise to shed light upon the transaction." In a note appended to this ground of the motion, the judge trying the case says: "The sole defense was self-defense, and justifiable homicide under the distress of the fears of a reasonable man, and accident. The statement shows these defenses were set up, and in addition in this statement the defendant denied that he was drunk, and the evidence on the part of the state fails to show that he was drunk—that he had taken a couple

of drinks before the killing." The brief of evidence sustains the judge in the note just quoted, with reference to the testimony and the statement of the accused. Nor do we think the charge complained of was erroneous as against the defendant, especially in view of the statement of the defendant himself, who claimed that he was not drunk. If the charge complained of was not full enough, a request should have been made for a fuller charge on the subject, if the facts authorized it. But conceding for the sake of the argument that the defendant was drunk at the time of the homicide (which is not borne out by the evidence), this court has often held that voluntary drunkenness is no excuse for crime. *Estes v. State*, 55 Ga. 30 (1-3); Penal Code 1910, § 39; *Marshall v. State*, 59 Ga. 154; *Moon v. State*, 68 Ga. 687 (6); *Hanvey v. State*, 68 Ga. 612 (2); *Beck v. State*, 76 Ga. 452 (1); *McCook v. State*, 91 Ga. 740, 17 S. E. 1019; *Cribb v. State*, 118 Ga. 316 (8), 45 S. E. 396.

[8, 10] 6. The following charge of the court, under the circumstances of this case, was not error as against the defendant: "Malice is excluded if the intention to kill grows out of hot blood produced by provocation other than that induced by mere words, threats, menaces, or contemptuous gestures. If the provocation be produced by an actual assault, by an attempt to commit a serious personal injury upon the person killing, or by other equivalent circumstances, calculated to excite sudden passion, the fact that the defendant shot with the intention to kill would not render the offense that of murder. But if the killing occurred under such circumstances and was unlawful, the slayer is guilty of voluntary manslaughter." *Pryer v. State*, 128 Ga. 29 (5), 57 S. E. 93; *Bird v. State*, 128 Ga. 253, 57 S. E. 320. See, also, *Adkins v. State*, 137 Ga. 81, 72 S. E. 898, where it was said that "the doctrine of reasonable fear has no connection with the offense of voluntary manslaughter." That portion of the charge excepted to in this case was on the subject of voluntary manslaughter, and, under the ruling just cited, the contention of counsel for the plaintiff in error is not sound.

[7, 11] 7. It was not error for the court to charge the jury: "The doctrine of reasonable fears only applies when the danger is urgent and pressing or apparently so at the time of the killing." And especially where it appears that just before the charge excepted to the court had charged the jury that: "The defendant is not required to demonstrate that a felony was about to be committed upon him or that his life was in danger. He is only required to show that the circumstances as they appeared to him at the time were sufficient to make him so believe."

[8] 8. If the defendant desired a fuller charge than that complained of in the tenth

ground of the motion, on the subject of a mutual intent to fight, it was his duty to request further instructions. We may remark, however, that a mutual intent to fight does not necessarily reduce the crime from murder to manslaughter. In order to do so, "the killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should have been an interval between the assault or provocation given and the homicide, of which the jury in all cases shall be the judges, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder." Penal Code 1910, § 65.

[8] 9. There was abundant evidence upon which the jury could have found the defendant guilty of murder. We think, from a careful reading of it, that the evidence supported a verdict of guilty as alleged in the indictment; and as the presiding judge is satisfied with it, we will not disturb the finding of the jury.

Judgment affirmed. All the Justices concur.

(137 Ga. 537)

GEORGIA R. & BANKING CO. v. TOWN OF DECATUR.

TOWN OF DECATUR v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia. Feb. 14, 1912.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS (§ 425*)—PUBLIC IMPROVEMENT—ASSESSMENTS—PROPERTY LIABLE.

A railroad company owns a strip of land in a municipality, 116 feet wide, through the center of which runs its main line of railroad. The land is located between two streets of the town, along which the town, under legislative authority, laid, respectively, 4,456 and 938 feet of sanitary sewer pipe. The land is held for present use to support the roadbed and to provide for an increase of tracks, which the future needs of the railroad probably may require. Under such circumstances the land abutting on the sewers, of such depth as will not interfere with the present roadbed, is liable for the cost of assessment of the local improvement, and such assessment is not illegal because the abutting property in its present condition, and as devoted to its present use, may not be specifically benefited by the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1031-1034; Dec. Dig. § 425.*]

2. MUNICIPAL CORPORATIONS (§ 465*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—STATUTORY PROVISIONS.

Under its amended charter (Acts 1903, p. 504) the town of Decatur was authorized to construct a system of sewerage and to assess against abutting property on each side of a street improved fifty cents per lineal foot. The legislative determination of the cost of the local public improvement and its apportionment to the abutting land is conclusive as to these matters.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1108; Dec. Dig. § 465.*]

3. MUNICIPAL CORPORATIONS (§ 425*)—PUBLIC IMPROVEMENTS—ASSESSMENT—PROPERTY LIABLE.

In the absence of express legislative authority, the main track of a railroad company is not subject to levy and sale to satisfy a lien for assessment for local improvements. It follows that an execution for assessments issued against a lot of land bisected by the main track of a railroad is not liable in solido for improvements on two streets which bound the lot of land and between which the main track is located, and therefore a portion of the land on one side of the railroad track cannot be levied on to satisfy assessments made against the entire strip of land through which the railway runs, on account of sewers constructed in streets lying on each side of the track.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1031-1034; Dec. Dig. § 425.*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Proceedings under execution on an assessment by the Town of Decatur against the Georgia Railroad & Banking Company. To the judgment, both parties bring error. Judgment reversed on both bills of exceptions.

Jos. B. & Bryan Cumming and Jno. S. Candler, for plaintiff in error. Mayson & Johnson and Leslie Steele, for defendant in error.

EVANS, P. J. By an act approved July 30, 1903 (Acts 1903, p. 504), the charter of the town of Decatur was so amended as to authorize the construction of a system of sewerage for that town. The caption and first section of the act are as follows:

"An act to amend the charter of the town of Decatur, in the county of De Kalb, so as to authorize the mayor and council of said town to construct a system of sewerage for said town, and to assess the cost of constructing said sewerage system against the abutting property, or the property through which said sewer may be constructed, and against the owners thereof, and for other purposes.

"Section 1. Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by the authority aforesaid, that from and after the passage of this act the mayor and council of the town of Decatur, in the county of De Kalb, shall have full power and authority to lay down and construct sewers in said town, and to assess the sum of fifty cents per lineal foot upon the property and estates respectively abutting on said sewer on each side of the street along which said sewer is laid or constructed; and in consideration of the payment of said assessment, the owners of said estates shall have the right to connect their drains from said abutting property for the discharge of sewerage into said sewer; and in case any such sewer is laid down or constructed through or on any private property, along

the course of any natural drain or otherwise, a like sum of fifty cents shall be assessed upon such property abutting on each side of said sewer for every lineal foot, making in all one dollar for every lineal foot to be assessed upon such property through which sewers are constructed as aforesaid: Provided, that when the same party owns the land on both sides of a sewer running through his land, he shall be assessed only for one side thereof; and in consideration of the payment of said assessment, the owners of real estate, respectively, on each side of said sewer, through or over which such sewer may be constructed, shall have the right to connect their drains from said abutting property for the discharge of sewerage into said sewer. The extent and character, material used, and expense of sewers constructed, as well as the time and manner of constructing the same, shall be in the discretion of the mayor and council of said town, to be prescribed from time to time by ordinance. The remaining cost of all sewers not thus assessed shall be paid by said mayor and council from the treasury of said town."

The Georgia Railroad & Banking Company owns a lot of land in the town, lying between College street and Railroad avenue, 116 feet in width, along the center of which is constructed its main line of railroad track. The town constructed a line of sewerage pipes in front of this property on College street, 4,456 feet, and a line of sewerage pipes, 938 feet, on Railroad avenue. For the construction of this sewer the railroad's property was assessed 40 cents for each lineal foot the sewer pipe was laid. An execution was issued against the property in solido for the aggregate sum. This execution was levied upon a rectangular strip of the land 30 by 912 feet, lying on one side of the railroad track. The railroad company interposed its affidavit of illegality; and on demurrer all grounds of the affidavit, except such as set up that the cost of the work as constructed was less than the amount assessed, were stricken. The case was tried by the judge without the intervention of a jury. He adjudged the railroad company subject to one-half of the amount assessed against its property. The company and the town sued out bills of exceptions.

Though assessments for local improvements are not taxes, within the meaning of the requirement of the Constitution that taxes must be ad valorem and uniform, nevertheless assessments for local improvements, such as street paving and sewerage, are an exercise of the taxing power. While assessments for sewerage are primarily referable to the taxing power, they also have in many instances the aspects of police regulations. It is competent for the Legislature

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to authorize the construction of a sewerage system in a municipality and to determine how the cost shall be borne as between the public and the property to be benefited. The Legislature may fix some definite standard of apportionment of costs to be applied to the property abutting the improvement by a measurement of length, quantity, or value. "Benefit to the owner of the real estate assessed, so far as necessary to be passed upon, as well as the necessity or reasonableness of the improvement, being for the determination of the Legislature, is concluded by the act authorizing the assessment, and will not be inquired into by the courts unless in extraordinary cases, presenting a manifest abuse of legislative authority." *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580. The foregoing principles were elaborately considered in the cited cases, and we need only apply them to the questions presented by the affidavit of illegality.

[1] 1. The first of these raises the point that a local assessment for a sanitary sewer cannot be levied against a railroad right of way. The argument is advanced in support of this contention that a sanitary sewer alongside a right of way of a railroad from the nature of things cannot be of benefit to the railroad, and comes within the exception to the rule referred to in the *Speer Case*, and applied in the case of *City of Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408, and 101 Ga. 697, 29 S. E. 14. In the latter case the property against which a paving assessment was made was, in consequence of its peculiar shape and situation, not worth more after than before the improvement, and the cost of the improvement largely exceeded the value of the lot; and under such circumstances the process to enforce the collection of the assessment was enjoined, because it virtually amounted to a confiscation of the property. The case in hand does not come within the exception to the rule referred to in the *Speer Case* and illustrated by the *Hamlein Case*. The railroad's land which abutted the improvement is 116 feet wide and located between two streets, and although it is stated in the affidavit of illegality that its present use is for the maintenance of the roadbed and that future needs of the company shall probably require all of it for additional tracks, it does not appear that the railroad company may not now put it to some accessorial use, such as leasing it for warehouse and business purposes. The railroad company does not present a case of confiscation. Its contention is but an inference drawn that it will derive no benefit from the improvement. It may be that from the present use to which the property is put no special benefit may result; but as all of the abutting property is not actually required for the support of

the roadbed, and may be used for warehouse or other business purposes, we cannot say that no special benefit will ensue. As was said by Mr. Justice Holmes: "There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspect, at least, it is peculiarly a thing to be decided by those who make the law." *L. & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 433, 25 Sup. Ct. 466, 49 L. Ed. 819. See, in this connection, *Chicago, etc., Ry. Co. v. City of Janesville*, 137 Wis. 7, 118 N. W. 182, and valuable note to this case in 28 L. R. A. (N. S.) 1124.

[2] 2. The railroad company contends that under the act providing for the construction of the sewerage system the cost of the improvement must be limited to costs actually incurred in front of the property. Learned counsel for the railroad company conceded on the argument that the Legislature could embrace, as a part of the cost to be assessed on the abutting property owner, not only the cost of providing and laying the sewer, but also the cost of all other things that went to make up a complete sewerage system; but it was contended that under the special act the Legislature did not make such provision. The caption and the first section of the act are set out in the statement of facts; and we think the legislative intent, as expressed from the language of the act, is to authorize the construction of a sewerage system in the town of Decatur at a cost of 50 cents per lineal foot of the land abutting on each side of the improvement, and that the additional cost shall be paid by the town. It was competent for the Legislature to estimate the cost of the improvement, and to fix the frontage assessment. As was said by the Supreme Court of the United States: "The Legislature determines expenditures and amounts to be raised for their payment; the whole discussion and all questions of prudence and propriety and justice being confined to its discretion. It may err; but the courts cannot review its discretion." *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879. The Legislature having determined that the cost be apportioned to the abutting land on each side of the improvement, the abutting landowners have no cause for complaint that the town, upon discovering that it could construct the improvement for a smaller sum, assessed the cost of the improvement at a less sum than fixed by the statute. It would

have been competent for the town to assess the improvement at \$1 per lineal foot, 50 cents of it to be paid by the landowners on each side; and the landowner cannot complain that the town voluntarily reduced the assessment to 40 cents per foot against each abutting tract of land.

[3] 3. The fl. fa. ran against the entire property abutting on the improvement, but was levied on a part of it. It was urged, as a ground of illegality, that the fl. fa., being a special lien against the property along which the sewer was laid, could not be levied for the whole amount upon a selected part. The affidavit of illegality alleged that the defendant owns a strip of land between College street and Railroad avenue, 116 feet in width, along the center of which is constructed its main line of railroad track, and that its present use is to give a sufficient right of way for the proper maintenance of the present roadbed and to provide for increase in the number of tracks as the business of the defendant may require in the future. A majority of the authorities are to the effect that the track, rails, and ties of a railroad company cannot be sold by piecemeal, in the absence of express legislative permission. The reason of the rule is that a railroad company is a quasi public institution, and owes a duty to the public to discharge the objects of its franchise, and a compulsory sale of a fragment of its track will prevent its discharge of this duty. Gray on Limitations of Taxing Power, § 1190; City of Atlanta v. Grant, 57 Ga. 340. Only so much of the right of way as is essential to the discharge of its present obligations comes within the operation of the principle. A railroad company, by extensive purchase of real estate for future needs, cannot defeat the sale of such real estate under a valid assessment against so much of the right of way as is not necessary for the present maintenance of its roadbed. We think, therefore, that the assessment should have been against the abutting land of such depth as not to interfere with the roadbed, and the land on each side of the track should have been assessed for the abutting improvement; that is to say, the abutting land on College street alongside of which is laid 4,456 feet of sewerage should be assessed 40 cents per foot, and the abutting land on Railroad avenue, alongside of which 938 feet of sewerage is laid, should be assessed 40 cents per lineal foot. Separate fl. fas. should be issued for each assessment, running against the property abutting the improvement.

We are not informed by the affidavit of illegality whether the property assessed contains warehouses or depots. If the right of way contains such structures, and is put to such uses, it is assessable and liable for the local improvement abutting the same. Chicago, etc., R. Co. v. Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763. As the

assessment was made against and levied upon the whole lot, which was bisected by the railroad track, it follows that the illegality should have been sustained on the ground stated in this division of the opinion.

Judgment reversed on both bills of exceptions. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 567)

FRANKLIN COUNTY v. GILLESPIE.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 302*)—REVIEW—GROUNDS FOR NEW TRIAL.

The note of the trial judge, appended to the ground of the motion for a new trial complaining of the exclusion of certain testimony of several witnesses, indicates that he did not intend to approve the ground as stated, and therefore this court cannot pass upon the merits of such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756; Dec. Dig. § 303.*]

2. INSTRUCTIONS.

The grounds of the motion assigning error upon the mere failure of the court, in the absence of any written request, to further instruct the jury as to certain matters dealt with in the charge, are without merit, when considered in connection with the entire charge as given.

3. SUFFICIENCY OF EVIDENCE.

There was evidence to authorize the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action between Franklin County and A. M. Gillespie. From the judgment, Franklin County brings error. Affirmed.

Geo. L. Goode, for plaintiff in error. W. R. Little, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 577)

HORTON v. BLACK.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 156*)—INTENT OF GRANTOR.

If a debtor conveys his property with intent to delay or defraud his creditors, and the grantee takes with knowledge of such intent, the land can be subjected to the judgment of one of such creditors rendered after the conveyance. If the conveyance is not made with such intent, but is a bona fide transaction on a valuable consideration and without notice or ground for reasonable suspicion, it is valid. Civil Code 1910, § 3224 (2).

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 156.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence fully supported the verdict.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. APPEAL AND ERROR (§ 1078*) — BRIEF — WAIVER OF OBJECTIONS.

It is settled by many adjudications that grounds of a motion for new trial, which are not referred to or argued in the brief of counsel for plaintiff in error, will be treated as waived, and will not be decided by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action between W. H. Horton and J. T. Black. From the judgment, Horton brings error. Affirmed.

G. A. Coffee, for plaintiff in error. J. G. B. Erwin, Jr., and F. K. McCutchen, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 583)

DODSON v. SOUTHERN RY. CO.
(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 654*) — BAR OF SUBSEQUENT ACTION—DISMISSAL.

Where a case was dismissed upon general demurrer, and it appears that the declaration, while so defective as to be open to attack by general demurrer, could have been amended by averments of negligence showing a complete cause of action, the judgment of dismissal may be pleaded in bar of a subsequent suit brought for the same cause of action, although the latter states the cause more completely, by adding averments of negligence which were wanting in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.*]

2. DISMISSAL AND NONSUIT (§ 79*)—INVOLUNTARY DISMISSAL — INTERPRETATION OF ORDER.

The court did not err in construing an order dismissing the first suit, which recited that such former suit was dismissed "on general motion," as being a judgment sustaining a general demurrer to the declaration in the case dismissed.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 174, 175; Dec. Dig. § 79.*]

Error from Superior Court, Douglas County; R. W. Freeman, Judge.

Action by J. P. Dodson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. James, for plaintiff in error. Maddox, McCamy & Shumate, for defendant in error.

BECK, J. The plaintiff brought suit against the Southern Railway Company to the May term, 1905, of the superior court of Douglas county, complaining that through the negligence of its agents and employes in the running of a train the defendant had

inflicted certain injuries upon a mule described in the petition, to the injury and damage of petitioner, the owner of the mule. The defendant pleaded, among other matters, the defense of former adjudication of the cause, alleging that a former suit, based upon the same cause of action, had been dismissed upon general demurrer. In support of the plea setting forth a former adjudication, counsel for the defendant introduced in evidence the record in the first suit, to the introduction of which counsel for the plaintiff objected, on the ground that "in the plea it is set up that they filed a demurrer to this bill, and here they are offering a bill—a declaration—wherein the cause was dismissed on motion, simply a motion." After the introduction of the evidence, the court directed a verdict for the defendant.

[1] 1. While the plea of res adjudicata in this case is inartificially drawn, and in some respects is open to attack by special demurrer, it is sufficient, in the absence of such special demurrer, to withstand the general oral objection made to the plea at the trial term. It appears from the plea, and from the records of the first case introduced to support the plea, that the plaintiff, at the May term, 1903, brought suit against the defendant in the present case, alleging that the defendant had injured and damaged him in the sum of \$250, in that the employes of the defendant, by the running of a locomotive of the defendant and the train which it was pulling, had struck and seriously and permanently injured a certain mule, and disabled the animal to such an extent as to render it practically worthless. In the second suit, to which the plea of res adjudicata was interposed, the damage complained of is for the same injury to the same animal referred to in the first suit. In the first suit the pleader failed to allege negligence upon the part of the defendant's employes who were running the locomotive and train. In the second suit negligence of the company was specifically alleged. It is insisted by counsel for plaintiff in error that no cause of action was set forth in the first suit, and that its dismissal upon general demurrer cannot be pleaded in bar of the second suit. While the cause of action was so defectively set forth in the first suit as to be open to attack by general demurrer, it could have been amended by averring negligence upon the part of the defendant, and showing wherein the negligence consisted, as was done in the petition in the last case. *Ellison v. Georgia Railroad Co.*, 87 Ga. 691, 13 S. E. 809. And, that being true, a dismissal of the former suit upon general demurrer will bar a second suit based upon the same cause of action. In the case of *Greene v. Central of Georgia Ry. Co.*, 112 Ga. 859, 38 S. E. 860, in discussing the rul-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing in the case of *Kimbrow v. Railway Co.*, 56 Ga. 185, the court said: "The effect of the decision, therefore, is that a dismissal of a declaration on a general demurrer thereto will bar a second declaration for the same cause of action, though it contains additional allegations, if they could have, by way of amendment, been incorporated in the first." And the court, after quoting from the decision supporting that ruling, continued: "In the present case the second petition is between the same parties and based on the same alleged cause of action. It is true that the grounds of negligence relied on in the two petitions are different, but all the grounds of the second could have been incorporated in the first by way of amendment; and, according to the decisions above cited, the judgment on demurrer was conclusive as to all such matters. On these decisions we rest our conclusion, though many authorities could be cited for as well as against it. See 1 Freeman, Judg. (4th Ed.) § 267; 2 Black, Judg. § 708; *Gould v. Railroad Co.*, 91 U. S. 534, 23 L. Ed. 416."

[2] 2. It is further contended by counsel for the plaintiff that it does not appear that the record of the former suit, offered to support the plea of *res adjudicata*, shows that it was dismissed upon general demurrer. The order passed dismissing the former suit is in the following language: "On general motion to dismiss made, the case is hereby dismissed, with judgment for \$11 as costs against Dodson, the plaintiff. March 24, 1904." We are of the opinion that the court properly construed this as an order sustaining a general demurrer. A general motion to dismiss a cause may be made orally at the trial term, and is effective as a general demurrer, where a case is open to attack by general demurrer. On the trial of the present case, the court stated to counsel for plaintiff that the terms of the order implied "that the cause was dismissed because there was no cause of action," and offered to allow plaintiff's counsel to show that the truth was otherwise; but this counsel did not attempt to do. The construction placed by the court below on the order was the proper one; and under the ruling made in the first division of this opinion the court properly directed a verdict for the defendant.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 561)

JONES v. LAURENS BANKING CO.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 715*)—*RES JUDICATA*—DOCUMENTARY EVIDENCE—RECORD OF FORMER SUIT.

Where the record of a former suit between the same parties, embracing the petition and

the plea filed therein, shows that the same matters of defense were then pleaded by the defendant as were pleaded in the present case, and that, while the two notes sued upon in the present case were not included in the petition in the former suit, the right of the plaintiff to recover upon them was put in issue by plea of settlement between the defendant and the plaintiff, in which settlement were embraced both the two notes sued upon in the first suit, as well as the two sued upon in the present case, such record was properly admitted in evidence.

(a) It was competent for the plaintiff to introduce the record of the former suit, to meet a defense based upon the alleged settlement, which had been set up to prevent a recovery in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1247; Dec. Dig. § 715.*]

2. APPEAL AND ERROR (§ 843*) — REVIEW—QUESTIONS CONSIDERED.

The ruling that the transcript of the record of the former suit was properly admitted controls the case in favor of the plaintiff, irrespective of other questions raised in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8331-8341; Dec. Dig. § 843.*]

Error from Superior Court, Toombs County; B. S. Rawlings, Judge.

Action by the Laurens Banking Company, for use, etc., against W. B. Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

Lankford & Dickerson and G. W. Lankford, for plaintiff in error. Thos. J. Parrish and Hines & Jordan, for defendant in error.

BECK, J. C. S. Pope brought suit, as holder and transferee of four promissory notes, against W. B. Jones, to the February term, 1907, of the superior court of Toombs county. The notes were for the principal sum of \$203.82, \$179.65, \$168.50, and \$279.42, respectively. They fell due, in the order above named, on May 8, 1900, June 8, 1900, June 20, 1900, and June 16, 1900. By amendment the plaintiff struck all reference to the first two notes, and declared that no judgment upon the same was prayed for. Subsequently to the filing of that suit, the plaintiff brought suit in the city court of Dublin on the note falling due on May 8, 1900, for \$203.82, and on the note falling due on June 8, 1900, for \$179.65; these two being the notes which by amendment were stricken from the first suit. These two notes were signed by W. B. Jones and A. B. Jones, as principals. W. B. Jones filed a plea in both cases. The case in the city court was tried in March, 1909, and resulted in a verdict for the plaintiff for the full amount of the two notes sued on. The case in the superior court was tried at the February term, 1910, and resulted in a verdict for the full amount of the notes sued on. W. B. Jones moved for a new trial in the latter case. The motion was overruled, and he excepted.

[1] 1. One of the grounds of the motion for a new trial complains that a certified transcript of the record of the case in the city court of Dublin was admitted in evidence upon the trial of the present case. It was offered for the purpose of establishing the plaintiff's contention that the matters in issue between the parties to the case in the superior court had been adjudicated by the trial of the case in the city court. It appears from this transcript that the defendant, after admitting the execution of the notes sued on, set up as a defense that the notes had been fully discharged as the result of a settlement between himself and the plaintiff. It was alleged in the plea in the case in the city court that on April 24, 1901, W. B. Jones was indebted to the plaintiff on the notes sued on, and on two other notes signed by W. B. Jones individually and indorsed by A. W. Garrett, cashier, in the principal sum of \$831.19, and that on the date last mentioned W. B. Jones and the plaintiff "had a settlement of all matters between them, and the defendant, at Conders, Ga., paid to the plaintiff the sum of \$——, leaving a balance due by the defendant Jones to the plaintiff on said date on the notes hereinbefore set out [that is, the four notes originally sued on in the superior court] of the sum of \$597.42"; that at the time of the settlement there was certain timber, which was delivered partly to Grier Bros. and partly to Bales, for and at the instance of the plaintiff; that no account was taken of this timber, "because the said Pope had not received measurements and bill of sale of said timber; that said timber so delivered to Pope had at least 60,000 feet in same, for which defendant was entitled to \$10.50 per 1,000 feet, making a total of \$639.60 due by plaintiff to defendant, Walter B. Jones; that it was distinctly agreed to and thoroughly understood by both plaintiff and defendant Walter B. Jones that said timber should be credited on balance due at that time on said notes sued on; and that said timber aforesaid was more than sufficient to pay the balance due by defendant Walter B. Jones on said notes." In the plea there was a further averment of the delivery by the defendant to the plaintiff of 25,000 feet of timber, of the value of \$250. Certain other items relating to lumber delivered and services performed by the defendant to the plaintiff were set forth, amounting to the sum of \$1,410, "which amount was paid by defendant to plaintiff on balance due on aforesaid notes, and \$500 for borrowed money and poplar bought from plaintiff by defendant; that said amount of \$1,410 was more than enough to pay off the said notes sued on and all other indebtedness due by the defendant Walter B. Jones to plaintiff C. S. Pope, and was paid on said indebtedness] aforesaid; that said plaintiff C. S. Pope,

notwithstanding the fact that said money aforesaid and said timber was paid by defendant Walter B. Jones and accepted by said plaintiff as payment of said notes, the said plaintiff failed and refused to apply same to said notes and indebtedness as aforesaid, or to give the defendant Walter B. Jones credit for the said sum of \$1,410, aforesaid.

From this plea it distinctly appears that, while in the suit brought in the city court of Dublin only two of the notes included in the suit previously brought in the superior court of Toombs county were sued upon, the defendant by his answer distinctly put in issue the question as to whether or not he was indebted to the plaintiff upon all or any one of the four notes. It was averred by the defendant that on April 24, 1901, he and the plaintiff had a settlement of all matters between them, that averment relating specifically to the indebtedness represented by all of the four notes, and that that settlement left a balance due to the plaintiff of \$597.42, and that he then pleaded matter showing a complete discharge and payment of that balance and the other indebtedness brought about by subsequent dealings between the parties. By an amendment to his original plea to the suit in the superior court the defendant set up the same settlement of April 24, 1901, between himself and the plaintiff. He again, after having alleged the settlement of all matters between them, stated the balance to be \$597.42, and alleged the delivery to Pope, or to other parties for and at the instance of Pope, of the rafts of timber containing 60,000 feet, of the value of \$639.60, and the subsequent delivery of timber to Pope, 25,000 feet in amount, of the value of \$250, and set forth the other dealings between himself and the plaintiff subsequently, as set up in the answer he filed in the city court. We are of the opinion that the court properly admitted the record of the suit brought by the plaintiff in the present case against the defendant in the city court of Dublin. It shows that, while only two notes were sued upon there, the defendant himself brought into the controversy the two notes that were being sued upon in the superior court of Toombs county. Under the plea filed in the city court the obligation of the defendant on all four of the notes herein referred to was put in issue. The defendant, in the suit in the city court of Dublin, pleaded a settlement which related, not to any one or two of the four notes, but to all of them. In his plea he showed a settlement which left a balance of \$597.42, and then in the next paragraph of his plea he alleged a delivery of 60,000 feet of timber, of the value of \$639.60, which was more than enough to cancel the unpaid balance, and then in immediate connection he alleged the delivery of still other timber, of the value of \$250. The jury found against

him upon the issue made by these averments, giving to the plaintiff a verdict for the full amount of his demand.

Upon what theory could the defendant again be heard to set up the delivery of these various lots of timber, which were more than sufficient in value to discharge the entire balance of his indebtedness to the plaintiff after the settlement referred to? We can conceive of none. In the city court the defendant rested his case upon a settlement of a certain date of all matters, which included the four notes, which settlement left a balance due by him to the plaintiff, which balance he asserted had been entirely discharged by delivery of goods of a value greater than the amount of the balance. The jury found against him on the issues made by his defense. Can he now set up, as a defense to the two notes which were being sued to judgment in the superior court, the same settlement, the same balance due after the settlement, and the same payments made to cancel that balance? Certainly he cannot, unless he make it appear, from the evidence introduced on the trial of the present case, that some of the matters put in issue by his plea in the city court of Dublin were not actually litigated. That that was done is not suggested in the ground of the motion which we are now considering, and which is based solely upon an alleged error in the admission of the record in the case in the city court. It was not necessary that the plaintiff should have pleaded former adjudication, in order to make the introduction of a transcript of the record proper. The petition of the plaintiff and the answer of the defendant were the only pleadings necessary in the case. And when the defendant attempted to defeat the plaintiff's action by setting up matters that had been adjudicated in a former suit, the plaintiff could show the former adjudication by evidence competent for that purpose, without having given any notice of the evidence in his pleadings.

[2] 2. There are two other grounds in the amended motion for a new trial—one complaining of the admission of certain evidence over the objection that it was immaterial and irrelevant, and the other assigning error upon a certain excerpt from the court's charge. It is unnecessary to consider these, however, as it appears from a consideration of the entire record that, if the transcript of the record of the suit between these parties in the city court of Dublin was properly admitted, a verdict for the plaintiff necessarily followed, and the court might properly have so directed. Counsel for plaintiff in error concede this in their brief.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 572)

BARRETT v. LOUISVILLE & N. R. CO. et al.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTIONS—PLEADING.

The petition sufficiently charged actionable negligence upon the part of the defendant. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—PLEADING.

The circumstances attending the homicide, as set forth in the petition, do not make such a case as that the court can, as a matter of law, decide that the plaintiff's husband could by the exercise of ordinary care have avoided the consequences to himself of the defendants' negligence. In this connection, see *Richmond & Danville R. Co. v. Howard*, 79 Ga. 44 (2), 3 S. E. 426; *Georgia R. Co. v. Pittman*, 78 Ga. 325 (5).

(a) It was error to dismiss the petition on general demurrer.

(b) This case differs from that of *Thompson v. Southern R. Co.*, 134 Ga. 371, 87 S. E. 939, in that in the present case plaintiff's husband was on the public crossing when struck, and was in the discharge of his duty at the time he was struck, whereas in the case cited the injured person was not on a crossing, and was not in the discharge of his duty at the time he was struck, and, further, in the case cited only one train was passing, whereas in the case at bar there were two trains coming from different directions, and the plaintiff's husband, while in the performance of his duty, was confronted with an emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1069-1132; Dec. Dig. § 289.*]

3. SPECIAL DEMURRER—NO RULINGS.

The court did not rule upon any of the grounds of special demurrer, and none of them are involved in this decision.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by M. L. Barrett against the Louisville & Nashville Railroad Company and another. Judgment for defendants, and plaintiff brings error. Reversed.

Mrs. M. L. Barrett instituted suit against the Louisville & Nashville Railroad Company and Walter Sparrow, an engineer in charge of one of defendant's trains, for damages on account of the homicide of her husband. Among other things the petition, as amended, alleged the following in substance: Kennesaw avenue, a public street in Marietta, a city of 8,000 inhabitants, was crossed by the railroad of the defendant railroad company, and also by that of the Western & Atlantic Railroad Company; there being three lines of railroad tracks. A great many persons and vehicles constantly passed over the crossing by means of the street, while a great many trains constantly and continuously passed over the crossing by means of the railroad tracks. As a consequence it was a place of danger, and the plaintiff's husband was

employed by the Western & Atlantic Railroad Company as a watchman at that place. While in the discharge of duty, at about 7:30 o'clock a. m. on the 24th day of October, 1908, he saw two persons approaching the crossing rapidly and about to be caught by a freight train of the defendant railroad company, which was approaching the crossing from the south at a rapid rate of speed. He immediately turned, waving his flag violently as a warning to the persons to stop, and just succeeded in stopping them from passing over the crossing and coming in collision with the approaching freight train. While thus engaged, and looking in the direction of the persons he was endeavoring to stop, the passenger train of the defendant approaching from the north (being the opposite direction), at a rate of 40 miles per hour, without any warning by ringing bells or otherwise, struck and killed him instantly. The passenger train was about five minutes ahead of its schedule time. Plaintiff's husband did not know of its approach, and could have been seen by those in charge of the train for a distance of 300 yards before reaching the crossing. Sparrow, the engineer, was not on the lookout. The court dismissed the petition on general demurrer, and plaintiff excepted.

Clay & Morris, for plaintiff in error. D. W. Blair and J. G. Roberts, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 601)

ROBERT v. WILKINSON COUNTY.

(Supreme Court of Georgia. Feb. 16, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 102*)—SUBJECTS OF RELIEF—ACTS OF OFFICERS—ISSUANCE OF WARRANT.

Before the writ of mandamus will issue to compel the county commissioners to issue their warrant upon the treasurer to pay a debt, it must appear that the debt comes within the classes provided in the Constitution for which a tax may be levied. *Brunson v. Caskie*, 127 Ga. 501, 56 S. E. 621, 9 L. R. A. (N. S.) 1002; *Barksdale v. Hayes*, 134 Ga. 348, 67 S. E. 852.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 217-219; Dec. Dig. § 102.*]

2. TAXATION (§ 28*)—POWER TO TAX—DELEGATION TO COUNTY.

Const. art. 7, § 6, par. 2 (Civil Code, § 6562), declares: "The General Assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes in instructing children in the elementary branches of an English education only, to build and repair the public buildings and bridges, to maintain and support prisoners, to pay jurors and coroners, and for litigation, quarantine, roads, and expenses of courts, to support paupers and pay debts here-

tofore existing, to pay the county police, and to provide for necessary sanitation."

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 28.*]

3. MANDAMUS (§ 102*)—SUBJECTS OF RELIEF—ACTS OF OFFICERS—ISSUANCE OF WARRANT.

It is manifest that the compensation provided for surveyors, their chain bearers, flag bearers, and other laborers in the act approved August 17, 1908 (Acts 1908, p. 96), for services rendered in connection with the settlement of disputed county lines, is not included among those things for which a county is authorized to levy a tax.

(a) Accordingly it was not error to sustain the demurrer to the petition for mandamus which sought to compel the county commissioners to issue a warrant on the treasurer for the payment of a debt of the character last mentioned.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 102.*]

4. PLEADING (§ 248*)—AMENDMENT—CHANGE OF CAUSE OF ACTION.

The petition for mandamus to compel the county commissioners to issue a warrant was not amendable into a suit against the county for the value of the services.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 248.*]

Error from Superior Court, Wilkinson County; Jas. B. Park, Judge.

Petition by C. S. Robert for writ of mandamus to the County Commissioners of Wilkinson County. From a judgment denying the writ, the petitioner brings error. Affirmed.

J. W. Preston, Sr., and F. Chambers & Son, for plaintiff in error. Hardeman, Jones, Callaway & Johnston and Jno. S. Davis, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 568)

TALLULAH FALLS RY. CO. v. RAMEY.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 124*)—PROCEEDINGS TO PROCURE—SUFFICIENCY OF MOTION.

A ground of a motion for a new trial, complaining of the exclusion of evidence referred to therein in general terms, is sufficient, where the evidence offered is fully set out in a marked exhibit attached to the motion, and the ground of the motion, including the exhibit, which is expressly referred to in his order, is approved by the judge, although the exhibit be not referred to in the ground of the motion.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 250-252; Dec. Dig. § 124.*]

2. RAILROADS (§ 265*)—OPERATION—TORTS—COMPANIES OR PERSONS LIABLE.

Where a railroad has been duly placed by a court of competent jurisdiction in the hands of a receiver, who is in full and exclusive possession and control of the railroad and all the property of the railroad company, such company is not liable for a tort committed by the receiver or his servants in the operation of the

railroad. 33 Cyc. 722, and cases cited in notes 20 to 24, inclusive; Ocean Steamship Co. v. Wilder, 107 Ga. 222, 33 S. E. 179.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. § 265.*]

3. RAILROADS (§ 271*)—TORTS—COMPANIES OR PERSONS LIABLE—EVIDENCE.

In view of the answer filed, it was error for the court to refuse to permit the defendant company to introduce in evidence a properly certified copy of the proceedings in the federal court, showing the appointment of a receiver for the defendant railroad company, and his discharge and the pendency of the receivership at the time of the commission of the tort complained of by the operation of the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 866; Dec. Dig. § 271.*]

4. OTHER ASSIGNMENTS OF ERROR NOT REFERRED TO.

The foregoing notes deal with all the assignments of error referred to in the brief of counsel for plaintiff in error.

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by James H. Ramey against the Tallulah Falls Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hamilton McWhorter, J. C. Edwards, Sam Kimsey, and Lamar Rucker, for plaintiff in error. Robt. McMillan and R. R. Arnold, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 573)

PARKS v. WILLIAMS.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 119*)—PROCEDURE—ATTACHMENT—VALIDITY OF SALE.

Where an attachment has been sued out in a justice's court against a nonresident, and no notice has been served as provided by Civil Code 1910, § 5103, and there has been no bond made, or appearance and defense, a general judgment cannot lawfully be rendered against the defendant; and if such a judgment be rendered, and an execution be issued accordingly and levied, the sale is void. Carithers v. Venable, 52 Ga. 389; Kimball v. Nicol & Davidson, 58 Ga. 175.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 119.*]

2. EXECUTION (§ 245*)—SALE—ESTOPPEL TO DENY VALIDITY.

A defendant in such an execution may estop himself from denying the validity of the sale by knowingly accepting a balance of the purchase money left in the hands of the officer after discharging the executions of the plaintiff in attachment, or directing its payment to another creditor, under a settlement with him. Tribble v. Anderson, 63 Ga. 31 (6); Reichert v. Voss, 78 Ga. 54, 2 S. E. 558; Ray v. Pitman, 119 Ga. 680, 48 S. E. 849; Civil Code 1910, § 6077.

(a) If one takes a deed from a defendant so estopped with knowledge of the facts, he will likewise be estopped; or he may so participate in the transaction as to estop himself, though

the deed to him may have been delivered before the actual disposition, by the agreement or direction of the defendant in fl. fa., of the fund left in the hands of the officer making the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 681-686; Dec. Dig. § 245.*]

3. EJECTMENT (§ 90*)—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

Where, in a statutory action to recover land held under a sheriff's sale and conveyance, it appeared that the sale was void, because based on executions issued upon general judgments, where only special judgments could lawfully have been rendered, but the purchaser set up that the plaintiff was estopped from denying the validity of the sale and the purchaser's title thereunder, and introduced evidence to support such contention, there was no error in admitting in evidence, in connection therewith, the sheriff's deed.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 90.*]

4. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

There was sufficient evidence to authorize the submission to the jury of the issue of estoppel and fraud.

(a) The charge was not altogether accurate or exact. It was especially erroneous to charge that, if the plaintiff should recover, the land sued for would be "subject to the purchase money and the amount paid by the defendant for repairs, taxes, insurance, interest on the purchase money at 7 per cent., less reasonable rents for the property." But, in view of the fact that the jury did not find for the plaintiff, and thus subject the property recovered to the charges mentioned, and in the light of the entire charge and the evidence, the verdict should not be disturbed or a reversal granted for any of the reasons set up by the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1068.*]

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by L. L. Parks against Mrs. A. S. Williams. Judgment for defendant, and plaintiff brings error. Affirmed.

W. E. Mann and M. C. Tarver, for plaintiff in error. F. K. McCutchen and C. D. McCutchen, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 569)

LOUISVILLE & N. R. CO. v. TILLESON.
(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 384*)—APPEAL AND ERROR (§ 1068*)—INSTRUCTIONS—HARMLESS ERROR.

In an action for damages against a railroad company for the wrongful ejection of a passenger, the petition contained three separate counts. The first and third were similar, except that the latter contained additional allegations as to why the ejection was wrongful. The second was similar to the first, except that it contained additional allegations as to aggravating circumstances, thus laying the foundation for the recovery of exemplary damages. On the trial it was error to instruct the jury in such manner as to authorize them to consider

the case as one for three separate causes of action for an amount equal to the sum of the damages laid in the three counts, and otherwise confuse and lead the jury to conclude that they would be authorized to find damages of the same character under each of the separate counts, thereby rendering it possible that a verdict might be rendered for double damages for one and the same tort.

(a) It does not appear that such error was harmless, because the jury, in rendering the verdict for a lump sum, recited that it was based only on counts 1 and 2.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384;* Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

2. INSTRUCTIONS.

Other portions of the charge excepted to were not entirely accurate; but in the light of the charge as a whole, and of the evidence, the criticisms upon them were not sufficient to require a new trial.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by J. E. Tilleson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Blair and E. W. Coleman, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 568)

NACOOCHEE INSTITUTE v. DAVIDSON.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 448*)—POWERS AND LIABILITIES—REPRESENTATION BY AGENTS.

A school was organized by private persons under the name of Nacoochee Institute, and a certain teacher, known as its president, having authority to teach, get out catalogues, advertise the school, and do anything he saw proper in order to build up the school, made a contract with a printer to publish a monthly magazine called the "Institute News." Its publication commenced under the contract in December, 1905, and was continued until December, 1907. A charter was obtained for the school in June, 1907, and organization as a corporation was perfected soon after the charter was granted. None of the trustees of the school, either before or after it was chartered, ever recognized the contract with the printer as a contract of the institution. Services were rendered by the printer under the contract to the amount of \$532.02, of which the sum of \$324.40 was paid at different times by the teacher who made the contract and other individuals connected with the school, either in the capacity of teacher or student, leaving a balance due of \$207.62. The nature of the magazine is not disclosed, further than that it was a paper "gotten up by the pupils." After the publication was discontinued, the printer, as well as some of the pupils, endeavored to get the trustees of the corporation to assume the debt, which was declined. Afterwards the printer instituted suit against the corporation for the balance due on the account for his services rendered under the contract, and ob-

tained a verdict. A motion for a new trial, on the grounds that the verdict was contrary to evidence, etc., was overruled, and the defendant excepted. Held, that the evidence fails to show authority upon the part of the teacher to bind the corporation to the contract, or ratification of the contract by it. In this connection, see the remarks of Evans, J., in Medical College of Georgia v. Rushing, 124 Ga. 239, 52 S. E. 333. Accordingly, the evidence was insufficient to support the verdict.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1789-1792; Dec. Dig. § 448.*]

Error from Superior Court, White County; J. J. Kimsey, Judge.

Action by Alex. Davidson against the Nacoochee Institute. Judgment for plaintiff, and defendant brings error. Reversed.

McMillan & Erwin, for plaintiff in error. Chas. H. Edwards and B. P. Gilliard, Jr., for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 570)

LOUISVILLE & N. R. CO. v. CALLAHAN.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

One of the instructions excepted to was erroneous, because there was no evidence to authorize it, and the error was of such a material character as to require the grant of a new trial.

(Additional Syllabus by Editorial Staff.)

2. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Where actions by a minor and his grandmother against a railroad company for acts of a conductor while plaintiffs were passengers were consolidated for trial, and in the case brought by the grandmother the court charged that she could recover if the conductor used the language which she attributed to him, if it tended to subject her to mortification, an instruction in the case of the minor that the same rule as to damages applies in his case was erroneous, where there was no evidence that the conductor used any improper language to the minor, who was only seven years of age, but that all he said was addressed to the grandmother, and the minor testified that he did not hear any abusive language to the grandmother.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by R. L. Callahan against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Blair and E. W. Coleman, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

FISH, C. J. Grady Callahan, a minor, by his next friend, brought an action for damages against the Louisville & Nashville Railroad Company. His grandmother, Mrs. Spence, also brought a similar suit against the same company. The acts of negligence on the part of the defendant's conductor and his abusive language to the plaintiffs while passengers on the defendant's train, as set forth in the respective petitions, were substantially the same, except that in the petition of young Callahan he alleged that upon the same occasion he received certain physical injuries by reason of a tort committed upon him by the conductor. As the two cases involved the same transaction, they were by consent tried together under the same evidence, and a separate verdict was rendered in each in favor of the respective plaintiffs. The defendant moved for a new trial in each case, which being refused, it excepted.

[2] We are now dealing only with Callahan's case. In one of the grounds of the motion for a new trial in his case, complaint is made that the court instructed the jury that "the same rule as to damages applies in this case as in the other," referring to the Spence case, and that in her case the court charged the jury, in effect, that she would be entitled to recover damages if the conductor of the defendant company used the language which she attributed to him, if it tended to subject her to humiliation and mortification. There was no evidence in the case we are now considering tending to show that the conductor used any improper or abusive language whatever to young Callahan, who was then only seven years of age, but that all the conductor said upon that occasion was addressed to Mrs. Spence. Indeed, young Callahan testified that he did not hear any abusive language used by the conductor to Mrs. Spence. It follows, therefore, that the plaintiff in this case was not entitled to recover any damages for humiliation and mortification caused by any language addressed to him by the conductor; for, as we have stated, none such was used. The instruction complained of was manifestly erroneous, for the reason just stated, and was evidently calculated to increase the amount which the jury might find in favor of the plaintiff. The amount of the verdict in this case was \$300, and the only injuries young Callahan received, according to the evidence, were that the defendant's conductor somewhat roughly took him by the arm, or hand, or both, and led him to the ground from the platform of the car where he was standing, or placed him upon the ground, and in being so taken from the platform down the steps from the car the plaintiff's foot or ankle struck the hand railing or steps, or some other portion of the car, and caused him pain, which according to the

plaintiff's own testimony he suffered for only a few minutes, and that he was forced to remain in the cold from five to seven minutes, while his grandmother, Mrs. Spence, was procuring a ticket for him, which the agent of the company had at first refused to sell her, and, further, that the plaintiff was required to enter the train from the platform of the negro coach, or, as this plaintiff testified, the smoker, and to pass through that coach in order to reach the first-class coach, or the one for white passengers.

[1] In view of the amount of the verdict, we think it apparent that the instruction complained of was harmful to the defendant. Accordingly, the judgment of the trial court is reversed on account of such erroneous instruction.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 592)

A. G. GARBUTT LUMBER CO. v. CAMP
et al.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 113*)—EVIDENCE—ADMISSIBILITY.

A suit for land was based upon prescription under color of title and seven years' possession. Certain deeds purporting to convey the land in controversy, and memoranda relating to the same, which were not admissible in evidence as muniments of title, were delivered to the plaintiffs at the time of the purchase of the land; and there was evidence tending to show that they took them, believing they were getting a genuine title to the land in controversy. *Held*, that the deeds and memoranda were admissible to show the good faith of the prescribers, and not as muniments of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 669-681; Dec. Dig. § 113.*]

2. CHARGE OF COURT—NO ERROR.

There was no error in the charges given, or failures to charge, dealt with in the second division of the opinion.

3. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict.

(Additional Syllabus by Editorial Staff.)

4. ADVERSE POSSESSION (§ 43*)—NATURE AND REQUISITES—SUCCESSIVE POSSESSIONS.

An inchoate prescriptive title may be transferred by a possessor to a successor, so that successive possessions may be tacked to make out the prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—FURTHER REQUESTS.

In an action for land, based on prescriptive title, instructions that the working and operating of timber for turpentine purposes may amount to possession which will ripen into prescription, being dependent upon the character of the work and the continuity thereof, and that whether the cultivation of a turpentine farm

upon a tract of land is such an occupancy as may be the basis of a prescriptive title is a question of fact, dependent upon the character of the possession, the extent of the visible signs of occupancy, and its continuance, were not erroneous, in the absence of a request to charge more fully.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—FURTHER OR MORE SPECIFIC INSTRUCTIONS.

Where the court charged correctly the law bearing on the issues involved, if a fuller charge was desired by defendants, a request should have been made therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

7. TRIAL (§ 255*)—INSTRUCTIONS—REQUESTS—NECESSITY.

In a suit for land, based on prescriptive title, where deeds were admissible in evidence to show good faith of the plaintiffs, but not as muniments of title, if defendants desired a charge to the effect that they were admitted solely to show good faith, they should have made a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

Error from Superior Court, Loundes County; W. E. Thomas, Judge.

Action by R. J. Camp and another against the A. G. Garbutt Lumber Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. J. and B. F. Camp brought their suit in Echols superior court against the A. G. Garbutt Lumber Company, to restrain them from cutting and removing the timber from land lot No. 90 in the Sixteenth district of Echols county, Ga., and for the recovery of damages. The plaintiffs claimed the title to the lot of land in controversy, and that the defendant was a willful trespasser upon said lot, and was engaged in cutting the timber therefrom for its own benefit, to the irreparable injury of the plaintiffs. They claimed title, also, to the timber suitable for sawmill and cross-tie purposes on the lot in controversy, and on lots Nos. 94, 95, and 136 in said county and adjacent thereto, and that they and their predecessors in title acquired a complete prescriptive title to the land, by reason of more than seven years' continuous and adverse possession under color of title, while engaged in working the timber for turpentine and cross-tie purposes. They relied upon a certain chain of deeds for color of title, and as showing good faith in those taking and holding under them, beginning with the plats and grants from the state of Georgia to Benjamin S. Jordan to the lots of land in controversy, dated January 2, 1842, and, the death of Jordan being shown, certified copies of deed conveying title out of the estate of Benjamin S. Jordan, deceased, into the estate of Skelton Napier, deceased, or to John T. Napier, as executor of the will of Skelton Napier; a certified copy of the will of Skelton Napier, deceased, dated April 7, 1832, with a codicil,

dated March 10, 1856, under which Jane E. Napier, William P. Napier, and John T. Napier were named executors, said will being probated in common form; a certified copy, from the ordinary's office of Bibb county, of what purported to be an agreement or deed of division between the heirs at law of Skelton Napier, deceased, dated November 10, 1866; a certified copy of a deed from Emily E. Jordan and Leonidas A. Jordan sole heirs at law of B. S. Jordan, deceased, to John T. Napier, executor of Skelton Napier, deceased, dated February 28, 1871; letters of administration issued by the court of ordinary of Houston county, Ga., to Frances C. Napier, as administratrix of the estate of John T. Napier, deceased, dated February 5, 1872; a certified copy of an order from the court of ordinary of Houston county, granted at the August term, 1872, authorizing Fannie C. Napier, administratrix of the estate of John T. Napier, deceased, to sell the lot of land in controversy and other wild lands, at private sale; a deed from Mrs. Frances C. Napier, administratrix of John T. Napier, deceased, to John T. Willey, dated September 8, 1882; a deed from John T. Willey to J. B. Withers, dated June 22, 1885; a deed from J. B. Withers to S. J. Barnes, dated January 1, 1897; and a lease from S. J. Barnes and others to the plaintiffs, dated January 20, 1902, conveying the timber suitable for sawmill and cross-tie purposes on said land.

The defendant, in answer to the petition, denied that the plaintiffs purchased the timber in controversy for the purpose or with the view to using the same for sawmill or cross-tie purposes, that the plaintiffs acquired any title thereto by reason of any purchase they may have made, that the timber was worth the sum alleged (\$1,000), or anything like said sum, that the profits from cutting and converting the timber into lumber and cross-ties could not be calculated and estimated, and that the plaintiffs would be entitled to the benefit of such profits, if made. Defendant admitted that it entered upon the lot of land described in the petition during the month of January, 1907, and commenced to cut and remove the timber therefrom suitable for sawmill purposes, and denied that it did so as a willful trespasser, without lawful claim, right, and authority, and denied, further, that the plaintiffs had sustained or would sustain any damages whatever by reason thereof, or that damages, if sustained, would be in their nature irreparable. The defendant further averred that it was the true and lawful owner of all the timber suitable for sawmill purposes situated, growing, and being on the lot of land described in the petition. A. G. Garbutt, secretary and treasurer of the defendant company, made an affidavit that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

original deed, purporting to be from Emily E. Jordan and Leonidas Jordan, as sole heirs at law of Benjamin S. Jordan, deceased, to John T. Napier, as executor of the last will and testament of Skelton Napier, deceased, reciting a consideration of \$5, etc., and conveying, among others, lot of land No. 90 in the Sixteenth district of originally Irwin (now Echols) county, Ga., was a forgery; and the issue of forgery was submitted, with the rest of the case, to the jury.

Under the charge of the court, the jury found the deed from Emily E. Jordan and Leonidas Jordan to John T. Napier, executor, to be a forgery, and also found in favor of the plaintiff the premises in dispute. A motion for a new trial was made by the defendant, which was overruled, and it accepted.

J. G. Cranford, E. K. Wilcox, and Wilson, Bennett & Lambdin, for plaintiff in error. J. L. Sweat, R. G. Tison, and G. A. Whitaker, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. This is the second appearance of this case here. It will be found reported in 129 Ga. 411, 58 S. E. 870. The case turns largely on prescriptive title. The possession began in J. B. Withers, who held possession less than the time necessary to ripen the prescription. Then Withers made a deed to the property in controversy to S. J. Barnes, dated January 1, 1897. Barnes and others made a "timber lease" to R. J. and B. F. Camp, the plaintiffs in the court below, on January 20, 1902, conveying the timber on the land in controversy for sawmill and cross-tie purposes. Possession, under which prescription ripened, was in Barnes and the Camps. Several deeds and papers which purported to convey the title to the land, as well as an abstract of title and certain memoranda, were offered in evidence and admitted by the court over objection of defendant's counsel. Most, if not all, of these documents were not admissible as muniments of title, but as bearing on the subject of good faith on the part of the plaintiffs in purchasing the timber, which is one of the elements of prescription. Withers testified that the memoranda and chain of title came to him together, and that he thought he was getting a genuine title, or he would not have paid for it. Barnes testified that certain of the deeds and grants were delivered to him when he bought as agent for his wife, that they were not all the deeds that he received, and that he did not know anything about the originals of two other deeds mentioned, but he knew that he had bought them and they were all there when he bought. "They were with the full chain." Also, that he delivered the papers to the agent of one of the Camps. From this and other evidence it will be seen that a number of the papers introduced were before the prescribing parties at

the time they purchased, and relied on by them in connection therewith; and while they may have been inadmissible as tending to prove title, they were admissible as bearing on the good faith of the prescribers. If any of these papers were inadmissible, their admission was not of sufficient materiality to require a reversal. The presiding judge did not submit to the jury at all the question of title by chain, or otherwise than by prescription; and certainly most, if not all, of the papers offered were admissible in that connection as bearing on the question of good faith, and, if any of them should have been rejected, their reception was not sufficiently material error to require a new trial, in the light of the charge, which directed the jury to find that a certain deed attacked for forgery should be declared to be such, and confined them to the contention as to whether the plaintiffs had acquired prescriptive title.

[2, 4] 2. It was not error for the court to charge the jury as follows: "An inchoate prescriptive title may be transferred by a possessor to a successor, so that the successive possessions may be tacked to make out the prescription." This charge of the court embodies a correct principle of law on this subject; and if a fuller charge, or an amplification of the principle to suit the facts of the case, was desired, a request therefor should have been made.

There was no error in the failure to charge the jury as contended in the thirteenth and fourteenth grounds of the amended motion for a new trial, in the absence of a request to so charge. The court had charged the jury that it took seven years' continuous adverse possession to ripen into prescription, and that the possession must be "public, continuous, exclusive, uninterrupted, and peaceable, and accompanied by a claim of right, and such continued for and during the term of seven years."

[5] There was no error in the following excerpts of the court's charge, in the absence of a request to charge more fully on the subjects excepted to: "The court instructs you, further, that the working and operating of timber for turpentine purposes may amount to possession which will ripen into prescription, being dependent upon the character of the work and the continuity thereof." And: "Whether or not the cultivation of a turpentine farm upon a tract of land is such an occupancy as may be the basis of a prescriptive title to the land itself is a question of fact, dependent upon the character of the possession, the extent of the visible signs of occupancy, and its continuance."

[6] The court concisely, but correctly, charged the jury the law bearing on the issues involved in the case; and, if a fuller charge was desired by the defendant, a request should have been made therefor. While the charge was meager in some respects, we cannot say that it was error.

[3,7] 3. It is insisted that the deeds and other papers admitted by the court in evidence on the question of the good faith of the plaintiffs were calculated to influence the jury in favor of the plaintiff's case. No request to charge the jury on the subject of limiting the deeds to the question of good faith was made, nor complaint that the court refused to so charge the jury. If the deeds and papers were admissible, and the defendant desired a charge to the effect that the deeds and other papers admitted were solely for the purpose of showing the good faith of the plaintiffs when they bought the timber in controversy, and the jury should consider them for that purpose alone, a request to so charge should have been made. *McGruder v. State*, 71 Ga. 864, 2 (a). While the evidence was somewhat meager on the question of possession, it was sufficient to authorize the verdict.

Judgment affirmed. All the Justices concurred.

(137 Ga. 545)

MORGAN v. COBB.

(Supreme Court of Georgia. Feb. 14, 1912.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 477*)—DEFENSES—PLEADING.

The court erred in refusing, on the plaintiff's motion, to strike the only plea which sought to set up a defense to the action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1524, 1525; Dec. Dig. § 477.*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by W. S. Morgan against M. C. Cobb. Judgment for defendant, and plaintiff brings error. Reversed.

W. S. Morgan brought an action against Mattie C. Cobb on four promissory notes, aggregating \$346 principal. The defendant, in her answer, admitted that she had executed and delivered the notes to the plaintiff, and that he was the owner of the same and had the right to sue thereon. By way of special plea she set up the following:

"For further plea and answer this defendant says that she was induced to sign said notes by the false statements and representations and fraudulent acts of the plaintiff, as will appear from the following statement of facts: Some years ago, previous to the time said notes were signed, defendant bought a small tract of land in said county, containing 20 acres, from J. A. Cook, and paid for the same; said land being a portion of a tract containing 100 acres, more or less, which the said J. A. Cook had purchased from J. N. Edwards, and on which entire tract of land the said J. A. Cook owed said Edwards a balance of the purchase money, amounting to \$346, including interest up to

January 15, 1904, which said sum this said defendant desired to borrow with which to pay said indebtedness as an accommodation to the said J. A. Cook, she, the said defendant, to have titles to said entire tract of land made to her to secure her for said money which she desired to advance on said land. On January 14, 1904, plaintiff came to the home of this defendant, and, voluntarily and unsolicited, proposed to loan her the said sum of money at the rate of 8 per cent. per annum, which he claimed to be doing only as an accommodation to this defendant. Defendant at first declined his offer of a loan; but plaintiff insisted, and told defendant that he would give her papers, or bond for title, to the entire tract of land, containing 100 acres, more or less, to make her safe, and secure her against loss on account of advancing said money, and promised defendant that he would have H. H. Chandler, defendant's attorney, to prepare all papers pertaining to said transaction. Defendant then believed all of said statements and representations made by said plaintiff to be true, and acted upon the same, and finally agreed to borrow said sum of money from plaintiff, believing that he, the said W. S. Morgan, would comply with all of his said promises. The said Morgan then informed this defendant that it would be necessary for her to sign a paper to get said money, and pretended to be in a great hurry, and insisted that defendant sign said paper as quickly as possible, which she did, not knowing at the time the contents of same, she being unable at that time to read said paper, since which time this defendant has been advised, and now believes, that the paper to which her signature was thus obtained was a transfer to the said W. S. Morgan of all of her rights, title, and interest in and to her own land, on which she then lived and for which she had paid in full. Afterwards, on January 15, 1904, R. W. Eaves, acting as agent for said W. S. Morgan, came to the house of the defendant and informed her that the said Morgan wanted her to sign notes for said sum of money, which she at first refused to do until she had received a bond for title, as per her agreement with said Morgan, to which the said Eaves replied that if she would sign said note she could then get the bond for title as promised her by said Morgan. Defendant, still believing that said Morgan would comply with his said promises and that he was acting in good faith, signed said notes, same being the notes sued on in this case. The said Morgan failed and refused to comply with his said promise to give defendant bond for title as agreed, but gave her a bond for title to her own land, containing 20 acres, on which he, the said Morgan, had no claim whatever, except such as were obtained in the fraudulent manner aforesaid. The said Morgan willfully de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceived this defendant, in that he promised to have H. H. Chandler, the attorney at law of this defendant, and in whom she had confidence, to prepare all the papers pertaining to said transaction, which he failed to do, but, on the contrary, took especial pains to prevent the said H. H. Chandler from knowing anything whatever about the transaction, and did, on the day following that on which said notes were signed, leave this state, and remove to New Mexico, or to some other Western territory or state. This defendant procured no funds whatever from said plaintiff, but the said Morgan did pay to W. N. Edwards, one of the executors of the estate of J. N. Edwards, deceased, the sum of \$346, and claimed to have received from said Edwards titles to said entire tract of land, including the land of this defendant. As soon as defendant learned and ascertained the contents of the bond for title which the said Morgan had given her, she immediately demanded a rescission of the entire contract, tendered him all the money which he had paid out on said land, and demanded of him titles to same, as he agreed to do, all of which he refused and still refuses to do. Defendant says that all of said notes were procured by the fraudulent acts and false statements and representations made as aforesaid by the said Morgan; that all of said statements upon which this defendant acted in signing said notes, which she then believed to be true, were false, and known to said Morgan to be false, at the time the same were made, and were fraudulently made for the purpose of cheating, swindling, and defrauding this defendant out of the sum of \$346; that the acts and statements made as aforesaid by the said Morgan amount to legal fraud, and that said notes are therefore void, all of said notes having been executed by this defendant without any consideration whatever. Defendant therefore asks that she be discharged, with costs of suit."

On the trial the plaintiff moved to strike this plea, on the ground that it did not set forth any legal defense to the action, which motion the court overruled. The plaintiff excepted to this ruling, and, after verdict in favor of the defendant, to the overruling of a motion for a new trial.

A. G. & Julian McCurry, for plaintiff in error. Jas. H. Skelton, for defendant in error.

FISH, C. J. (after stating the facts as above). In our opinion the court erred in refusing to strike the plea, which should be construed more strongly against the defendant. The averment in the plea that the plaintiff fraudulently induced the defendant to give him a bond for title to the 20 acres of land which she had purchased from Cook was not a sufficient allegation to constitute fraud practiced by the plaintiff upon the defendant. The averment in the plea was that

the plaintiff "informed this defendant that it would be necessary for her to sign a paper to get said money, and pretended to be in a great hurry, and insisted that defendant sign this paper as quickly as possible, which she did, not knowing at the time the contents of same, she being unable at that time to read said paper, since which time this defendant has been advised, and now believes, that the paper to which her signature was thus obtained was a transfer to the said W. S. Morgan of all her rights, title, and interest in and to her own land, on which she then lived and for which she had paid in full." There is no averment that the plaintiff misrepresented to the defendant the character or the contents of the paper which she was then requested to sign, or that the plaintiff knew that the defendant believed the paper to be one other than it really was. Even if for any reason the defendant could not then read the paper, it does not appear that she inquired of the plaintiff what the contents of the paper were.

It does not appear from the plea that, before the transaction about which the notes were given, the plaintiff had any interest whatever in the balance of the land purchased by Cook from Edwards. Under the allegations of the plea, the title to such balance was either in Edwards, or, if he were dead, in his estate, or in Cook, if a conveyance had been made to him by Edwards or his executor. The plea, therefore, fails to show that the plaintiff, Morgan, could execute a valid bond for title or conveyance covering the balance of the land to the defendant; and it not appearing that the plaintiff had any authority so to do, his failure to give the defendant a bond for title to the balance of the land, or to convey the same to her, would not be a valid defense to the action on the notes. It appears from the plea that the plaintiff loaned the defendant the sum of \$346, for which she gave him the notes sued on, which loan, as the plea shows, went to the payment of the balance of the purchase money for the whole 100 acres of land which Cook had purchased from Edwards, and there is no reason set up in the plea why the plaintiff, who was the lender of the money to the defendant, should have given her security, or an obligation to repay the same to her. Indeed, there is nothing in the plea indicating that the \$346 was to be repaid to the defendant by the plaintiff, or by Cook, or any one else; but it does appear that she was paying it for Cook's accommodation, though he was no party to the contract between the plaintiff and defendant.

As the plea should have been stricken, the subsequent trial on the issue sought to be made by the plea was nugatory, and it is therefore unnecessary to pass upon the grounds of the motion for a new trial.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 567)

SOUTHERN RY. CO. v. BALES.

(Supreme Court of Georgia. Feb. 15, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1078*)—REVIEW—ERROR WAIVED IN APPELLATE COURT.**

The assignment of error upon the overruling of the demurrer to the petition is not referred to in the brief of counsel for plaintiff in error, and therefore it must be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. CHARGE OF COURT—APPLICABILITY TO EVIDENCE.

So much of the charge as was excepted to was correct in the abstract and applicable to the evidence, and the criticisms upon it furnish no ground for a new trial.

3. APPEAL AND ERROR (§ 979*)—REVIEW—DISCRETION OF TRIAL COURT—REFUSAL OF NEW TRIAL.

Though conflicting, the evidence was sufficient to support the verdict, and the discretion of the trial judge in refusing a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by H. S. Bales against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Max Michael and Jno. J. Strickland, for plaintiff in error. E. K. Lumpkin and S. C. Upson, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 565)

A. B. SMALL CO. v. LIBERTY MILLS.

(Supreme Court of Georgia. Feb. 15, 1912.)

*(Syllabus by the Court.)***1. SALES (§§ 369, 377*)—FRAUDS, STATUTE OF (§ 158*)—REMEDIES OF SELLER—DAMAGES—MODIFICATION OF CONTRACT.**

A contract for the sale of a given number of barrels of flour, to be shipped in the future on orders furnished by the buyer, stated that it was "subject to the terms and conditions printed on the back hereof, which are hereby agreed to," and among such terms and conditions were that "failure to order flour out on demand of shipping instructions at expiration of the maximum 90-day period, or to pay accrued carrying charges on demand, gives seller the right to cancel contract, or resell the goods for buyer's account," and failure of seller "to ship within the maximum 90-day limit entitles the buyer to cancel the contract or buy a similar quantity and grade of goods for seller's account." *Held* that, upon failure of the buyer to comply with the contract in respect to the matter above indicated, the seller, without a resale, had the right at his option to sue for the difference between the contract price and the market value at the time and place of delivery (Civil Code 1910, § 4131); the contract not expressly stipulating

or necessarily implying that the remedies given therein to the seller were to be exclusive. In this connection, see *Leonard v. House*, 15 Ga. 473; *Seymour v. Cobb*, 43 Ga. 525; *Adams v. Haigler*, 123 Ga. 659; 51 S. E. 638.

(a) In a suit by the seller against the purchaser for a breach of contract of the character indicated by the preceding note, where the damages for his failure and refusal to order shipment of a given number of barrels of flour were laid as the difference between the agreed price and the market value at the time and place for delivery, the petition was not demurrable because it also alleged that the seller shipped to the buyer at the place of delivery, on a given date within the time which the buyer was to order shipment of the same, a stated number of barrels of flour, which he had refused to order shipped, which specified number of barrels the buyer declined to accept, and thereupon the seller sold the same in that market at the highest and best price obtainable, and that the difference in the price so obtained and the contract price was the same as what was alleged to be the difference between the contract price and the market value at the time and place of delivery of the flour which buyer had failed and refused to order shipped.

(b) Where the contract stipulated that the buyer was to order shipment of the flour within a specified time, and in an action by the seller against him for its breach the petition alleged that additional time was granted the buyer upon his requests, it will not be assumed that such requests were oral, and therefore ineffective to change or modify the written contract, which under the statute of frauds was required to be in writing. We do not mean to hold, however, that, if the buyer procured delay in the performance of the contract by parol requests he could take advantage of that fact, whether the agreement for delay amounted to a binding contract or not. See, in this connection, *Mendel v. Miller*, 126 Ga. 834 (2), 58 S. E. 88, 7 L. R. A. (N. S.) 1184; *Hardwood Lumber Co. v. Adams*, 134 Ga. 821 (6), 68 S. E. 725, 32 L. R. A. (N. S.) 192.

[Ed. Note.—For other cases, see Sales, Dec. Dig. §§ 369, 377; Frauds, Statute of, Dec. Dig. § 158.*]

2. SUFFICIENCY OF PETITION—STATUTE OF FRAUDS.

The allegations of the petition as amended sufficiently explained the meaning of all the material portions of the contracts, in order to allow such meaning to be proved by competent aliunde evidence, and the petition was not demurrable on the ground that the contracts were obnoxious to the statute of frauds. *Happ v. Hunter Co.*, 136 Ga. 671, 71 S. E. 1099.

3. DEMURRER TO PETITION OVERRULED.

The rulings above announced dispose of the controlling questions raised by demurrer to the petition. Other points presented by various grounds of demurrer were without merit, and it is not necessary to specifically deal with them.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Liberty Mills against the A. B. Small Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. P. Jones and Hardeman, Jones, Calaway & Johnston, for plaintiff in error. Harris & Harris, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 573)

LOUISVILLE & N. R. CO. v. RAMSEY et al.
(Supreme Court of Georgia. Feb. 15, 1912.)*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1194*)—DISPOSITION OF CAUSE—CONSTRUCTION OF JUDGMENT.**

Where error was assigned on the overruling of a demurrer, the refusal to grant a nonsuit, and the overruling of a motion for a new trial, and this court passed upon the various questions raised, and entered a judgment that "the judgment of the court below be reversed because the court erred in refusing to grant a new trial," the effect of making such judgment of the Supreme Court the judgment of the lower court would not be to put the case out of court as on a nonsuit, but to leave it to stand for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1194.*]

2. APPEAL AND ERROR (§ 1201*)—DISPOSITION OF CAUSE—REMITTITUR OF CAUSE—AMENDMENT OF PROCEEDINGS.

Under the ruling in *Holcombe v. Richmond & Danville R. Co.*, 78 Ga. 778, 3 S. E. 755 (which has not since been modified or reversed), where certain persons, claiming to own land, brought suit against a railroad company for the purpose of recovering on account of damage alleged to have resulted to the land from the erection by the defendant of a bridge across a stream, and where it appeared that the legal title was in another at the time when the action was commenced, though he had made a conveyance to the plaintiffs pending the case, and this court held that the plaintiffs therefore could not recover, and granted a new trial, it was not error to allow an amendment to the petition, adding the name of the person who appeared to hold the legal title when the action was begun, suing for the use of the original plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1201.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by Earl Ramsey and others against the Louisville & Nashville Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed, with directions.

Ramsey and others brought suit against the Louisville & Nashville Railroad Company to recover damages alleged to have resulted by reason of the construction of a bridge across a stream, causing water to be backed on a part of the land, and also causing soil to be washed away from a part of it. A demurrer was overruled. On the trial a motion for nonsuit was overruled, and the defendant filed exceptions pendente lite. A verdict was rendered in favor of the plaintiffs, and the defendant moved for a new trial. This court affirmed the ruling on the demurrer, but for other reasons reversed the judgment of the trial court. The remittitur transmitted to the court below recited that: "It is considered and adjudged that the judgment of the court below be reversed because the court erred in refusing to grant a new trial." At the succeeding term of the superior court a judgment was entered, making the judgment of the Supreme Court the judgment of the superior

court. Immediately thereafter counsel for the plaintiffs announced to the court that they wished to amend the declaration by adding a named person, claiming to hold the legal title when the suit was brought, as plaintiff, suing for the use of the originally named plaintiffs. Objection was made to this, on the ground that there was no case in court, as the entry of the judgment on the remittitur operated as a grant of a nonsuit, and also on the ground that the amendment added a new party and a new and distinct cause of action. Thereupon the plaintiffs' counsel made an oral motion to vacate the order, which had been signed, but not entered on the minutes, making the judgment of the Supreme Court the judgment of the superior court. The court granted the motion, and passed an order making the person named as holding the legal title to the land a party plaintiff, suing for the use of the plaintiffs already named. Counsel for the defendant moved the court to enter a judgment upon the remittitur from the Supreme Court, making its judgment that of the superior court, and that a nonsuit be entered. The presiding judge refused to enter a nonsuit, holding that the case had not been finally disposed of, and assigned it for trial at the succeeding term of court. The defendant excepted.

C. N. King and D. W. Blair, for plaintiff in error. Maddox, McCamy & Shumate, W. W. Sampler, and W. E. Mann, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Ramsey and others brought suit against the Louisville & Nashville Railroad Company to recover damages to land arising from the construction of a bridge across a stream. On the trial plaintiffs obtained a verdict. The defendant excepted to the overruling of a demurrer, to the refusal to grant a nonsuit, and to the overruling of a motion for a new trial. In this court the judgment of the court below was reversed. 134 Ga. 107, 67 S. E. 652. The decision dealt with the different rulings. While doubtless this court might have given direction that the case be entered nonsuited, had it seen proper to do so, such was not the judgment rendered. The admission of evidence and charges complained of in the motion for a new trial were dealt with in connection with the question whether the plaintiffs made out a prima facie case; and, upon the whole case, the judgment entered, as shown by the remittitur, was that the judgment of the court below be reversed, because the court erred in refusing to grant a new trial. The making of such judgment the judgment of the court below did not operate to nonsuit the case, or finally dispose of it, but to grant a new trial. It was accordingly not error for the presiding judge

to refuse to enter a judgment of nonsuit or dismissal, upon motion. The remittitur from this court should have been made the judgment of the trial court, and the order for that purpose should not have been revoked. But so doing did not have the effect claimed for it by counsel for the plaintiff in error.

[2] 2. The action was originally brought in the name of Ramsey and others. It appeared that they relied on a parol gift, and also on a deed from one Harlan, but that such deed was made after the suit was brought. This court held that it was improperly admitted in evidence, as was also certain evidence tending to attach to a deed absolute on its face an express trust in land. When the case was returned to the superior court, a motion was made to amend the petition by inserting the name of Harlan as plaintiff, suing for the use of the original plaintiffs. To this objection was made, on the ground that it added a new party and a new and distinct cause of action. The objection was overruled, and the amendment allowed. It was urged in this court that section 5689 of the Civil Code of 1910, which declares: "When it becomes necessary for the purpose of enforcing the rights of such plaintiff, he may amend by substituting the name of another person in his stead, suing for his use"—applied to cases in which persons having equitable rights might enforce them in the name of the holder of the legal title; that, in general, there is no equity in damages arising from a tort; and that this section is not applicable to the case in hand. As an original proposition, there might appear to be some force in the argument. "An action for a tort must, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed." Civil Code 1910, § 5517. "A right of action is not assignable if it does not involve, directly or indirectly, a right of property; hence a right of action for personal torts, or for injuries arising from fraud to the assignor, cannot be assigned." This section was codified from a statement in the opinion in *Central Railroad & Banking Co. v. Brunswick & Western Railroad Co.*, 87 Ga. 388, 18 S. E. 520, where one railroad company sued another for damages arising from a collision, and not only sought to recover damages done to it, but also to sue for the use of its engineer, who had been hurt. It is unnecessary to discuss the exact meaning of the words, "if it does not involve, directly or indirectly, a right of property." But the Code section first above quoted, allowing the petition to be amended by substituting the name of another person, instead of the original plaintiff, suing for his use, when it becomes necessary for the purpose of enforcing his rights, has been directly considered in *Holcombe v. Rich-*

mond & Danville R. Co., 78 Ga. 776, 3 S. E. 755. In that case an insurance company brought suit against a railroad company, alleging that certain wood belonging to Holcombe had been destroyed through the negligence of the defendant; that the plaintiff had insured Holcombe against loss, and had paid the insurance; and it thereupon sought to recover from the railroad company the amount so paid. It was held that the petition, as originally brought, was demurrable, but that the presiding judge properly allowed an amendment adding the name of Holcombe as plaintiff, suing for the use of the insurance company.

We are not now discussing the question of the right of an insurer who is liable for the loss of property under certain circumstances, to recover in the name of the insured, for his use, against one negligently destroying the property. The point under consideration is as to amending a petition by adding the name of the person having the legal title to the property, suing for the use of the original plaintiffs. As to this point we think the ruling as to the case cited is controlling on that now before us. It has not been reviewed and reversed or modified. In connection with the general subject, see *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760, 771, 36 S. E. 971, 51 L. R. A. 622; *Willis v. Burch*, 116 Ga. 374, 42 S. E. 718; *McElmurray v. Harris*, 117 Ga. 919, 43 S. E. 987; *McEachern & Co. v. Edmundson*, 122 Ga. 80, 49 S. E. 798; 38 Cyc. 463; 15 Enc. Pl. & Pr. 487 et seq.

Direction is given that the remittitur be entered.

Judgment affirmed, with direction. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 555)

ROGERS et al. v. GREAT SOUTHERN ACCIDENT & FIDELITY CO. et al.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 80*)—LIABILITIES—ACTIONS—PLEADING.

Under the allegations of the petition, the plaintiffs are not entitled to the relief prayed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 80.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. L. Rogers and another against the Great Southern Accident & Fidelity Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. L. Rogers, T. A. Maynard, and A. A. Camp, suing for themselves and others similarly situated, brought their petition against the Great Southern Accident & Fidelity Company, R. H. Cantrell, W. G. Chipley, J. R.

Duval, Ed. S. Moore, and H. H. Bass, alleging as follows:

In the early part of 1909 Cantrell and Chipley conceived the scheme of promoting and subsequently organizing the Great Southern Accident & Fidelity Company, ostensibly to engage in the business of casualty and fidelity insurance, but really for the purpose of defrauding such of the public as could be induced to subscribe for the stock of the proposed corporation. About March 1, 1909, Cantrell, Chipley, and their associates, including Duval, procured from the Secretary of State of Georgia a certificate of incorporation for the insurance company, authorizing it to do an insurance business, and providing that the capital stock of the company should be \$500,000, divided into shares of \$100 each. Petitioners are informed and believe that Cantrell and Chipley, through a fraudulent arrangement with the other incorporators of the company, took entire charge of promoting the organization of the company, by inducing subscriptions to the capital stock, collecting the subscriptions, and appropriating to themselves an enormous part of the collections; and after their efforts in this direction were exhausted, and they had looted the fund collected as far as possible, having a fictitious organization of the company, they abandoned the company. It was never the intention of Cantrell and Chipley to raise the entire capital of the company, nor to legitimately organize the company and prosecute the business for the conduct of which the company was incorporated; but their purpose was to realize for themselves an enormous sum of money by persuading people to invest in the stock of the proposed corporation, by falsely representing that men of large experience and national reputation as insurance men were to be identified with the company and have control of its affairs, that the company would begin business with a capital stock of \$500,000 and a surplus of equal amount, that the stock would ultimately have an actual value of 2 for 1, that the field of operation was broad and ample, and that the profits of the company would be enormous from the beginning and the value of the stock would rapidly enhance. By false representations of this character, Cantrell and Chipley contemplated collecting a very large sum of money, deducting therefrom 45 per cent., or other large percentage, for themselves, paying such moneys as might be left to the provisional officers of the company, and leaving the company to its fate in the hands of incompetent and irresponsible men. Upon procuring a certificate of incorporation from the Secretary of State, Cantrell and Chipley proceeded to canvass, by themselves and other men employed by them, for the sale of the stock of the proposed company. In every instance they made false statements to induce subscriptions to the stock, painting the situation

in such glowing terms that within the space of a few months they procured many subscriptions, selling each share for \$200; although their par value was only \$100, and representing that \$100 for each share was to go to the capital account of the company and \$100 to the surplus account. In this way they collected \$325,000, representing \$162,500 capital stock of the company. In nearly every instance a note was taken for the amount of the subscription, payable 12 months after date, to the subscriber's order, which note was placed at the subscriber's home bank, who was given a bonus of from 10 to 12 per cent. It was represented that the fund realized in any particular town would be left at the home bank, according to the plan adopted. In each case the bank, upon taking the note, issued its deposit slip in favor of the Great Southern Accident & Fidelity Company, showing the amount of credit in the bank. The deposit slip was then sold at a considerable discount. Out of the cash realized in this way Cantrell and Chipley appropriated to themselves 45 per cent., or other large percentage.

Petitioners were officers of the Winder Cotton Mills, and they subscribed to the stock of the proposed corporation under the persuasion of one Jackson, agent and representative of Cantrell and Chipley. Among the other false and fraudulent representations made to them in order to induce their subscription, it was promised to them by Jackson that the insurance company would immediately lend to the Winder Cotton Mills the sum of \$35,000 at 6 per cent. interest, taking bonds of the mills as security. The mill was in need of a considerable sum, and had it not been for the representation of Cantrell and Chipley, through their agent, Jackson, that the insurance company would make the loan, petitioners never would have subscribed for the stock. This promise was a large inducement, and was falsely made, and it was never intended that the same should be carried out or performed, and in fact the insurance company refused to make such loan. Each of petitioners subscribed for five shares of the capital stock, executing a 12 months note for \$1,000, payable to his own order, indorsing the same, and the notes were deposited in the Winder Banking Company; the bank receiving a bonus and issuing its time deposit slips upon the plan above referred to. Each of the petitioners was issued his certificate of stock for five shares, par value \$100. The additional \$500 was to go to surplus account of the company.

Afterwards, in the fall of 1909, as petitioners are advised and believe, a fictitious organization of the company was had in the office of the company in Atlanta, Ga. The required capital stock of the company had not been subscribed, and those who had subscribed were not notified of the proposed

meeting. The entire capital stock of the company was voted by Cantrell and Chipley and by J. H. Dean, who was previously represented to be president of the company, although the company had never been duly organized so far as petitioners are informed, and who was in fact a mere figurehead, without real interest in the company. At this meeting Dean was deposed as president and Cantrell elected in his stead. Thereafter there was an attempt to organize the company, although the required capital stock had never been subscribed. At the stockholders' meeting at which this organization was attempted, H. H. Bass was elected president and J. R. Duvall secretary, as petitioners are informed. The company obtained a license to do business in February, 1910. It has practically done no business. It was really never contemplated by Cantrell and Chipley and their associates that the company would ever be organized in good faith, or in good faith engage in business. Since obtaining the license to do business above referred to, the company has been paying out large salaries to its various officers, as to the amounts of which the plaintiffs are not advised. They are informed that Ed. S. Moore, as manager of the company, is drawing an annual salary of \$10,000, and that Renfro Jackson, as special agent, is paid \$250 per month and all expenses. There are a number of other salaries paid, as petitioners are informed, all of which are out of proportion to the amount of business done by the company. The company is doing very little business, the expenses are heavy, and such assets as the company has are being rapidly impaired and wasted, and they will soon be exhausted and the company entirely wrecked, unless the assets of the company are seized by the court, conserved, and administered for the benefit of those entitled. Neither Cantrell nor Chipley is now interested in the company. None of the officers of the company are experienced and competent men to conduct the business of such a company. Not only are its assets being wasted, as before indicated, but the company is carrying on business without being properly and legally organized; and Bass, Moore, and Duvall are unauthorized to conduct the affairs of the company or receive or pay out the funds thereof.

As an instance of the reckless manner in which the company is being managed, it is alleged that the defendants settled with a subscriber, who claimed that he had been defrauded, by refunding his money and paying a large sum, amounting to about \$1,000, as fees to the attorneys in the case brought by him. They also refunded to another subscriber his money paid on stock subscription. Petitioners are informed that a large percentage of those induced to subscribe are claiming that their subscriptions were given under false and fraudulent representations, and a number of the subscribers have brought

ordinary suits against the company for the money paid by them to Cantrell and Chipley for the company. "Under the circumstances aforesaid, petitioners are not indeed stockholders of said company, and they here and now repudiate as void their subscriptions to the stock of said company, being induced as aforesaid by false and fraudulent representations and promises. Most of the other persons who were induced to subscribe to the stock of said company are claiming that their stock subscriptions are likewise void, and that they are creditors of the company, and not stockholders; and upon information and belief petitioners aver that such is the fact, and that said company is therefore insolvent, its assets having been so largely looted, wasted, and dissipated as to leave the company without sufficient money to redeem such fraudulently induced subscriptions." Petitioners are informed that a large number of the notes given by subscribers to the stock for payment of their subscriptions have been and will be repudiated, and that the subscribers will not pay the same, claiming them to be void, because procured by fraud, all of which notes must be paid to the banks holding them by the company. Petitioners are informed that Cantrell and Chipley have now considerable property, purchased with the money illegally and fraudulently taken by them from subscribers to the stock of the company; but petitioners are not able to locate and describe these properties.

They pray that the defendants be enjoined from disposing of any of the assets or funds in their hands, belonging to the company or purchased with money put into the company by petitioners or others in like position, or in any way disturbing or changing the present status of the assets or the affairs of the corporation, or attempting to prosecute the business in the corporation's name; that Cantrell and Chipley be especially restrained from disposing of any of their properties in which they have invested the money illegally procured by them of petitioners and others in like situation, on subscriptions to the stock of the company; that a receiver be appointed to take charge of all the property of the various defendants; that Cantrell and Chipley be required to account to the receiver for all moneys illegally received by them from subscriptions of petitioners and others in like position; and that judgment be rendered in favor of the receiver against Cantrell and Chipley for the sum of money found to be due by them by such accounting.

The defendants filed their several demurrers, both general and special, upon numerous grounds, asserting, inter alia, that no cause of action is set out against any of the defendants; that the allegations with reference to the fraud of Cantrell and Chipley in no wise affected the corporation; that no specific acts of fraud were charged; that the plaintiffs, having paid no money for the

stock, and having repudiated the notes given therefor, were neither creditors nor stockholders, and had no interest whatever in the company; that there was a misjoinder of parties; and that the plaintiffs, if they were stockholders, were estopped from attacking the validity of the organization of the company, as it had complied with the laws with reference to the organization of insurance companies, and had been recognized by the state and given a license to do business as an insurance company.

The petition was dismissed on general demurrer, and the plaintiffs excepted.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. Robt. P. Jones, E. P. Upshaw, Tye, Peeples & Jordan, and Jno. L. Hopkins & Sons, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 579)

PURYEAR v. FARMERS' MUT. INS. ASS'N.
(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 651*)—ACTIONS ON POLICIES—ADMISSIBILITY OF EVIDENCE—BY-LAWS.

In September, 1906, a fire insurance company, which assessed its members to pay losses, issued a policy which contained a clause providing that the liability of the company should cease if the insured should neglect to pay any assessment within 30 days after the agent's notices had been issued. The policy declared that the company and the insured should be bound by the by-laws; but no by-laws were set out or attached, as provided by the act of August 17, 1906 (Civil Code 1910, § 2471). *Held* that, on the trial of a suit on the policy, it was error to admit in evidence a clause of the by-laws for the purpose of showing the provision as to the manner of issuing notices of assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1673-1675; Dec. Dig. § 651.*]

2. INSURANCE (§ 310*)—FORFEITURE—NON-PAYMENT OF ASSESSMENT—NOTICE.

Where a policy of insurance contains a clause which works a forfeiture on failure to pay assessments made to meet losses within 30 days after notice, unless there is something to show a contrary intent, it will be construed to require actual notice; and the mailing of a notice which is never received will not work that result.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.*]

3. INSURANCE (§ 310*)—FORFEITURE—NON-PAYMENT OF ASSESSMENT.

A provision that such forfeiture shall result from a failure to pay any assessment within 30 days "after the agent's notices have been issued," in the absence of anything further, will not be construed to work a forfeiture for failure to pay an assessment of which notice was mailed, but never received.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.*]

4. INSURANCE (§ 668*)—ACTIONS ON POLICIES—DIRECTION OF VERDICT.

There was evidence tending to show these facts: A policy was issued to D. Puryear, and the insured later received by mail a postal card addressed to "C. Y. Per," containing a notice of an assessment of a stated amount; but, not believing it to be intended for him, and at the instance of the company's agent, he returned it to the company by mail, with the request that, if it was for him, they should correct it, and the statement that he was ready to pay his assessment. He heard nothing from the company, though its agent promised to call and correct the matter. *Held*, that in a suit on the policy it was error to direct a verdict for the defendant, although the company's secretary testified that he mailed a correct notice after receipt of the plaintiff's letter.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

(Additional Syllabus by Editorial Staff.)

5. INSURANCE (§ 687*)—"FRATERNAL BENEFICIARY ORDER."

A fire insurance company operating on the assessment plan is not a "fraternal beneficiary order," within Civ. Code 1910, §§ 2866-2877, relating to such orders.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by D. Puryear against the Farmers' Mutual Insurance Association. Judgment for defendant, and plaintiff brings error. Reversed.

Maddox, McCamy & Shumate, for plaintiff in error. J. G. B. Erwin, Jr., and J. M. Neel, for defendant in error.

LUMPKIN, J. A policy of insurance on a house was issued to D. Puryear by the Farmers' Mutual Insurance Association; the insurer being a company operating on the assessment plan. In addition to making certain provisions as to assessments, the policy declared that both the association and the insured should be governed by the by-laws. After a loss by fire, a suit was filed by the insured. On the trial the court directed a verdict for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted.

[1] 1. The policy of insurance was dated September 18, 1906. It had no copy of by-laws attached to it. Objection was made to the introduction in evidence of the by-laws in regard to mailing notices of assessments, but this was overruled. The objection was well taken, and should have been sustained. The act of August 17, 1906 (Civil Code 1910, § 2471), was in force when this policy was issued. It declares that where an insurance policy contains a reference to the application for insurance, or to the constitution, by-laws, or other rules of the company, as forming part of the policy or contract, or having any bearing on the contract, a copy thereof shall be contained in or attached to the policy, and that, if not so attached,

such constitution and by-laws shall not be received in evidence as a part of the policy, or as an independent contract, or be so considered. *Johnson v. American National Life Ins. Co.*, 134 Ga. 800, 68 S. E. 731. This applies in terms to "all life and fire insurance policies issued upon the life or property of persons within this state," whether issued by a domestic or foreign company. There is no exception as to insurance companies operating on the assessment plan. It is true that prior to 1906 there was in the Code a section which declared that the rules and regulations of a mutual insurance company became a part of the policy; and this still remains in the Code of 1910 as section 2530. But it must be construed in harmony with the act of 1906, now embodied in section 2471. Similarly section 2479, which was in existence prior to 1906, declares that representations in an application are considered as covenanted to be true. But, if not harmonized with section 2471, it practically nullifies that section, codified from a latter act.

[5] In Pennsylvania it has been held that a somewhat similar statute does not apply to benefit societies; but a different rule has been declared in Kentucky. Whichever of these decisions may be the sounder, it does not affect this defendant, which is not a fraternal beneficiary order, within the meaning of the laws of this state. Civil Code 1910, § 2866 et seq. See, in this connection, *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S. E. 1008. It was accordingly error to admit in evidence the by-laws of the company, which were referred to in the policy, but of which no copy was attached.

[2] Omitting from consideration the by-laws, how stands the case? The policy declares that "the insured shall bear his pro rata portion of all expenses and loss sustained by the members of this association." It also contains this clause: "Should this insured neglect to pay any assessment to meet the loss of property of any member of the association, that at noon of the thirtieth day after the agent's notices have been issued the liability of this association shall cease until such time as the insured be again restored to membership in the association; but the treasurer shall collect the last assessment, it being a premium for past protection." What was the effect, standing alone, of the provision that the liability of the association should cease on the thirtieth day after the agent's notices "have been issued"? The ceasing of liability was provided to occur without further action. Where forfeitures are to result from non-payment of contingent and irregular assessments, in the absence of any agreement as to notice, it has been declared that the law will hold that no liability to pay the assessment has become fixed until notice has been given. *Wright v. Supreme Commandery of*

the Golden Rule, 87 Ga. 426, 13 S. E. 564, 14 L. R. A. 283. Where notice is required to be given, it is generally held, in the absence of anything appearing to the contrary, that the notice is not complete until it is received, and that, while mailing a notice duly directed and stamped may furnish presumptive evidence of its receipt, it does not alone constitute notice. *Courtney v. U. S. Masonic Benefit Association (Iowa)* 53 N. W. 238; *McCorkle v. Texas Benevolent Ass'n*, 71 Tex. 149, 8 S. W. 516; *Castner v. Insurance Co.*, 50 Mich. 277, 15 N. W. 452; *Supreme Council American Legion of Honor v. Hass*, 116 Ill. App. 587; *Preferred Accident Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; 3 *Cooley's Briefs on Ins.* 2356 (h) et seq., and citations.

[3] In *Wyone Shoe Co. v. Daniels & Co.*, 136 Ga. 192, 71 S. E. 1, a statute requiring a purchaser of a stock of goods in bulk to notify, "personally or by registered mail," the creditors of the vendor, 5 days before completing the purchase or paying therefor, was construed, with reference to its language and context, to be satisfied by sending the proper notice by registered mail. This is different from the present case. Here the liability of the company was to cease if the insured should neglect to pay any assessment to meet the loss of property of any member within 30 days "after the agent's notices have been issued." Unaided by any by-laws as to issuance of notice, what does this require? The transitive verb "issue" sometimes means to send out or let out, and sometimes to deliver or give out, as for use, to send out officially, or to deliver by authority. Webster's Dictionary; Century Dictionary. A county warrant has been held not to be issued until it is actually delivered to the person authorized to receive it. *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534. Where a provision in the constitution of a society declared that a member should be liable for dues, etc., for the month in which his certificate was "issued or dated by the supreme secretary," it was held that the certificate was not "issued" until it had been delivered to and accepted by the subscriber. *Logsdon v. Supreme Lodge of Fraternal Union of America*, 34 Wash. 666, 76 Pac. 292. In *Mass. Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, it was held that, "If a policy of insurance is capable of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured." *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 126, 42 S. E. 287, 289, 94 Am. St. Rep. 99. No mode of issue is here prescribed. If the company could say that sending out a notice by mail would suffice, whether received or not, why might it not urge the same argument if the notices were sent out by a messenger?

[4] The plaintiff testified, among other

things, as follows: His name was D. Puryear. He found in his mail box a card addressed to "C. Y. Per," calling for payment of an assessment of \$2, and having attached a notice that unless it was paid in 30 days the policy would be void. He asked the postmaster if it was intended for him, to which the latter replied that he thought so, and, if not, he did not know for whom it was. Plaintiff met the agent of the company at the post office, and asked him if the card was intended for plaintiff, to which the agent replied that he thought not, and told him to send it back to the company, or a named officer, and tell them, if it were intended for him, to send another notice of assessment, and that he was ready to pay the money. He did so, but received no reply. The agent promised several times to come down and have it corrected, but the plaintiff never knew of his having come. He did not know the authority of the agent. It is unnecessary to set out the evidence for the defendant, further than to say that the treasurer of the company testified that, after receiving the letter of the assured, he mailed another notice. The judge directed a verdict, which he could not lawfully do, unless the uncontradicted evidence, with all reasonable deductions therefrom, demanded it. Civil Code 1910, § 5926. It did not do so in this case.

It was argued that, if the first card or notice was insufficient, the policy holder made the United States post office his agent by asking for a reply to his letter, and thus ran the risk of receiving the reply. This is not sound. He did not ask a reply by mail, if that would have had the effect claimed. The evidence stated above makes a very different case from making a proposition or offer by mail.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 530)

WHITE et al. v. BROWN, Governor.
(No. 3,700.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

PROCESS (§ 31*)—PARTIES (§ 59*)—AUTHORITY OF COURT—DIRECTION TO DIFFERENT DEFENDANT—VALIDITY.

Where process is prayed against a named person, and there is nothing in the petition to indicate an intention on the part of the plaintiff to name any other person as defendant, the suit must be construed as having been brought only against the party named in the prayer. In such a case the clerk has no authority to annex a process directed to a different person, nor can the petition be amended by striking the name of the defendant from the prayer and substituting in his stead that of the person named in the process.

[Ed. Note.—For other cases, see PROCESS, Dec. Dig. § 31;* PARTIES, Dec. Dig. § 59.*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Action by J. M. Brown, Governor, against M. W. White and others. Judgment for plaintiff, and defendants petition to set aside the judgment, and ask process against the solicitor of the city court. The clerk issued process against Hoke Smith, Governor, and a special appearance was entered in behalf of J. M. Brown, his successor. From an order dismissing the petition, petitioners bring error. Affirmed.

B. R. Collins, for plaintiffs in error. W. G. Park and Glessner & Park, for defendant in error.

POTTLE, J. A judgment absolute upon the forfeiture of a criminal recognizance was entered in the city court of Blakely against White as principal and Harris as surety. At a subsequent term they filed a petition seeking to set aside the judgment absolute, upon several grounds mentioned in the petition. The petition did not in its body name any person as a party defendant, but did allege that the judgment sought to be vacated was against the plaintiffs and in favor of J. M. Brown, Governor. The plaintiffs prayed that process issue against the solicitor of the city court. The clerk annexed a process naming Hoke Smith, Governor, as defendant, and requiring him to appear and plead, and service was acknowledged by the solicitor, but no waiver of process was made. At the trial term, the city court solicitor entered a special appearance in behalf of "J. M. Brown and his successor, Hoke Smith, Governor," and moved the court to quash the process which had been issued by the clerk, requiring the Governor to appear and answer the petition. Thereupon the plaintiffs offered an amendment, praying that process issue directed to Hoke Smith, Governor, and striking the prayer for process against the city court solicitor. The court refused the amendment and dismissed the petition, to all of which the plaintiffs excepted.

1. This was not an effort to amend a defective process. The process was in proper form. It is clear, however, that the city court solicitor was the party defendant, since this must be determined by the prayer for process. No other person was named as defendant in the body of the petition, nor was anything therein disclosed to indicate an intention to proceed against any other person as defendant. *Orr Shoe Co. v. Kimbrough*, 99 Ga. 143, 25 S. E. 204. The clerk was without authority to annex a process calling upon Governor Smith to appear and answer, and such a process was properly treated as a nullity. *Selsel v. Wells*, 99 Ga. 159, 25 S. E. 266. The amendment offered sought to add a new and distinct party, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

was properly disallowed. The mere acknowledgment of service by the solicitor did not cure the defect. *Selsel v. Wells*, 99 Ga. 159, 25 S. E. 266. The decision in *Lyons v. Planters' Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155, does not, upon its facts, conflict with what is now ruled. In that case there was no prayer for process at all and the persons named as defendants appeared and pleaded. This was a waiver of process and of a prayer therefor. It has never been held that a plaintiff can proceed directly against one person as defendant, and then by amendment, convert the action into one against an entirely different person.

Judgment affirmed.

(10 Ga. App. 522)

SARTORIOUS v. PAPER MILLS CO.
(No. 3,680.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(*Syllabus by the Court.*)

1. APPEARANCE (§ 24*)—EFFECT—WAIVER OF IRREGULARITY.

Where the process attached to the petition was dated January 7, 1907, and required the defendant to be and appear at the city court of Atlanta to be held on the first Monday in January, 1908, and the defendant was duly served with the process and petition and appeared in that court at the January term, 1908, and filed a plea to the merits of the suit, this was a waiver of irregularities of the proceedings; and it was not error to overrule a motion to dismiss the petition, made one year after the plea was filed, because of the mistake in the date of the process. Civil Code 1910, § 5551. The date of the process was immaterial, when the defendant was duly served with the petition and process, and made an appearance and filed a plea at the term of the court at which the process required him "to be and appear."

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

2. BILLS AND NOTES (§ 487*)—CONTINUANCE (§ 30*)—AMENDMENT OF PLEADING—DISCRETION OF COURT.

The copy of the note sued on, attached to the petition, contained the clause that it was payable "at the Fourth National Bank of Atlanta, Ga., for value received, with interest after date until paid at 8 per cent. per annum." By an amendment to the petition this clause was stricken, and in lieu thereof the following inserted: "At the Third National Bank of Atlanta, Ga., for value received, with interest at 6 per cent. per annum," etc. *Held*: (1) The amendment was properly allowed. *Chapman v. Skellie*, 65 Ga. 125 (1). (2) Overruling a motion to continue on the ground of surprise because of the allowance of the amendment was not an abuse of discretion, in the absence of a showing that the movant was less prepared to go to trial. *Railway Co. v. Sasser*, 4 Ga. App. 276 (2), 61 S. E. 505.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1575-1583; Dec. Dig. § 487.*; *Continuance*, Cent. Dig. §§ 99-112; Dec. Dig. § 30.*]

3. COSTS (§ 260*)—ON APPEAL—DAMAGES FOR DELAY.

The evidence demanded the verdict directed, and the bill of exceptions is so clearly without merit that the judgment is affirmed, with 10 per cent. on the amount of the judgment as

damages for delay in suing out and prosecuting the writ of error.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 983-996; Dec. Dig. § 260.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by the Paper Mills Company against J. Sartorious. Judgment for plaintiff, and defendant brings error. Affirmed.

Morris Macks, for plaintiff in error. J. E. & L. F. McClelland, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(10 Ga. App. 588)

TAYLOR v. KNOWLES. (No. 3,475.)

(Court of Appeals of Georgia. Jan. 15, 1912. Rehearing Denied Feb. 27, 1912.)

(*Syllabus by the Court.*)

COMPROMISE AND SETTLEMENT (§ 15*)—OPERATION AND EFFECT.

The plaintiff's petition disclosing that, if he ever had a valid cause of action, it had been ended by an executed compromise, the court did not err in dismissing it on demurrer.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Dec. Dig. § 15.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by M. A. Taylor against W. A. Knowles, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Walker, for plaintiff in error. Dean & Dean and J. M. Hunt, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 572)

MOON v. CITY OF JEFFERSON.

(Nos. 3,416, 3,457, 3,458, 3,459.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(*Syllabus by the Court.*)

MUNICIPAL CORPORATIONS (§ 642*)—VIOLATION OF ORDINANCE—REVIEW—CERTIORARI—BOND.

The filing of a bond conditioned for the personal appearance of the defendant to abide the final order, judgment, or sentence of the municipal court or of the superior court (or the filing of a proper affidavit in forma pauperis in lieu of a bond) is a condition precedent to obtaining the writ of certiorari in a case where one seeks to review the judgment of a municipal court. The bond must be approved by the clerk of the municipality under which the court exists, if there be one, and it must be conditioned for the appearance of the defendant to abide the final judgment of the superior court, as well as of the mayor's court, and a defect in either respect is fatal. Consequently it is not error for a judge of the superior court to refuse to sanction a petition for certiorari when it appears from an inspection of the bond tendered and attached to the petition that it is neither conditioned as required by law nor ap-

proved by the municipal officer charged by law with the duty of approving it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 642.*]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Ause Moon, Dock Appleby, Grace Duke, and Buster Phillips were severally convicted of violating an ordinance of the City of Jefferson. From an order of the superior court refusing to sanction petitions for certiorari, each defendant brings error. Affirmed.

Ray & Ray and Mahaffey & Mahaffey, for plaintiffs in error. C. L. Bryson, for defendant in error.

RUSSELL, J. We are precluded from a consideration of the merit of the attacks upon the constitutionality of the ordinance of the city of Jefferson, sought to be made in the petitions for certiorari in these cases. The trial judge, for the same reason, could not consider them. It appears, from an inspection of the petition for certiorari and the exhibits referred to thereby, including the bond itself, that the bond was approved in one case by the mayor and in the others by the acting mayor of the city of Jefferson, when they should have been approved by the clerk of the city council. It also appears in the case of Ause Moon that the petitioner only binds himself to appear before the mayor, if the certiorari is decided finally in favor of the city of Jefferson, and pay the fine or serve the sentence. In the other three cases the condition of the bond is that it shall be void if the principal in the obligation abides and answers the final judgment in said case, whatever it may be. It is therefore plain, that the judge of the superior court did not err in refusing to sanction all of these petitions. As held by the Supreme Court in *Johns v. City of Tifton*, 122 Ga. 734, 50 S. E. 941: "The filing of the bond or making of the pauper affidavit is a condition precedent to the application for certiorari." Both the Supreme Court and this court have frequently defined the requisites of the bond in cases of certiorari from judgments of municipal courts. In the *Johns Case*, supra, it was held that "a bond conditioned to pay the eventual condemnation money is not such a bond as the statute prescribes, and the trial judge did not err in refusing to sanction the application." In *McDonald v. Ludowici*, 3 Ga. App. 654, 60 S. E. 337, this court held that a certiorari could properly be dismissed, either where the bond was not approved by the proper officer of the municipality, or where it was not conditioned to abide by the judgment of the superior court, or the mayor's court.

This ruling has been followed without ex-

ception, because we have deemed the act of 1902 (Acts 1902, p. 105) mandatory, and have considered the matter of perhaps even more importance since the passage of the act of 1909 (Civil Code 1910, §§ 5192-5194), which provides for the supersedeas of the judgment upon the filing of the bond. Upon the proposition that the certiorari should not be sanctioned, or, if sanctioned, should be dismissed, where it appears that the bond was not approved by the proper municipal officer, see *Condon v. Town of Jesup*, 5 Ga. App. 100, 62 S. E. 677. Upon the proposition that the certiorari bond must be conditioned strictly as provided by law, we pointed out, in *McDonald v. Ludowici*, supra, the apparent reason for the legislative requirements for the appearance of the defendant to abide the final order or judgment of the superior court, as well as of the police or mayor's court, and this ruling was followed in *Simon v. Savannah*, 4 Ga. App. 172, 60 S. E. 1036, *Poulos v. Atlanta*, 4 Ga. App. 567, 61 S. E. 1128, *Tooke v. City of Oglethorpe*, 4 Ga. App. 851, 62 S. E. 544, and *Roach v. Atlanta*, 7 Ga. App. 171, 66 S. E. 484.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 487)

HUBBARD v. SHAW. (No. 3,218.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

1. COMPENSATION OF BROKER—SUFFICIENCY.

There was a direct conflict between the evidence for the plaintiff and the testimony of the defendant; but the credibility of the witnesses is a question to be determined by the jury, and the evidence fully authorized the conclusion that the defendant empowered his partner in the land to employ the plaintiff as a real estate agent to sell the farm in question, giving his partner unlimited discretion as to the terms and conditions of the sale, and that the real estate agent fulfilled his contract by finding a purchaser who was able, willing, and ready to comply with the terms of sale fixed by the partner and ratified by him.

2. APPEAL AND ERROR (§§ 207, 1051*)—RELEASE (§ 28*)—HARMLESS ERROR—PRESENTATION OF QUESTIONS IN LOWER COURT—RELEASE OF JOINT OBLIGOR.

The remaining assignments of error are not sufficiently meritorious to warrant a reversal of the judgment refusing a new trial.

(a) The hearsay testimony was not injurious to the defendant, in view of the testimony of the defendant's partner that he was satisfied as to the willingness of the proposed purchaser to buy and his ability to pay for the partnership farm.

(b) The statement of counsel for the plaintiff in the court below to the effect that Kelly, one of the codefendants, had tendered one-half of the commissions sued for, and that none of the costs should be taxed against him, did not amount to a release of the other defendant; and, even if the statement was prejudicial to the plaintiff in error, no ruling of the lower court was invoked thereon, and consequently

that phase of the exception presents nothing for the consideration of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1500, 4161-4170; Dec. Dig. §§ 207, 1061; *Release, Cent. Dig. §§ 57-62; Dec. Dig. § 28.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by M. S. Shaw against Jno. R. Hubbard. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Dinsmore and B. P. Gaillard, Jr., for plaintiff in error. Fulwood & Murray and Hendricks & Christian, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 479)

PETERS v. QUEEN INS. CO.
(No. 2,513.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

REVIEW.

This case is fully controlled by the instructions contained in the opinion of the Supreme Court upon the question raised by the record and certified to that court. Under that opinion the judgment of the lower court must be reversed. *Peters v. Queen Insurance Co.*, 73 S. E. 664, decided by the Supreme Court January 12, 1912.

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by Beulah Peters against the Queen Insurance Company. Judgment for plaintiff, and defendant brings error. Certified to Supreme Court. Reversed, on opinion of Supreme Court. 73 S. E. 664.

J. A. Wilkes and Shipp & Kline, for plaintiff in error. King, Spalding & Underwood, for defendant in error.

PER CURIAM. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 479)

UNITED STATES CASUALTY CO. v. NEWMAN. (No. 2,984.)

(Court of Appeals of Georgia. Feb. 12, 1912.)

(Syllabus by the Court.)

JURISDICTION OF CITY COURT—JUDGMENT REVERSED.

The question of jurisdiction raised by the record having been certified by this court to the Supreme Court for instructions, and that court having, in an opinion handed down January 12, 1912 (73 S. E. 667), decided that "the city court of La Grange had not acquired such jurisdiction of the defendant as would authorize it to proceed to try this action and to render a judgment against the defendant thereon," the judgment of the city court must be reversed.

Error from City Court of La Grange; Frank Harwell, Judge.

Action between the United States Casualty Company and J. D. Newman. From the judgment, the Casualty Company brings error. Certified to the Supreme Court (73 S. E. 667). Reversed.

Slaton & Phillips and Hatton Lovejoy, for plaintiff in error. W. T. Tuggle, for defendant in error.

PER CURIAM. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 567)

KNOWLES v. J. A. DAYRIES RICE CO.
(No. 3,393.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1031*)—PRESUMPTION OF PREJUDICE—ARGUMENT OF COUNSEL.

The argument of counsel, being based upon an inference unsupported by evidence and irrelevant to the merits of the cause, was presumably prejudicial to a fair consideration by the jury of the rights of the opposite party; and, the latter's counsel having properly objected thereto and moved for a mistrial, it was error not to grant a mistrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

2. REVIEW.

Otherwise than as above stated, the trial was free from error.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by the J. A. Dayries Rice Company against J. W. Knowles. Judgment for plaintiff, and defendant brings error. Reversed.

Chapman & Howard, for plaintiff in error. O. E. Battle and Howell Hollis, for defendant in error.

RUSSELL, J. Upon an examination of the record in this case we were first inclined to affirm the judgment in refusing a new trial, but upon more mature reflection we are satisfied that the argument of the distinguished counsel for the plaintiff in the court below must necessarily have prejudiced the rights of the defendant, and probably deprived him of his right of an absolutely fair and impartial trial, had, as all trials should be had, upon the law and the evidence, and nothing else. The right to an absolutely fair and impartial trial is guaranteed every party in every cause, and the highest duty of a court is to see that this right is preserved absolutely unimpaired. The importance of the principle is likely to be overlooked, when the cause is a civil case and only a small amount is involved; but the paramount importance of this right should never be overlooked, and, when the power of the court is properly in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

voked for its protection and preservation, the appeal should in no case be disregarded. Retribution upon any party offending should be speedy and unsparing. As was said in *Parker v. State*, 3 Ga. App. 23, 59 S. E. 205: "It is with the greatest reluctance and with the gravest sense of responsibility that a court of review will control the conduct of a trial judge in the administration and exercise of the high duties which devolve upon him." Counsel, too, in the discharge of his duties to his client, standing, as he does, in his client's shoes to plead his cause, should be allowed the utmost freedom of speech and action consistent with the rules of orderly judicial procedure; yet in any case in which the attorney for one party does any unwarranted act which prejudices the right of the opposite party to have the jury accord exactly impartial consideration of his contentions as deducible from the evidence in the case, or when the attorney for either party argues before the jury matters foreign to the issue and unsupported by the evidence which are prejudicial to the opposite party, the duty devolves upon the court of dealing summarily with the matter, if it is properly called to his attention. This rule is essential, to the end that exact justice shall be administered. [1] In the present case, which only involves a small amount, the judge certifies that the plaintiff's attorney argued in conclusion that the defendants had collected insurance money from insurance companies on all the stock of merchandise of the defendant, including the rice in controversy. The defendant's attorney objected in open court to this argument, and the judge stated to the jury that such argument was improper, and that the jury should not consider it. After this ruling and instruction, the plaintiff's counsel stated to the court that he was arguing this fact only as an inference to be drawn from the testimony in the case, to which the court replied, in substance, that it would not be proper to argue any fact not brought out by the testimony, but any fair inference counsel drew from the testimony might be stated as an inference only. Thereupon counsel for the plaintiff continued to argue that it was a fair inference to be drawn from the testimony in the case that the defendant had collected on all his stock of merchandise, and on all this rice, which had been destroyed in the store. Counsel for the defendant again objected to the argument, and urged that it was unfair and prejudicial to the defendant, and without any evidence to support it, and thereupon moved the court to declare a mistrial. The court overruled the motion to grant a mistrial, and error is assigned upon this ruling. We think a review of the record sustains the contention that the failure of the court to declare a mistrial, under the circumstances, had the effect of denying the defendant a fair and impartial trial upon the issues involved in the case; that the

argument was calculated to prejudice the jurors' minds against the defendant, because it was unfair argument and had no connection with the true issues in the case. The only issues under the evidence were whether the rice ordered by the defendant was shipped to him by the plaintiff, and, if so, whether the fact that the rice was received by the defendant from the carrier sufficed to constitute such an acceptance of the shipment as would remove the sale from the operation of the statute of frauds, the value of the rice being more than \$50. "Mere receipt of goods, without acceptance, will not meet the requirements of the statute of frauds." *Wholesale Mercantile Co. v. Jackson*, 2 Ga. App. 782 (3), 59 S. E. 109; *Loyd v. Wight*, 20 Ga. 578, 65 Am. Dec. 636; s. c. 25 Ga. 215; *Tiedeman on Sales*, § 66. If there had been any evidence to the effect that the defendant collected insurance upon the rice, or any evidence that the rice was specifically considered by either party when the loss by fire was adjusted, the inference that the defendant had accepted the rice and treated it as his own would have been authorized. We do not find anything in the defendant's letter to the plaintiff, however, which authorized any such inference. Nothing to that effect was elicited from Knowles on cross-examination, and no direct or circumstantial evidence to that effect appeared in the record from any source.

For this reason we think there was nothing to suggest the inference which counsel for the plaintiff sought to argue, except mere conjecture. There could, at most, be but a suspicion that Knowles might have been paid for the rice, due to the fact that it was in his store at the time of the fire; but this would not authorize the inference that he had received pay for it, in the absence of any evidence as to the time when his insurance was taken out, the amount of insurance upon the stock, and the value of his stock of goods at the time the contract of insurance was entered into and at the time of the fire. If, as we think, the inference was unauthorized, it was naturally very prejudicial to the defendant, because it would place him in the attitude of refusing to pay for goods for which he himself had been paid. Nothing more strongly prejudices an honest jury against the litigant than evidence of his dishonesty. Nothing in our experience can more strongly tend to influence a fair jury (perhaps unconsciously to themselves) against a contention otherwise unanswerable than circumstances which strongly suggest the fact that the contention is not fairly presented. The amount involved in this case was small. As suggested by the remarks of Judge Lamar in discussing a similar situation (*Patton v. State*, 117 Ga. 238-239, 43 S. E. 533), the defendant's counsel in the instant case took a great risk in objecting to the argument at all, because juries are so

much in favor of the right of free speech that the objection might suggest to the jury that the counsel was of the opinion that the plaintiff was protecting an unusually vulnerable point in the defendant's defense, and that if the plaintiff's counsel had been permitted to develop the whole truth, unobstructed by a legal technicality, more of the true merits of the transaction might have been disclosed to their view. The court properly sustained the objection of the defendant's counsel, but practically withdrew the ruling and magnified the injurious effect of the argument when he later permitted plaintiff's counsel to argue, as a legitimate inference from circumstances proved in the case, the same thing to which objection had been offered as not being a matter of direct proof. We think the court erred in the latter ruling; for, unless the inference indulged can be reasonably drawn from facts and circumstances in a given case, it cannot arise at all and does not exist. There must be a plain connection between the facts in proof and the inference drawn therefrom. If the inference in question is not manifestly supported by, and reasonably deductible from, the facts in proof, the argument is irrelevant, and ordinarily prejudicial.

[2] Otherwise than as above stated, the trial was free from error.

Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 587)

CASSEL et al. v. RANDALL. (No. 3,438.)
(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 27, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 71*)—PRESUMPTIONS—DUE COURSE OF MAIL.

Where the plaintiff's evidence shows that letters were written and duly mailed, properly addressed to the defendant, a presumption arises that they were received. This presumption is rebuttable, and is entirely overcome by the uncontradicted evidence of the defendant that the letters were never received. *Hamilton & Co. v. Stewart*, 108 Ga. 476, 34 S. E. 123, and citations.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 92; Dec. Dig. § 71.*]

2. LANDLORD AND TENANT (§ 150*)—REPAIRS—DUTY OF LANDLORD.

The duty of the landlord to make repairs does not arise until he has knowledge of defects. The tenant, being in possession, must notify the landlord of needed repairs. *Dougherty v. Taylor & Norton Co.*, 5 Ga. App. 776, 63 S. E. 928; *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204; *White v. Montgomery*, 58 Ga. 204.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 150.*]

3. LANDLORD AND TENANT (§ 150*)—REPAIRS—DUTY OF LANDLORD.

Where the tenant and the landlord live in different cities, and the custom during the ten-

ancy for several years has been for the tenant to make needed repairs and charge the costs of the repairs in the settlement of rent, the landlord would have the right to assume that this custom would continue during the tenancy, unless expressly notified by the tenant to the contrary.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 536-557; Dec. Dig. § 150.*]

4. LANDLORD AND TENANT (§ 154*)—CONDITION OF PREMISES—LIABILITY FOR INJURIES.

The uncontradicted evidence in this case showing that the landlord did not know of the necessity for making the repairs, and that the tenant had been in the habit for several years of making all needed repairs on the premises and deducting the costs therefor from the rent, which practice had been acquiesced in by the landlord, and the landlord had not been informed by the tenant of any discontinuance of such practice, the landlord was not liable for any damage to the property of the tenant caused by want of repairs, and a nonsuit was properly awarded.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 558-566; Dec. Dig. § 154.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action between Max Cassel and another and Mrs. M. A. Randall. Judgment for the latter, and the former bring error. Affirmed.

R. S. Wimberly, for plaintiffs in error.
Lane & Park, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 558)

GEORGIA SOUTHERN & F. RY. CO. v.
RANSOM. (No. 3,244.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1004*)—REVIEW—QUESTIONS OF FACT—AMOUNT OF RECOVERY.

The plaintiff in her petition asks for no damages other than vindictive damages. "The entire injury," as alleged, "is to the peace, happiness, and feelings of the plaintiff. The verdict of a jury in such a case should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. APPEAL AND ERROR (§ 1006*)—REVIEW—QUESTIONS OF FACT—AMOUNT OF RECOVERY.

This is the third consecutive verdict for the plaintiff, upon testimony at each trial substantially identical (*Ga. So. & Fla. Ry. Co. v. Ransom*, 5 Ga. App. 740, 63 S. E. 525; *Id.*, 8 Ga. App. 277, 63 S. E. 943), the instructions of the court to the jury in the instant case do not vary in any material particular from the charge heretofore approved by this court (5 Ga. App. 740, 63 S. E. 525), and this court having then ruled that a verdict for the same amount as that now under review (\$700) could not, as a matter of law, be held to be excessive, the assignment of error that the verdict was contrary to evidence is not sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

3. TRIAL (§ 116*)—ARGUMENT OF COUNSEL—READING FROM NEWSPAPER.

It is within the privilege of counsel, in reply to the contention of his adversary that the word "woman" could never be used as a term of reproach or contempt, to read a supposed newspaper item, illustrative of an opposite contention upon his part, or even to read, from notes used by him in the argument, the language of a news item sustaining his contention, where it does not appear that the newspaper item was exhibited to the jury, or that they were told that the illustration employed had ever existed in fact, and where it is perfectly plain that the instance related was used, and intended to be treated, merely as matter of illustration in argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 288; Dec. Dig. § 116.*]

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by Mrs. J. W. Ransom against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. I. Hall, J. E. Hall, and J. T. Hill, for plaintiff in error. F. G. Boatright, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 559)

SOUTHERN RY. CO. v. CRABB. (No. 3,259.)
(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 136*)—ACTIONS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

"The allowance rightfully to be made for indiscreet conduct under excitement and alarm can better be determined by the jury than by the court." Smith v. Wrightsville & Tennille R. Co., 83 Ga. 671, 10 S. E. 361.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 286, 291, 299, 340; Dec. Dig. § 136.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

Whether the agents of the defendant are negligent or exercise extraordinary diligence in the case of a passenger seeking to enter a train, as well as the comparative negligence of the passenger and the agents of the carrier in contributing to or preventing injury, is a question for determination by a jury; and the finding of the jury is not to be disturbed, if there is any reasonable inference from the facts and circumstances in proof which supports the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

3. CARRIERS (§ 287*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

The duty of extraordinary diligence for the safety of passengers, which rests upon a carrier in behalf of a passenger who has purchased a ticket and is seeking to enter the train for the purpose of being transported to his destination, and whether extraordinary diligence requires that a passenger be assisted in entering a train, may be dependent upon the circumstances and conditions surrounding the

passenger, the location of the tracks, the height of the steps or platform, and other facts of the particular case. If, in the exercise of extraordinary care, it should be necessary for the safety of a particular passenger, in an emergency, that the passenger be assisted in mounting the steps, or otherwise aided in entering the train, then it will become the duty of the carrier to assist the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1157, 1158; Dec. Dig. § 287.*]

4. INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CONSTRUCTION OF CHARGE AS A WHOLE.

The instruction of the court upon the subject of contributory negligence, when taken in connection with the entire charge, was a brief, but clear, presentation of the correct rules upon that subject as applied to the evidence in the case, being substantially similar to an instruction approved by the Supreme Court in Southern Railway Co. v. Wallis, 133 Ga. 553 (3), 66 S. E. 370, 30 L. R. A. (N. S.) 401.

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

The assignments of error based upon the failure to charge upon contributory negligence in the language of the Code do not authorize a reversal. The principles referred to in these assignments of error were presented to the jury, and, if fuller instructions were desired, they should have been requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 256.* Carriers, Cent. Dig. § 1407.]

6. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by Mrs. T. J. Crabb against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Trawick & Ault, John L. Tison, and Maddox, McCamy & Shumate, for plaintiff in error. I. F. Mundy and W. W. Mundy, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 560)

SCOTT v. TURNER. (No. 3,326.)
(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 644*)—BILL OF EXCEPTIONS—COMPELLING FURTHER CERTIFICATION—WAIVER.

The application for mandamus nisi must be denied. The exact point is ruled in Moore v. Reid, Judge, 110 Ga. 248, 34 S. E. 211. The acceptance of the writ of error and its filing by the agent of the plaintiff in error cannot be treated otherwise than if they had been his own act. "After a judge has certified a bill of exceptions, and the plaintiff in error has, by serving and filing the same and by causing it and the specified portions of the record in the case to which it relates to be transmitted to the Supreme Court, accepted the certificate of the judge as sufficient, it is too late to apply to this court for a mandamus to compel the judge to certify further respecting such bill of excep-

tions. *Rogers v. Roberts*, 88 Ga. 150, 13 S. E. 962. The above is true, although counsel for the plaintiff in error may, before receiving from the judge the certified bill of exceptions, have orally expressed some dissatisfaction with the certificate and requested an addition thereto. The proper course in such case, if counsel regarded the certificate as incomplete, would have been to decline to receive and act upon it, and then apply to this court for a mandamus."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795-2798; Dec. Dig. § 644.*]

2. APPEAL AND ERROR (§ 641*)—RECORD—DEFECTS—DISMISSAL.

The recitals of fact as to the only assignment of error contained in the bill of exceptions not being certified to be true, and it appearing, on the contrary, that the material statement of material facts in the bill of exceptions are denied by the trial judge, the writ of error must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2789, 2790; Dec. Dig. § 641.*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action by Thomas E. Scott, trustee in bankruptcy of E. C. Taylor, against Arch Camp, defendant, and N. S. Turner, garnishee. To a ruling permitting the garnishee to file his answer, plaintiff excepts. Writ of error dismissed.

Phil W. Davis, Jr., for plaintiff in error.
R. W. Milner, for defendant in error.

RUSSELL, J. The plaintiff in error presented to the judge of the lower court a bill of exceptions in which it was stated that in the suit of Thomas E. Scott, trustee in bankruptcy of E. C. Taylor, against Arch Camp, in which a judgment was rendered against the defendant, Arch Camp, at the March term, 1910, of the city court of Covington, a summons of garnishment returnable to said November term of court had been served upon one N. S. Turner; that no answer to the garnishment had been made at the November term, 1910, or the January term, 1911, and that the plaintiff in *fi. fa.*, after having introduced in evidence his judgment and the affidavit and bond for garnishment, the return of service showing that the garnishee had been duly served, the docket of the court, and all other papers in the case on file, and thereby having shown that the garnishee had filed no answer, asked for a judgment against the garnishee, which was refused, the court, on the contrary, having allowed the garnishee to file an answer. Exceptions pendente lite were filed to the ruling of the court in permitting the garnishee to file his answer, and exception was taken in the bill of exceptions to the refusal to grant a judgment against the garnishee as in default. There was prepared and attached to the bill of exceptions, which was sent to the judge, the certificate prescribed by section 6145, Code 1910. How-

ever, the judge did not sign this certificate, but in lieu thereof prepared and signed the certificate following, which incorporated a contradiction of the facts related in the bill of exceptions concerning the only material assignment of error:

"I do certify that the foregoing bill of exceptions is true, subject to the following explanation: In the second exception upon the ruling of the court, found on page 2 of the bill of exceptions, I do not certify that the garnishment was returnable to the November term, 1910, of the city court of Covington. No evidence whatever was offered by the plaintiff showing to what term the summons of garnishment was returnable. The affidavit and bond for garnishment was dated October 22d. The entry of service thereon was dated October 24th. The case was docketed to the January term, 1911, and I ruled that, inasmuch as there was nothing to show when the summons of garnishment was issued and the service on Turner was dated October 24th, and the November term of the city court began November 2d, giving only eight days between the service of the summons of garnishment on Turner and the beginning of the November term, that the clerk had properly docketed the same to the January term, and that therefore the March term was the second term, and that he had a right to file his answer under the statute at the second term. This also upon the statement made by the plaintiff's counsel in open court to me, and to the opposing counsel, to the effect that, if Turner did not owe the defendant anything, he did not want a judgment upon a technicality. I then allowed the answer and overruled the motion for a judgment. I further certify that this bill of exceptions specifies and contains all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Covington is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be reviewed and corrected."

With the certificate in this form the bill of exceptions was filed and served. More than 30 days had elapsed since the date of the judgment, and the bill of exceptions had been filed in this court before counsel for plaintiff in error discovered that the bill of exceptions had not been certified. Thereupon counsel for plaintiff in error presented a petition for a mandamus nisi, requiring the judge of the city court of Covington to show cause why he should not be required to certify the bill of exceptions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] 1. The first question which arises is upon the petition for the mandamus. It appears from the petition and the exhibit that counsel for the plaintiff in error sent his bill of exceptions by mail to the judge, and that as it was not returned to him until several days elapsed, and the time within which the bill of exceptions could be certified was about to expire, plaintiff's counsel wrote to the judge in regard to the matter. The judge replied the next day, stating that he had "certified the bill of exceptions and turned it over to the clerk immediately after he had received it." The same day counsel for plaintiff in error addressed a letter to the clerk of the superior court, with a request that the clerk have the bill of exceptions served the next day without fail, and asking the clerk to see to it that the entry of service was entered and signed by the sheriff. He inclosed copy of the bill of exceptions to be served upon Turner, and requested the clerk to fill in the date of the certificate in the copy before having it served. The bill of exceptions, as appears from the entries thereon, was filed March 23, 1911, and service was acknowledged by the attorney for the garnishee (the defendant in error here) on March 25, 1911. We think that the act of the clerk in having the bill of exceptions filed and served must be treated as the act of the plaintiff in error himself. The bill of exceptions was not certified by the judge, and an examination of the joint statement of facts and certificate prepared by the judge would have disclosed that fact. It is very apparent that counsel for plaintiff in error believed that the bill of exceptions, as prepared by him, had been certified. He had the right to believe this from the statement of the judge's letter to that effect; but it transpired that from the judge's statement he understood one thing, while the judge meant another. Acting upon his belief that the writ of error had been certified, he wrote to Mr. Davis, clerk of the superior court, to have it served by the sheriff. He thus constituted Mr. Davis his agent, and is bound by his acts. "After a judge has certified a bill of exceptions, and the plaintiff in error has, by serving and filing the same, and by causing it and the specified portions of the record in the case to which it relates to be transmitted to the Supreme Court, accepted the certificate of the judge as sufficient, it is too late to apply to this court for a mandamus to compel the judge to certify further respecting such bill of exceptions. *Rogers v. Roberts*, 88 Ga. 150, 13 S. E. 962. The above is true, although counsel for the plaintiff in error may, before receiving from the judge the certified bill of exceptions, have orally expressed some dissatisfaction with the certificate and requested an addition thereto. The proper course in such case, if counsel regarded the certifi-

cate as incomplete, would have been to decline to receive and act upon it, and then apply to this court for a mandamus." If what purports to be the certificate of the judge to the bill of exceptions be treated as a nullity, or the equivalent of a refusal to certify the bill of exceptions, as it must be, then the application for mandamus under the ruling above cited comes too late.

[2] 2. On the other hand, if the judge's note could be considered as a certificate—informal, it is true, but substantially sufficient to give this court jurisdiction—then no proceeding would be of any avail, because the judge could not be required to certify to facts and conditions related to have existed, when as a matter of fact such was not the case. It is plain that the only material assignment of error set forth in the bill of exceptions depends upon whether the summons of garnishment served upon Turner was returnable to the November term, 1910, of the city court of Covington. Under the facts stated by the judge, the averments of the bill of exceptions in this essential particular are fully contradicted. The recitals of fact as to the only assignment of error contained in the bill of exceptions not being certified to be true, it appearing, on the contrary, that the material statement of facts in the bill of exceptions is denied by the trial judge, the attempted writ of error must be dismissed.

Writ of error dismissed.

POTTLE, J., not presiding.

(10 Ga. App. 580)

COOK v. STATE. (No. 3,470.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 101*)—CONFLICTING JURISDICTION—TRANSFER OF CAUSES—EFFECT.

An indictment having been duly transferred by the superior court of the county having jurisdiction of it to the city court for trial, jurisdiction of the case was immediately vested in the city court, and the superior court had no further jurisdiction over the indictment. *Coleman v. State*, 94 Ga. 87, 21 S. E. 124.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 101.*]

2. CRIMINAL LAW (§ 101*)—CONFLICTING JURISDICTION—TRANSFER OF CAUSES—EFFECT.

The act of the General Assembly approved August 15, 1910 (Acts 1910, p. 201), entitled "An act to abolish the city court of Newton, to provide for the disposition of business pending in said court, and for other purposes," having been held by the Supreme Court to be "nugatory and ineffectual" (*Cook v. State*, 137 Ga. —, 73 S. E. 672), it follows that the city court of Newton retained jurisdiction of all criminal cases which the superior court of Baker county had duly transferred to it for trial, irrespective of the provisions of that act.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 101.*]

3. CRIMINAL LAW (§ 101*)—CONFLICTING JURISDICTION—TRANSFER OF CAUSES—EFFECT.

The indictment against the plaintiff in error having been duly transferred by the superior court of Baker county to the city court of Newton for trial, the former court lost jurisdiction of the case, and the latter court was vested with exclusive jurisdiction thereof. Under the provisions of the act of 1910, supra, which attempted to abolish the city court of Newton and to provide for the disposition of business pending in that court, the indictment was transferred back to the superior court of Baker county for trial. Since the act abolishing the city court of Newton was ineffectual for that purpose, as declared by the Supreme Court in the present case, the transfer of the indictment back to the superior court under the provisions of that act was unauthorized, and did not confer upon the superior court jurisdiction of the case which it had previously fully relinquished to the city court, and therefore the superior court was without jurisdiction to try the case, and a plea in abatement, filed in the superior court, challenging the jurisdiction of this court, should have been sustained, and the case sent back by the superior court to the city court for trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 101.*]

Error from Superior Court, Baker County; Frank Park, Judge.

Leroy Cook was convicted of crime, and brings error. Reversed, after receipt of answers of Supreme Court in response to certified questions (73 S. E. 672).

W. I. Geer, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 581)

McFARLIN et al. v. REEVES. (No. 3,509.)
(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 276*) — FORECLOSURE—NOTICE TO MORTGAGOR—WAIVER.

There was no motion to dismiss the levy of the mortgage *fi. fa.* upon the ground that the justice of the peace had not notified the mortgagor at the time of issuing the execution upon the affidavit of foreclosure; and, in the absence of an appropriate request, the judge did not err in failing to charge the jury that it was the duty of the magistrate, with whom the mortgage and affidavit to foreclose it were filed, to give notice to the mortgagor of the proceedings to foreclose at the time of issuing the execution, and that if the proof showed that he failed to do this the jury should find for the plaintiff. Nor did the court err in overruling the objection to the mortgage *fi. fa.*, based upon the ground that it did not show that the justice of the peace had given notice to the defendant in *fi. fa.* as required by law.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 276.*]

2. EXEMPTIONS (§ 86*)—PROPERTY EXEMPT—STATUTORY PROVISIONS.

It is optional to take either the exemption provided by section 3416, or the exemption declared in section 3414, of the Civil Code 1910;

but one cannot take both the exemptions. Civil Code 1910, § 6585.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 89; Dec. Dig. § 86.*]

3. SUFFICIENCY OF EVIDENCE — NEW TRIAL REFUSED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Upson County; R. T. Daniel, Judge.

Action by T. J. Reeves against Lizzie McFarlin and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jas. R. Davis, for plaintiffs in error. J. Y. Allen and M. H. Sandwich, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 571)

SLACK v. ELKINS. (No. 3,403.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 138*) — DEFAULT — SETTING ASIDE.

Under the facts stated in the defendant's motion, it was error to refuse, at the trial term, to allow the default to be opened. The defendant had paid the costs, the showing under oath set up a meritorious defense, and the movant offered to plead *instanter* and announced ready to proceed with the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251; Dec. Dig. § 138.*]

2. PLEDGES (§ 58*)—ENFORCEMENT OF RIGHT OF ACTION PLEDGED—AMOUNT OF RECOVERY.

Generally the holder of a promissory note, pledged to him as collateral, may enforce it for the entire amount against the maker as obligor, holding as trustee for the pledgor, any surplus after the payment of his debt; but if the maker has a valid defense against the original payee, the holder cannot recover more than the amount of the debt due him by the payee as his pledgor. If the maker of a promissory note which has been pledged to a third person as collateral security proves a defense not available as a bar to recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the amount of the debt for which he holds the collateral security.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 186-194; Dec. Dig. § 58.*]

3. PLEDGES (§ 58*)—ENFORCEMENT OF RIGHT OF ACTION PLEDGED—AMOUNT OF RECOVERY.

In a case in which A. gives his promissory note to B. and deposits with B. a promissory note of C. to himself as collateral security, and B. sues C. upon the collateral note, and A. thereafter, before the trial term, pays in part his original obligation to B., and C. on his part has paid to A. either the whole or a part of the amount of the note held by B. as collateral, B. is not entitled to recover in his action against C. a sum larger than the amount of the unpaid balance due him by A. at the date of the judgment.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 194; Dec. Dig. § 58.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. BILLS AND NOTES (§ 534*)—CONSTRUCTION—PROVISION FOR ATTORNEY'S FEES.

Where the contract for attorney's fees contemplates that it shall be fixed upon a percentage basis, the amount due as attorney's fees is determined with reference to the amount actually due upon the obligation at the time of the trial, and not by the amount alleged to be due when the suit was filed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by O. H. Elkins, administrator, against S. G. Slack. Judgment for plaintiff, and defendant brings error. Reversed.

On May 18, 1909, S. G. Slack executed and delivered his promissory note for \$2,500 to J. H. Harris, due 16 months after date, with interest at 8 per cent. per annum from date of said note. J. H. Harris in turn indorsed the note sued on to G. E. Walters, administrator, who was afterwards succeeded by the defendant in error. On January 14, 1911, Elkins, as administrator de bonis non, filed suit against S. G. Slack in the city court of Tifton to recover principal, interest, and 10 per cent. attorney's fees provided for in said note. At the appearance term in February, 1911, the case was marked in default; no plea being filed. At the March term, the defendant, S. G. Slack, appeared in court, and, before final judgment was rendered, paid the court costs and filed his plea to said suit. He charges in his plea that the note sued on was by J. H. Harris deposited with the defendant in error as collateral security to a note signed by J. H. Harris et al. to G. E. Walters, former administrator, and that the indebtedness existing between J. H. Harris and the estate represented by the defendant in error had been satisfied, and that by operation of law the collateral security had answered its purpose, thereby reverting back to J. H. Harris.

Defendant further charged in his plea that the indebtedness between J. H. Harris and the estate represented by O. H. Elkins had been sued to judgment in the city court of Fitzgerald, and that said judgment had been fully paid, and that said payment occurred on March 10, 1911, after the default judgment and before final judgment in the city court of Tifton. It was there alleged in the plea that J. H. Harris had been paid the sum of \$592.20 on March 10, 1911, on the note sued on in the city court of Tifton, it being the same day that the judgment in favor of this defendant in error against J. H. Harris et al. was marked satisfied and canceled of record in the clerk's office in Ben Hill county. The court declined to open the default, and on March 16, 1911, entered judgment as in default in favor of the plaintiff against the defendant, S. G. Slack, for \$2,500 principal, \$368.30 interest, and \$286.53

attorney's fees. The plaintiff in error then and there excepted to this judgment, and tendered the court his bill of exceptions, which was duly certified. Exception is taken to the refusal to open the default.

On March 16, 1911, the court, without the intervention of a jury, and before entering up a judgment, heard the evidence of S. G. Slack and O. H. Elkins, and also inspected the documentary evidence; but it will be observed that the judgment in this case is entered up independent and aside from the evidence of S. G. Slack and O. H. Elkins, and on April 15, 1911, after the bill of exceptions had been certified by the court, the court, on complaint of the defendant in error, ordered the clerk to certify and send up the evidence of Slack and Elkins and the documentary evidence introduced.

J. B. Murrow and J. J. Murray, for plaintiff in error. Geo. E. Simpson, W. H. Horne, and O. H. Elkins, for defendant in error.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 548)

KIGHT v. ROBINSON. (No. 3,137.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 423*)—PAROL EVIDENCE—MORTGAGES.

Parol evidence is inadmissible to extend or increase the amount of indebtedness specifically secured by a mortgage, where the mortgage does not on its face show that it was given to secure advances. Evidence that a mortgage was intended to secure a note not specified in it is properly repelled, in the absence of any averment that by reason of fraud, accident, or mistake the correct amount was not stated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1963; Dec. Dig. § 423.*]

2. MORTGAGES (§ 146*)—LIEN.

A mortgage foreclosure is a proceeding stricti juris, and the lien of the mortgage cannot be extended to secure any indebtedness other than that specifically mentioned in the condition of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 290½; Dec. Dig. § 146.*]

Error from City Court of Wrightsville; J. L. Kent, Judge.

Action by Mrs. N. J. Kight against Louis Robinson to foreclose a mortgage. Defendant interposed an affidavit of illegality. Judgment for plaintiff for less than the amount claimed, and she brings error, which is here prosecuted in the name of B. T. Kight, as administrator. Affirmed.

Wm. Faircloth and Chas. S. Claxton, for plaintiff in error. E. L. Stephens, for defendant in error.

RUSSELL, J. Mrs. N. J. Kight foreclosed a chattel mortgage executed by Louis Robin-

son, and to the foreclosure the mortgagor interposed an affidavit of illegality. The mortgage and the note which it was given to secure were included in the same writing. By its terms Robinson promised to pay N. J. Knight, or order, on October 1, 1908, \$500, with interest at maturity at the rate of 8 per cent. per annum, and to secure the payment of the note he mortgaged a growing crop of 75 acres in cotton and 38 acres in corn on a designated farm, with several head of live stock. The condition of the note was that, if he should "truly pay the above note at maturity, then this mortgage to be null and void." There is no intimation, from the language of the note or mortgage, that it was executed to secure future advances. The consideration of the note is not stated, further than by the usual phrase "value received." The affidavit of illegality set up that the mortgagor had paid the plaintiff the amount of the mortgage which was given to secure payment for supplies to be furnished to make the crop for the year 1908, but specifically denied that the mortgage was to secure the purchase price of any guano. Another ground of the affidavit of illegality was that the plaintiff was not entitled to recover more than three-fourths of the amount of the account for supplies, because she had not at any time applied to the ordinary and had her weights and measures marked, sealed, and stamped as required by law. Another ground of illegality was that the mortgage was void on account of usury. Upon the trial (in which all issues of fact were submitted to the judge without the intervention of a jury) a judgment was rendered, finding the defendant to be indebted to the plaintiff \$65.66, with \$10.51 interest, and to this judgment exception is taken.

There is no conflict in the evidence as to the fact that the defendant sustained by uncontradicted testimony the ground of illegality based upon the provisions of section 1882 of the Civil Code of 1910, and established by the plaintiff's own witnesses that he was entitled to have a deduction of one-fourth of \$330.89 of supplies sold to him by the plaintiff. It was also admitted that the defendant had paid upon the supplies advanced him from the store \$368.08. Under this view of the evidence the defendant would have owed for supplies from the store only \$366.64, instead of \$444.42, and therefore would also have sustained the ground of illegality in which he asserted that he owed nothing upon the mortgage. Under this view of the case, it seems to us that the defendant could well have complained of the judgment for \$65.66 rendered against him, but he has not done so. So much as to the evidence which was admitted by the court, and upon this branch of the case it appears that the only ground for complaint by the plaintiff in error con-

sists in the fact that, if she was entitled to recover at all, she was entitled to a finding for a larger amount. This contention rests upon two propositions: First, that under the evidence which was excluded, and not considered by the court, the levy of the mortgage *fi. fa.* was entitled to proceed for the full amount of the *fi. fa.*; and, second, that even if the first proposition be not sound, the judge should have entered judgment for \$76.34, instead of \$65.66, upon the evidence which the judge did consider. We shall therefore first consider the assignments of error which complain of the exclusion of testimony.

[1, 2] It appears from the evidence that the defendant purchased from the plaintiff supplies to the amount of \$444.42, and also bought of her \$225 worth of guano. The plaintiff's contention in the lower court was that the mortgage for \$500 was given to secure this entire sum of \$669.42. The plaintiff admitted that Robinson had paid \$368.08 upon the running bill at the store. The difference between the two, of course, would be \$76.34. As evidence of the indebtedness for guano, the plaintiff tendered in evidence a note of \$225, payable to the Mutual Fertilizer Company, or bearer, signed by Robinson. This note, upon objection, the court repelled from the evidence, and in his judgment he states that it was not considered. As to whether the guano was intended to be included in the \$500 note, the parties were in direct conflict in their testimony, and for that reason the judge would have been authorized to find either way upon the issue; but since the court states in the judgment that the note, which was admitted by both parties to represent the purchase price of the guano, was not considered by him, the question is squarely raised as to whether evidence was admissible to the effect that, while the mortgage purported to secure an indebtedness stated in its face to be \$500, it was in fact intended to secure a considerable larger amount. In other words, where the amount of the note to be secured by the mortgage is definitely stated in the mortgage, can it be shown aliunde that a different amount was intended to be secured, and that thereby the lien of the mortgage for an amount different from that specified therein attached to the personal property upon which a lien was created? We have been unable to find any adjudication upon the direct point in this state. We are cited by counsel for the plaintiff to the rulings in *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165, and *Emerson v. Knight*, 130 Ga. 105, 60 S. E. 255. Neither of these cases, however, appear to be in point.

Judgment affirmed.

POTTLE, J., not presiding.

(30 S. C. 535)

WILHELM v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. March 6, 1912.)

1. TELEGRAPHS AND TELEPHONES (§§ 66, 73*)—DELAY IN TRANSMITTING MESSAGE—PRESUMPTION.

Where a telegraph company has notice of the urgency of a message, and its agent promises to rush it, an unexplained delay in transmission and delivery of more than 18 hours raises a presumption of a willful disregard of the sender's rights, and in an action against the company the question of punitive damages should be submitted to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61, 76; Dec. Dig. §§ 66, 73.*]

2. TELEGRAPHS AND TELEPHONES (§ 69*)—DELAY IN TRANSMITTING MESSAGE—DAMAGES.

In an action for delay in transmitting a telegram, the nominal damages to which the sender is entitled for loss of the fee paid are sufficient actual damages to support a recovery of punitive damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 71; Dec. Dig. § 69.*]

3. TELEGRAPHS AND TELEPHONES (§ 73*)—DELAY IN TRANSMITTING MESSAGE—DAMAGES.

In an action for delay in transmitting a telegram, it appeared that the message was sent by plaintiff's agent to notify plaintiff of the time of trial of an action against her. By reason of the delay, she was unable to be present, and lost the case. The testimony in the prior case was introduced in evidence, and presented a conflict as to her liability in that action. *Held* that, if such damages could be recovered, the court invaded the province of the jury in holding that she ought to have lost her case.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from Common Pleas Circuit Court of Chesterfield County.

Action by Louisa S. Wilhelm against the Western Union Telegraph Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed.

Stevenson & Matheson, for appellant. Willcox & Willcox and Edward McIver, for respondent.

HYDRICK, J. Plaintiff brought this action to recover actual and punitive damages for alleged negligent and willful delay by defendant in the transmission and delivery of a telegram. The testimony introduced at the trial tended to prove the following facts and circumstances: Plaintiff was sued in the court of a justice of the peace at Monroe, N. C., by a firm of attorneys at law for a fee, which they alleged she owed them for professional services rendered in the preparation of a certain statement showing the cause and manner of her husband's death, which statement was asked for by the agent of a fraternal insurance order in which her

husband was insured. It appears that these attorneys were familiar with the facts and circumstances connected with the death of her husband, because they had been employed to assist, and did assist, in the prosecution of the person who killed him. Therefore it seems that the agent of the insurance order applied to them for the statement. They in turn applied to plaintiff to know whether she wished them to prepare it. At the trial in the justice's court, she and her sister, Miss Cora Steen, testified that she refused to consent for them to do so until the attorney, who consulted her about the matter, assured her that there would be no charge for it. On the other hand, the attorney testified that she agreed to pay \$25 for the preparation of the statement. The justice found in favor of Mrs. Wilhelm, and gave judgment accordingly. The attorneys appealed to the superior court, where, according to the practice in North Carolina, the case was tried de novo. About midday, on August 20, 1906, the case was set for trial on August 21, 1906, and plaintiff's father, who was looking after the matter for her, filed with the defendant's agent at Monroe, at 2:25 p. m., a telegram, addressed to his daughter, Miss Cora Steen, at Middendorf, S. C., where she was with the plaintiff, Mrs. Wilhelm, saying: "Both come to-night. Get B. to stay at night." Plaintiff and her sister were expecting the message, and were ready to go, and made inquiry of the agent at Middendorf about it. Middendorf is a small station on the Seaboard Air Line Railway, about 90 miles from Monroe. Plaintiff's residence was about 150 yards from the station, which is a combined railroad and telegraph station, at which the office is kept open until about 9 o'clock at night. It does not appear at what hour it opens in the morning, nor does it appear at what hour the office at Monroe opens or closes, nor whether there is direct connection between the two, or an intermediate relay station. It appears that plaintiff's father informed defendant's agent at Monroe of the importance of the message and the reasons thereof, and asked him to rush transmission and delivery, which he promised to do. There were two trains upon which plaintiff and Miss Steen could have taken passage from Middendorf and reached Monroe in time for the trial. One left Middendorf about 8 o'clock p. m., August 20th, and the other about 8 a. m., August 21st. The message was not delivered until 9 a. m. on August 21st, too late for them to get to Monroe in time for the trial. The same witnesses testified in the superior court as in the justice's court, except plaintiff and Miss Steen. The result of the trial was a judgment against plaintiff for \$25 and costs. Plaintiff and Miss Steen both testified that, if the telegram had been delivered in time,

they would have gone to Monroe, and have testified the same as they had done in the justice's court. The testimony which was taken in the trials in North Carolina was introduced in this case. The defendant offered no explanation of the delay in transmitting or delivering the message, except as it may be based upon and inferred from the testimony, brought out of plaintiff's witnesses on cross-examination, that the office at Middendorf closes about 9 o'clock p. m.

At the close of all the testimony, defendant moved for the direction of the verdict on the grounds: (1) Because there was no allegation in the complaint that plaintiff and her sister would have gone to Monroe, if the telegram had been delivered in time. (2) The damages sued for are speculative. (3) No evidence to warrant punitive damages. (4) No evidence of damages resulting proximately from the alleged delay. (5) No allegation or evidence of actual damages. Hence no punitive damages can be recovered. The court granted the motion, on the ground that there was no evidence warranting a verdict for punitive damages, and on the ground that, under the testimony introduced, plaintiff ought to have lost her case in North Carolina; and therefore she should not in justice have any cause of action against the defendant.

[1] The rule is well settled that delay in the transmission or delivery of a telegram raises a presumption of negligence, which casts upon the telegraph company the burden of explaining the delay; and that long and unexplained delay raises a presumption of wantonness. *Baker v. Telegraph Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848, and cases cited. In that case, the court said that no hard and fast rule could be adopted as to the duration of the time of delay that would raise a presumption of wantonness, but that each case must be decided according to the circumstances, and a delay of between four and five hours was held insufficient to carry the issue of punitive damages to the jury, in the absence of other circumstances tending to show willfulness. In this case, special notice was given to defendant of the urgency and importance of the message, and the agent promised that it should be rushed. We think, under these circumstances, the unexplained delay of more than 18 hours in transmitting and delivering the message affords a reasonable inference of a conscious disregard of plaintiff's rights. It is true that a good part of this time was not office hours at Middendorf; but the judge states that the telegram showed that it was received at Middendorf at 8:50 a. m. on August 21st. Therefore it is inferable that it was not sent from Monroe until the morning of the 21st. If, for any reason, it could not have been sent from Monroe on the afternoon or evening of the 20th before the office at Middendorf had

closed for the night, the sender should have been notified, so that he might take other steps to communicate with his daughter. The court erred, therefore, in directing the verdict on the issue of punitive damages.

[2] Passing the question as to whether the actual damages alleged to have been sustained in the loss of her case in North Carolina, as the result of the delay complained of, are too remote and speculative to be recovered, it appears that plaintiff paid the defendant the usual fee for transmitting and delivering the message. Her purpose in having the message sent was thwarted by the delay. She was therefore entitled to recover at least nominal damages for the breach of defendant's duty to her, as a member of the public, even if she suffered no other actual damages than the loss of the fee paid, and such nominal damages was a sufficient basis for the recovery of punitive damages for the wanton disregard of her rights. *Arial v. Telegraph Co.*, 70 S. C. 418, 50 S. E. 6; *Doster v. Telegraph Co.*, 77 S. C. 56, 57 S. E. 671; *Gens v. Telegraph Co.*, 86 S. C. 242, 68 S. E. 530.

[3] As the circuit court did not rule upon the question whether the damages sustained by the loss of her case were too speculative and remote, that question is not properly before this court for consideration. But, if such damages may be recovered, as to which we express no opinion, the circuit judge invaded the province of the jury in holding that the plaintiff ought to have lost her case in the superior court in North Carolina. There was a sharp issue of fact in the testimony as to whether plaintiff agreed, expressly or impliedly, to pay the fee for which she was sued.

Judgment reversed.

(90 S. C. 439)

In re DICKS' WILL.

DICKS et al. v. DICKS et al.

(Supreme Court of South Carolina. March 1, 1912.)

COURTS (§ 202*)—PROBATE COURTS—APPEAL—TIME TO PERFECT APPEAL.

A party appealing from a judgment of the probate court must file a certified copy in the appellate court within a reasonable time; and where he permits five terms of court to convene without doing so, and falls, after motion to dismiss the appeal, to take any steps under Code Civ. Proc. 1902, §§ 339, 349, to relieve himself from his neglect, the appeal is properly dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vore, Judge.

Proceedings by Ransom Dicks and another for the probate of the will of Ransom Dicks, deceased, against David Dicks and others. From a judgment dismissing an appeal from the probate court and affirming the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of the probate court denying probate, plaintiffs appeal. Affirmed.

L. D. Jennings, for appellants. Lee & Moise, for respondents.

WATTS, J. This is an appeal taken from the order of Judge Shipp, dismissing an appeal from the probate court of Sumter county, and affirming the judgment of the probate court in this cause.

The facts are that Ransom Dicks died in 1906, and shortly after his death two of his children, Ransom Dicks, Jr., and Rose Willis, presented an alleged will to the judge of probate, and the same was proven in common form; the alleged will being filed October 11, 1906. This alleged will devised all of his property to these two children. Subsequently, on October 31, 1906, David Dicks, Kate Brunson, and Abram Dicks, three children of the deceased, petitioned the judge of probate, praying that the court require Ransom Dicks, Jr., and Rose Willis to prove the said will in due and solemn form of law. Thereupon due notice was given by the judge of probate that he would require said alleged will proven in due and solemn form of law on August 15, 1907. Nothing was done in pursuance of this notice, and a rule to show cause was served on Ransom Dicks, Jr., and Rose Willis why they should not be attached for contempt in not proceeding to prove the said alleged will in accordance with the order of the judge of probate. Afterwards, about March 7, 1908, an action was commenced in the court of probate to prove the alleged will in due and solemn form. After taking testimony and hearing argument, the judge of probate, on July 1, 1909, made his decree, adjudging and holding that the said alleged will was a forgery, and refused to admit it to probate. On the same day, a formal written notice of the filing of the decree was given to Ransom Dicks, Jr., and Rose Willis. On July 8, 1909, the appellants served notice of appeal, and grounds thereof, upon the respondents, stating that they intended to appeal from the court of probate to the court of common pleas for the county of Sumter. Nothing further was done to perfect the appeal. The appellants failed to file in the circuit court a certified copy of the record of the proceedings appealed from, or the grounds of appeal, or the proper evidence that notice had been given to the adverse parties according to law. The appellants having taken no steps whatever to perfect their appeal, and five terms of the court of common pleas for Sumter county having passed since the notice of intention to appeal was served, the respondents served on the appellants, on February 28, 1911, a notice that they would move to have the said appeal dismissed. Upon hearing the motion upon this notice, Judge Shipp

dismissed the appeal, and affirmed the judgment of the court of probate.

There is only one question involved in this appeal: Did his honor, Judge Shipp, err in making this order? Notice of the filing of decree in probate court was given appellants on July 1, 1909, and on July 8, 1909, notice of intention to appeal therefrom, and grounds of appeal, were duly served upon respondents, and no further steps were taken to perfect the appeal until February 28, 1911, when attorneys for respondents served notice upon the appellants that they would move, on March 20, 1911, or as soon thereafter as counsel could be heard, to dismiss the appeal, on the grounds that the petition had not been filed in the circuit court in the time required by law. After this notice on March 10, 1911, the attorneys for appellants filed a certified copy of the proceedings appealed from and the grounds of appeal filed in probate court, together with proper evidence that notice had been given adverse party according to law. The court of common pleas had convened five times since July 1, 1909. Judge Shipp passed his order July 20, 1911. It is unnecessary to decide whether or not it was necessary for appellants to file a certified copy of record and proceedings, etc., appealed from before the next stated session of the said court of common pleas after such appeal is taken. But we do say that this must be done within a reasonable time, and to let five terms of court convene without doing this is unreasonable. Notice was given on February 28, 1911, that on March 20, 1911, a motion would be made to dismiss the appeal. This motion was not heard until July 20, 1911, and during all this time, and at the hearing, no effort was made or urged by the appellants to be relieved, under section 339 and 349, Code of Laws of South Carolina, volume 2, and there was no error on part of circuit judge in dismissing the appeal.

The judgment is affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. FRASER, J., did not sit in this case.

(90 S. C. 459)

SMITH v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 1, 1912.)

1. TRIAL (§ 191*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In an action by a car repairer against a railroad company for injuries from being struck by a car in defendant's yards while attempting to cross a track, instructions that it was not necessary to have the bell rung or whistle sounded in moving engines and cars in a railroad yard, nor to have a man posted in front of the cars to warn the railroad's own employes in its switching yard, invaded the province of the jury; it being for the jury to say

whether any warning was necessary, and, if so, what warning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

2. NEGLIGENCE (§ 6*) — ELEMENTS — STATUTORY PROVISIONS.

When a statute directs a certain thing to be done, it is negligence per se not to do what the law requires; but it does not follow that these things are not to be done at other times and under other circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by P. J. Smith against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

De Pass & De Pass, for appellant. E. M. Thomson, for respondent.

FRASER, J. This case was tried in Richland county before his honor, Judge Prince, and a jury, and was an action for damages for personal injury. The exceptions deal entirely with the charge to the jury. A short statement, eliminating all extraneous matters, will make the questions simple and clear.

The plaintiff contends that he was a car repairer in the employ of the defendant on its Royster yard near Columbia. That there were 10 tracks in said yard. That while working on a car on track No. 3 he and his assistant were directed by the proper officer of the defendant company to repair the door of a car on track No. 1 as soon as they finished the work on which they were then engaged. That track No. 2 was situated between track No. 3 and track No. 1, and that it was necessary for them to cross track No. 2 in order to reach track No. 1. That there were lines of cars on tracks No. 2 and No. 3. That in going to track No. 1 he found an open space between two cars on track No. 2. That he stopped and looked and listened, but could see no indication of any movement of the cars on track No. 2, and undertook to cross track No. 2 to reach track No. 1. That while he was in the act of crossing track No. 2 the defendant, through its agents and servants, by shoving in another car on track No. 2, thus suddenly moved the cars on track No. 2, which struck the plaintiff and knocked him to the ground, ran over his foot, cut off a part of it, and did him serious bodily injury. The plaintiff alleged that the defendant was negligent in this matter in not giving warning of the movement of the cars on track No. 2, and that his injury was caused by defendant's negligence.

The specifications of negligence that are now before this court are: "(3) In causing

said car to violently strike with great force and shove backwards a long line of cars upon another track within the yard where workmen are constantly at work, without giving any warning of their intention so to do. (4) In shoving, kicking back, said car in the manner aforesaid, without having an employé on the forward part to protect same."

The defendant admitted that it was necessary for plaintiff to cross track No. 2 in order to reach track No. 1, but not that it was necessary for him to cross track No. 2 at the time he did, denied that it was necessary to give warning before moving the cars on track No. 2, and pleaded that the sudden movement of these cars was to be expected, and that plaintiff had assumed the risk with the employment.

Exception 4 was abandoned at the hearing, and need not be considered.

[1, 2] Exceptions 1, 3, and 5 complain of error in the circuit judge in charging that it was not necessary to have the bell run or the whistle sounded in moving engines and cars in a yard. In this charge, his honor invaded the province of the jury. When the statute directs a certain thing to be done, it is negligence per se not to do what the law requires; but it does not follow that these things are not to be done at other times and under other circumstances. His honor charged the jury, "the duty is placed upon the defendant by law in thus operating its engine that these engines and cars must be shifted with due regard for the safety of its employes," but the sounding of the bell or whistle had been excluded. It was the province of the jury to say what due regard for the safety of its employes required. It was the province of the jury to say whether any warning was necessary under the circumstances, and, if warning was necessary, what warning. His honor erred in this, and these exceptions are sustained.

Exceptions 2 and 6 complain of error in the charge, in that his honor charged the jury that it was not necessary to have a man posted in front of its cars to warn its own employes in its switching yard. For the reasons stated above, this, also, was error. It was the jury's province to state what, if any, warning was necessary.

The seventh exception cannot be sustained. It is an isolated sentence. Almost immediately before, his honor had limited the expression "any damages," and in his main charge had fully explained. This exception is overruled.

For the errors which we have pointed out, the judgment is reversed, and the cause remanded for a new trial.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. WATTS, J., did not sit in this case.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(90 S. C. 470)

CAROLIAN TIMBER CO. v. HOLDEN et al.
(Supreme Court of South Carolina. March 2, 1912.)

1. CONTINUANCE (§ 7*) — DISCRETION OF COURT.

The granting of a continuance is in the discretion of the trial judge.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

2. APPEAL AND ERROR (§ 204*)—OBJECTION IN LOWER COURT—NECESSITY—EVIDENCE.

The admission of a deed in evidence was not reversible error, though a subscribing witness was incompetent by reason of interest, where no objection to the admission of the deed was made, and the objection to the deposition of the witness was withdrawn.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

3. DEEDS (§ 47*)—SUBSCRIBING WITNESSES—INTEREST.

A subscribing witness to a deed is not incompetent, where he is entitled to commissions on the sale of the land, since this is not an interest in the land itself.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 106; Dec. Dig. § 47.*]

4. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SUFFICIENCY.

An exception to the admission in evidence of certain statements, which does not identify the statements nor specify the grounds of objection, will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.*]

5. DEEDS (§ 126*)—ESTATES CREATED—CONDITIONAL FEES.

A conveyance to a person "and the heirs of her body and assigns forever" creates a fee conditional in the grantee, and, upon the birth of children, she may convey in fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 356½, 357; Dec. Dig. § 126.*]

Appeal from Common Pleas Circuit Court of Oconee County; G. W. Gage, Judge.

Action by the Carolian Timber Company against W. V. Holden and another. From a judgment for plaintiff on a directed verdict, defendants appeal. Affirmed.

J. R. Earle and M. G. Long, for appellants.
Haynsworth & Haynsworth, for respondent.

WATTS, J. This is an action of trespass upon a tract of land described in the complaint; both parties claiming under a deed bearing date March 13, 1886, and made by Robert Johnson to Artemissa Chapman. The action was tried before his honor, Judge Gage, and a jury on March 2, 1911. After all the testimony was in, upon motion of plaintiff's attorney, the court directed a verdict for the plaintiff. Judgment was entered thereon, and defendants appeal on 10 grounds.

In the deed from Johnson to Chapman, the habendum reads, "unto Artemissa Chapman and the heirs of her body and assigns forever, reserving a life estate to her husband,

Jackson Chapman." The language of the granting clause was similar. On January 11, 1890, Artemissa and Jackson Chapman, having at that time children, executed a deed purporting to convey this land to M. C. Newton, who, on January 16, 1890, conveyed it to W. J. Duffie. W. J. Duffie having died, his executors, in accordance with authority contained in his will, conveyed it to R. E. Bowen by deed, dated March 1, 1902; and Bowen on the same day conveyed it to the Benedict-Love Company, who in turn conveyed it to the Montvale Lumber Company on February 2, 1904. This company conveyed it to plaintiff on June 10, 1909. The defendants claim title under deeds made by children of Artemissa and Jackson Chapman, both of whom have died. There was evidence as to the alleged acts of trespass. The defendants by their answer to the complaint denied, for the purpose of this action, that the plaintiff had capacity to sue, and that plaintiff was the owner of the land, and that the defendants had trespassed on the land. W. V. Holden denied plaintiff's title to land, and asserted and set up title in himself, alleging that the Chapmans only had a life estate in the lands, and that after their death their children took possession of the land, and remained in possession until they sold to him, and that defendants had no notice of the claims of any one to the land until the commencement of this action. They further allege that the deed under which plaintiff claims was obtained by fraudulent representations from the Chapmans and for a nominal sum and inadequate price.

[1] Exception 1 "assigns error and abuse of discretion for the court to force defendant to trial under the peculiar circumstances as set out in the case." We see no error on the part of Judge Gage in refusing to grant a continuance of the case on the showing made. Granting of a continuance is a matter entirely in the discretion of the judge; and the record shows no abuse of this discretion. This exception is overruled.

[2, 3] Exception 2: "That it was error for the court to admit in evidence the deed of Artemissa Reid Chapman and Jackson Chapman to M. C. Newton, as it appears that W. J. Roark was the real party in interest who was purchasing the land, and that he was one of the subscribing witnesses thereto. That the said grantee never had any knowledge or gave her consent to the transaction, or no delivery of the deed was made." The deed from Artemissa and Jackson Chapman to Newton was witnessed by W. K. Stewart, and W. J. Roark. The testimony shows that, before the execution of the deed, Roark had bid off the land in question at tax sale, and that J. H. Newton had told him that he could sell the land to Duffie if he (Roark) would get a deed to it from the Chapmans to Mrs. Newton. Roark undertook to obtain

the deed, and was to receive \$50 from Newton. Roark was to have no interest in the land itself, but was to be paid upon the condition that he obtained the deed. When Mr. Haynesworth read the testimony of W. J. Roark, taken before the clerk of court under an order of Judge Gary, Mr. Earle objected and said: "We object to that. We would like for the court to pass upon that question first as being the interest witness; further on in his testimony he was a beneficiary under this deed which he was undertaking to execute. I think the balance of his testimony which follows this shows that he is an incompetent witness, and we would like for your honor to pass upon this question." Judge Gage made no ruling. The plaintiff put up W. K. Stewart, the other subscribing witness, who testified that he saw the Chapmans sign the deed, and that he and W. J. Roark witnessed it. B. R. Roark, a son of W. J. Roark, testified for the plaintiff that his father lived at Raleigh, N. C.; that he knew his handwriting; and that the signature to the deed was the handwriting of W. J. Roark. Later Mr. Earle said: "We want to offer the cross-examination in. Mr. Haynesworth: My friend can offer the entire testimony. By the Court: You can't put part of what was said, and not the whole. Mr. Earle: Then we withdraw our objection to the deposition, as my friend there started to read it. (Deposition of W. J. Roark introduced in evidence and read to the jury by Mr. Earle.)" After this testimony as to execution of deed, plaintiff's attorney, Mr. Haynesworth, said: "This deed is over 20 years of age. I now introduce it in evidence, dated January 11, 1890, from Artemissa and Jackson Chapman to M. C. Newton. (Introduced and marked 'Exhibit C'.)" This deed purported to convey land in question, and was put in without objection on part of defendants. If they intended to object they should have done so at the time it was offered in evidence. Having failed to make any objection, they are precluded from raising the question on appeal. But even between the parties to the deed, the fact that one of the subscribing witnesses had an indirect interest in the transaction, such as the commissions due a real estate agent, or a claim on the part to be received, would not make him incompetent, as he had no interest in the land itself. This exception is overruled.

[4] Exception 3 charges error in admitting "certain statements of J. H. Newton in reference to the execution of the deed from the Chapmans to M. C. Newton, and to the contents thereof, as appears upon the record." The exception does not make it clear what statements are referred to, and no grounds are stated in the exception. This exception is overruled.

Exception 4 is overruled for the same reason.

Exception 5 charges "error in refusing the motion for a nonsuit, on the ground that the plaintiff had failed to show title." This is overruled as the circuit judge made no mistake in refusing motion.

Exception 6 alleges error in excluding certain testimony of the witness George Holcomb. The ruling of the court was proper, as the testimony referred to was incompetent to show undue influence. This exception is overruled.

[5] Exception 7 charges error in construing the deed to the Chapmans as a conveyance of a fee conditional, and in construing the deed made by the Chapmans as conveying a fee. The Chapmans having children living at the time of the execution of their deed conveying the land to M. C. Newton, it is clear that this deed conveyed to Newton the fee simple, provided the Chapmans, or either of them, held the fee conditional. Both the habendum and the granting clause in the deed from Johnson to the Chapmans read, "unto Artemissa Reid Chapman and the heirs of her body and assigns forever," reserving a life estate to her husband, Jackson Chapman, that this conveyed to Artemissa Reid Chapman a fee conditional, and under the authorities of this state she had a right to alienate by deed. *Miller v. Graham*, 47 S. C. 288, 25 S. E. 165; *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716; *Mattison v. Mattison*, 65 S. C. 345, 43 S. E. 874. This exception is overruled.

Exception 8 alleges "error in holding that there was no testimony upon the issue of fraud, and directing the jury to find verdict for plaintiff." We have carefully considered all the testimony, and we find no competent relevant testimony tending to show fraud. This exception is overruled.

Exception 10 alleges "error in not holding that the testimony of W. K. Stewart, W. J. Roark, George Holcomb, M. C. Newton, W. M. Chapman, and R. L. Smith was some testimony to go to the jury on the question of fraudulent representation to obtain the execution of the deed." We have carefully considered all the testimony, and we find there was no competent evidence introduced to show fraud on the part of Roark in obtaining deed. The exception is overruled.

The judgment of the circuit is affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 442) 1

HUMPHRIES v. SPARTANBURG RY., GAS & ELECTRIC CO. (two cases).

(Supreme Court of South Carolina. March 1, 1912.)

1. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—WILLFUL INJURY.

In an action for injuries by being struck by a street car, held that, though the evidence

indicated ordinary negligence on defendant's part, there was no proof of a wanton or willful injury authorizing the submission of the question of punitive damages to the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 1062*)—REVIEW—REVERSAL.

Where, in an action for injuries in a street car collision, the court erroneously submitted the question of punitive damages, and there was no way to determine what amount of the verdict the jury intended for punitive damages, the judgment will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; John S. Wilson, Judge.

Actions by A. J. Humphries and Docia Humphries against the Spartanburg Railway, Gas & Electric Company. Judgment for plaintiff in each case, and defendant appeals. Reversed on condition in the first case, and reversed and remanded in the second.

Sanders & De Pass, for appellant. Stan-yarne Wilson, for respondents.

WATTS, J. By agreement, these two cases were tried together in the circuit court. The plaintiff, A. J. Humphries, seeks to recover \$2,000 damages on account of the alleged negligent, willful, and wanton breaking of his wagon, killing of his mule, and jarring and frightening the plaintiff by being struck by a car of the defendant in a street in the city of Spartanburg.

The plaintiff, Docia Humphries, seeks to recover \$2,000 on account of injuries received by her while riding in a wagon with her husband on a street in the city of Spartanburg, caused by said wagon being struck by a car of defendant which was carelessly, willfully, and wantonly run against said wagon. The answer of the defendant was a denial of each and every allegation of the complaint, and set up the defense of contributory negligence. At conclusion of the evidence, defendant moved the court to direct a verdict in favor of the defendant as to the cause of action for willfulness and wantonness. This motion was refused. The jury returned a verdict in favor of plaintiff for \$300, and in favor of the plaintiff Docia Humphries for \$133. The exceptions question the correctness of his honor's rulings and refusal to direct verdict in favor of defendant as to the cause of action for punitive damages, and also the correctness of his charge in several particulars shown in the exceptions.

[1] Was it error on the part of his honor in refusing to direct a verdict for the defendant as to punitive damages? We think so. The testimony of plaintiffs tend to show that on May 15, 1906, the plaintiff was driving

on North Church street in the city of Spartanburg on left side of street, and, coming to a place where the street hands had thrown out a pile of dirt, his mule stopped, and, getting scared at the pile of dirt, started to back the wagon, cutting it in towards the track of defendant company. When the mule stopped at this pile of dirt, a car of defendant company was opposite the post office, a short distance in rear of the wagon. This car started forward just about the time the mule began to back and cut the wagon in towards the track of defendant. The wagon in which plaintiffs were riding was covered from front to rear, both ends being open. The plaintiff was sitting in front part of wagon on right side driving his mule. While the mule was backing, the plaintiff was holding the lines in his right hand, slapping or whipping the mule with them. The plaintiff A. J. Humphries testified that, while the mule was backing and when the car was within about 10 steps of the wagon, he motioned with his left hand and the motorman said, "Get out of the way." That almost immediately afterwards, and about the time the mule backed the wagon on the track, the car collided with the left hind wheel, breaking the wheel and throwing the mule to the ground, and that the mule died about a month thereafter. The plaintiff also testified that the car came to a stop four or five feet after it had passed the wagon. That the conductor immediately got out of the car, came back and inquired whether plaintiff or his wife had been injured and offered assistance. The injuries to the wagon were about \$5 or \$10. The mule was worth \$100. No bodily injuries were inflicted on A. J. Humphries. The plaintiff, Docia Humphries, was injured, receiving a bruise on one of her limbs which was sore for some time. There was no testimony showing that the employes of the defendant saw the plaintiff waving his hand, or as to what the speed of the car was. The defendant's evidence tended to show that the car had stopped at the post office, not quite 100 yards away from where the collision occurred, for the purpose of letting a passenger off. That shortly after starting, and before the car had acquired much speed, it was discovered that the wagon was being backed toward the track of the defendant. That immediately the motorman began ringing the gong, and as soon as it was discovered that there was danger of the wagon being backed on the track, and danger of a collision, he began to put on brakes. A passenger who was on the front of the car called out, "Look out, look out." That the front step of the car struck the left hind wheel of the wagon, breaking the same, and that the car was stopped before it had fully passed the wagon. That, as soon as the car was stopped, the employes of the company went out to where the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff, A. J. Humphries, was, offering to assist him, and inquiring as to whether any one was injured or not. They were then informed that neither had been hurt. From the testimony it will be seen there "was no conscious failure on the part of the defendant to observe due care," as laid down in *Watts v. South Bound R. R. Co.*, 60 S. C. 67, 38 S. E. 240, and *Tinsley v. Telegraph Co.*, 72 S. C. 350, 51 S. E. 913. There is no evidence showing that the servants of defendant consciously or intentionally did any act, or consciously or intentionally failed to do what it ought to have done, at the time of the collision of the wagon in which plaintiffs were riding. There was evidence to prove ordinary negligence, but none to show conscious, advertent wrong. The evidence indicates that an honest effort was made to prevent the injury, and, that being so, no inferences of a conscious failure to discharge the duty which defendant owed the plaintiffs could be drawn, and the question of punitive damages should not have been submitted to the jury. The plaintiff, A. J. Humphries, sued for personal injuries, as well as the value of his mule and wagon. His testimony shows that he received no personal injury, but that his mule was worth \$100 and his wagon from \$5 to \$10. The judgment obtained by him as to punitive damages is reversed, but as to his actual damages, \$110, it is sustained. He obtained judgment for \$300, \$190 of which necessarily was for punitive damages. As to this amount, the judgment is reversed.

[2] The plaintiff, Docia Humphries, sued for personal injuries. The jury awarded her as actual or exemplary damages \$133. There is no way for the court to determine what amount the jury intended for either actual or punitive damages, and we have decided that the court should have directed a verdict for punitive damages, so as to her the case must be remanded for a new trial as to actual damages. The judgment as to A. J. Humphries shall be for a new trial, unless he remits \$190 of the judgment in whole case within 10 days after remittitur is sent down. If this is done, the judgment for the remaining sum shall be affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 454)

HODGES v. GRAY.

(Supreme Court of South Carolina. March 1, 1912.)

EVIDENCE (§ 441*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where from the pleadings in foreclosure it appeared that the mortgage and note were given some time after the purchase of a sawmill to secure the price, an answer which averred that, in consideration of the execution of the mortgage, the plaintiff agreed to put the mill in good condition stated matters proper to

be shown by parol, as they would merely add to the contract shown an independent and contemporaneous agreement; and a motion to direct a verdict on the ground that such evidence tended to vary a written instrument was improperly allowed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

Appeal from Common Pleas Circuit Court of Marlboro County; S. W. G. Shipp, Judge. "To be officially reported."

Action by P. A. Hodges, trading as the Bennettsville Hardware Company, against Ansel A. Gray. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. I. Rogers, for appellant. D. D. McColl, for respondent.

GARY, C. J. This is an action to foreclose a mortgage on certain personal property, to wit, a sawmill and log cart.

At the close of the testimony, the plaintiff's attorney made a motion for the direction of a verdict, on the following grounds: "Mr. McColl: I move for the direction of a verdict, on the ground that all of the testimony goes to show that the chattels involved in this controversy were sold to Mr. Gray and kept by him, in his undisputed possession, for a period of about six months, and in reply to all of his criticisms and questions about the character of that property he was allowed to continue the use of it until such times as he was satisfied, and then, after the period of six months had elapsed, on the 17th day of June, he came in and signed an unequivocal promise to pay for all the chattels, amounting to \$378; and that he is precluded by the terms of that written instrument from now raising the question of an acceptance of the goods under the sale, or from varying the terms of the written instrument to show that it is not an absolute promise to pay the definite sum of \$378 at the ascertained and fixed time of November 1, 1904." The motion was granted, and the defendant appealed.

On the 17th of June, 1904, the defendant executed a certain instrument of writing, under his hand and seal, whereby he promised to pay to Bennettsville Hardware Company \$378 on the 1st of November thereafter; and, in order to secure the payment of said indebtedness, bargained, sold, and delivered to the plaintiff one sawmill complete and one log cart.

For a defense to plaintiff's alleged cause of action, and by way of counterclaim thereto, the defendant alleged: "That heretofore, during the early part of the year 1904, or the latter part of the year 1903, this defendant made a contract with plaintiff, whereby the plaintiff agreed to sell, and did sell, to the defendant a sawmill complete, including saw, at and for the sum of \$340, at the same

time representing and guaranteeing to the defendant that same was first class in every respect, and would do good and satisfactory work; he well knowing at the time that the defendant was purchasing said sawmill for the purpose of sawing lumber as soon as same could be delivered to him. * * * That he could not get same to work in anything like a satisfactory manner, and immediately reported to the plaintiff that said sawmill would not work, and offered to return same to the plaintiff; but, at the earnest solicitation of the plaintiff, this defendant employed other millmen to make repeated efforts to get the mill to operate, but, finding that he could not do so, this defendant again notified the plaintiff that said sawmill was worthless to him, as same would not work in a satisfactory manner, and told the plaintiff that he would not pay anything more therefor, and offered to return the same, including the log cart covered by the chattel mortgage mentioned in the complaint, to the plaintiff and lose the \$75 which he had paid in cash thereon. That thereupon the plaintiff persuaded this defendant to execute to him the note and chattel mortgage, mentioned in the complaint, by promising this defendant that he would send a man to put said mill in proper condition, and make it do satisfactory work to the defendant, as he had guaranteed it would do, and then and there promising this defendant that if he failed to make said mill do work satisfactory to the defendant he would take back the mill and cart, and surrender to the defendant the note and mortgage. * * * That, by reason of the inferior quality of said sawmill and its entire failure to come up to the representations and guaranty which the plaintiff made to the defendant concerning it, this defendant lost much valuable time and labor in trying to operate same, large sums of money which he had to pay out on account thereof, including freight on said sawmill, and other expenses which he had to incur, and buying lumber at a high price to supply the place of lumber intended to be cut with this sawmill, and was so hampered, hindered, and delayed in his sawmill business that he had to abandon same, to his damage \$1,000."

The plaintiff, replying to the answer of the defendant and the counterclaim therein set up, alleged: "That he denies each and every allegation of the said answer, except as same may be hereinafter admitted or qualified. That the plaintiff admits that heretofore, on or about the 17th day of December, 1903, the defendant made a contract with the plaintiff whereby the plaintiff agreed to sell, and did sell, to the defendant a certain sawmill outfit and a log cart, including with the sawmill a certain saw, all for the price of \$410; but the plaintiff denies that he represented and guaranteed to the defendant at the same time that the said sawmill was of any special class, other than

it was a good sawmill for the money. The plaintiff, however, did state to the defendant that the said sawmill was guaranteed by the company from which the plaintiff purchased the same, and that in case the defendant became dissatisfied with said sawmill that he must report the same to the plaintiff, who would then have recourse on the company from which he purchased the same, under its guaranty to plaintiff; but the plaintiff did not represent that the said sawmill was sold as a standard one, but as a low-priced one. * * * That plaintiff, further replying to the answer and counterclaim of the said defendant, says that the chattel mortgage was given to secure, not only the purchase price of the sawmill outfit and log cart, but for other indebtedness due to the plaintiff by the defendant, and that the said note and chattel mortgage was not based on any other verbal understanding between the plaintiff and defendant."

It thus appears from the pleadings (1) that the mortgage executed on the 17th of June, 1904, was to secure the payment of the purchase money for the new sawmill, etc., which was sold and delivered during the latter part of 1903 or the early part of 1904; (2) that the instrument of writing executed on the 17th day of June, 1904, did not contain all the terms of the contract entered into between the plaintiff and the defendant when the property was purchased; and (3) that the defendant's answer alleges an independent agreement, and the following authorities show that it does not vary, contradict, or alter the terms of the written agreement, dated the 17th of June, 1904: *Chemical Co. v. Moore*, 61 S. C. 166, 89 S. E. 346; *Ashe v. Railway*, 65 S. C. 134, 43 S. E. 393; *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980; *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 79; *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367.

We desire to call special attention to the case of *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 79, in which it was held that a contract to repair houses, or to build new ones, is separate and apart from a lease of the premises. It may or may not be incorporated in the written lease. If not, it may be made and proved by parol, and an additional consideration to that expressed in the lease may be shown. Also the case of *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367, in which it was held that, where a rent contract is silent as to repairs, evidence is admissible for the purpose of showing that the landlord, as part of the consideration of the contract, agreed to make repairs. We see no difference in principle between these cases and that now under consideration.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WOODS, HYDRICK, and WATTS, JJ., concur. FRASER, J., did not hear this case.

(90 S. C. 452)

OSTEEN et al. v. BULTMAN et al.
(Supreme Court of South Carolina. March 1, 1912.)

1. JURY (§ 14*)—RIGHT TO JURY TRIAL.

Where, in a suit to enforce a covenant in a deed by which defendants agreed to pay the cost of constructing a party wall, defendants claimed that such cost was limited to \$750, that the wall did not cost the amount sought to be recovered, and that they were not to be called on to pay for the wall until they, their heirs, or assigns made use of it, they were not entitled to a jury trial as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 85-83; Dec. Dig. § 14.*]

2. TRIAL (§ 370*)—APPEAL AND ERROR (§ 87*)—MATTERS OF DISCRETION—ISSUES FOR JURY—DENIAL.

A motion to frame issues to be submitted to a jury in a suit triable in equity is addressed to the discretion of the trial court, so that a denial of the motion is not appealable, in the absence of a showing of abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 881; Dec. Dig. § 370.* Appeal and Error, Cent. Dig. §§ 559-596; Dec. Dig. § 87.*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. DeVose and S. W. G. Shipp, Judges.

Action by C. P. Osteen and another against F. A. Bultman and others, to recover the cost of the construction of a party wall, amounting to \$1,684.93, under a covenant in a deed. Defendants answered, alleging that it was agreed that defendants were only to pay for a wall 80 feet long and two stories high of a certain character, of much less size than the wall constructed, and that it was also agreed that such wall was not to cost defendants more than \$750, and that plaintiffs guaranteed to defendants that the wall would not cost more than that sum, and that they would have it constructed for that amount should they cause it to be built, that defendants purchased the lot of land described in the complaint from plaintiffs on the express understanding in contract and guaranty that the wall should not cost more than \$750, which guaranty was a part of the consideration for the land, that the wall as actually constructed did not cost \$1,684.93, and that such amount was an extortionate and exorbitant price for a wall of the character and kind constructed by plaintiffs on the land described. By a supplemental answer defendants alleged that since the commencement of the suit and the filing of the answer they had parted with the title to the land described in the complaint, and then had no title or interest therein, and for this reason prayed to be dismissed. Defendants moved for an order requiring issues as to the actual cost of the wall constructed, as to whether defendants had parted with their interest in the land, the amount, if any, due to plaintiffs in the action, and, if defendants were to pay plaintiffs the cost of the wall, when that payment was to be made, to be submitted to a

jury, and from an order denying such motion, defendants appeal. Affirmed.

Lee & Molse and John H. Clifton, for appellants. L. D. Jennings, for respondents.

WATTS, J. This action was commenced on September 1, 1910, by service of summons and complaint, and its pendens was duly filed. The defendants answered, and subsequently the defendants conveyed the real estate referred to in the complaint by warranty deed, which was duly recorded, and thereafter having been granted an order by his honor, Judge Shipp, on June 13, 1911, served their supplemental answer, setting up the fact that they had parted with their title to the land described in the complaint. Within 10 days after the service of the supplemental answer, defendants served on plaintiffs a notice that they would move the court on the first day of the ensuing term, immediately after the call of calendar 3, to frame issues out of chancery for trial by jury. On July 20, 1911, Judge Shipp, then holding court in Sumter county, upon the call of the case on the calendar, was moved by defendants to transfer the case for trial by jury, the defendants taking the position that the transfer of the title by them had terminated the alleged lien, if any ever existed, and the cause of action remaining consisted only of a money demand. When this motion was made, the jury for the term had been discharged, and the court was engaged in hearing matters that did not require a jury. The motion was refused. The defendants then moved, upon notice previously served, to frame issues out of chancery for the jury. This was also refused. From this order defendants appealed, and raise two points to be considered by this court: (1) Are defendants entitled to trial by jury of the issues involved in this case as a matter of right? (2) If defendants are not entitled to have this case submitted to a jury as a matter of right, are defendants entitled to have issues framed out of chancery to be submitted to a jury in compliance with the notice given in the case?

[1] Judge Shipp by his order held that, upon the pleadings in the case, the defendants were not entitled as a matter of right to a trial by jury, and that they failed to comply with rule 28 of the circuit court, and that his order was not intended to affect the right of any subsequent judge to refer any issues which he might see fit for the purpose of enlightening his conscience.

[2] We do not think under the pleadings in the cause that the defendants had the legal right to demand a jury trial, and that the motion to frame issues was addressed to the discretion of the court and a refusal by him is not appealable, unless there was an abuse of such discretion. We find no such

abuse when his honor decided that the defendants had waited too long to make the motion and refused the same. *Neal v. Suber*, 56 S. C. 303, 33 S. E. 463; *Pruitt v. Pruitt*, 57 S. C. 163, 35 S. E. 485.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 496)

MACKORELL BROS. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. March 2, 1912.)

On petition for rehearing. Dismissed.
For former opinion, see 73 S. E. 359.

GARY, C. J., and WOODS and HYDRICK, JJ. After careful consideration of the within petition, we find no ground for a rehearing. The petition is therefore dismissed, and the stay of remittitur revoked.

FRASER, J. I did not sit in this case, had no access to the record, and therefore do not feel myself at liberty to sign an order in the cause.

WATTS, J. I did not sit in this case, but concur in the order dismissing petition for a rehearing, as the members of the court who heard the case now sign such an order. At the same time I am unwilling to commit the court on the point referred to in concurring opinion of Mr. Justice WOODS until a case arises in which that question is involved directly and the court has had the benefit of full argument.

(90 S. C. 414)

DOBSON v. DUNCAN et al.

(Supreme Court of South Carolina. Feb. 29, 1912.)

1. CARRIERS (§ 303*)—PASSENGERS—DUTY TO STOP TRAINS.

A railroad company is bound to stop its train at stations long enough to give passengers therefor a reasonable time to alight.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1226-1229; Dec. Dig. § 303.*]

2. CARRIERS (§ 347*)—PASSENGERS—INJURIES AT STATIONS—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM MOVING TRAIN.

It is not contributory negligence as a matter of law for a passenger to alight from a moving train at the invitation of the carrier's agent, unless the danger is obvious to one of ordinary prudence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1391-1393; Dec. Dig. § 347.*]

3. CARRIERS (§ 347*)—PASSENGERS—INJURIES IN ALIGHTING—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Evidence in a passenger's action for personal injuries in alighting from a moving train

at the porter's direction *held* to make it a jury question whether plaintiff was negligent.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 347.*]

4. NEGLIGENCE (§ 68*)—CONTRIBUTORY NEGLIGENCE—STANDARD OF CARE.

The legal standard of due care is the conduct of one of ordinary prudence under similar circumstances, irrespective of whether the person in question be careful or careless.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 92, 94, 95; Dec. Dig. § 68.*]

5. CARRIERS (§ 347*)—PASSENGERS—INJURIES—JURY QUESTION—DANGER IN ALIGHTING.

Evidence in a railroad passenger's action for personal injuries in alighting from a moving train at the porter's request *held* to make it a jury question whether the train was going so fast as to make it obviously dangerous for plaintiff to alight.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 347.*]

6. CARRIERS (§ 319*)—INJURIES TO PASSENGERS—PUNITIVE DAMAGES.

A railroad passenger who was ordered by the porter to alight from a train which was going so fast as to make it obviously dangerous for her to do so, thereby showing a reckless disregard of her rights as a passenger, could recover punitive damages for resulting injuries.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.*]

7. CARRIERS (§ 319*)—INJURIES TO PASSENGERS—PUNITIVE DAMAGES—EFFECT OF CONTRIBUTORY NEGLIGENCE.

A railroad passenger's contributory negligence in alighting from a moving train pursuant to an employe's direction would not prevent recovery of punitive damages, if the employe was guilty of a reckless disregard of her rights in ordering her to alight.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.*]

8. CARRIERS (§ 333*)—PASSENGERS—DUTY IN ALIGHTING.

Ordinarily a passenger should alight with reasonable promptness at his destination, provided the train stops long enough for him to safely do so, and he is not prevented from safely alighting by forces beyond his control, such as a severe storm.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*]

9. TRIAL (§ 260*)—REFUSING INSTRUCTIONS COVERED BY INSTRUCTION GIVEN.

Plaintiff was not prejudiced by the refusal of requested instructions, where the parts thereof which were correct were given in the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. NEGLIGENCE (§ 68*)—“CONTRIBUTORY NEGLIGENCE”—“DUE CARE.”

The standard for determining whether plaintiff has exercised due care is the conduct of an ordinarily prudent person under similar circumstances; and, if plaintiff did not exercise the care which an ordinarily prudent person would have exercised for her own protection under similar circumstances, she was guilty of contributory negligence, irrespective of her actual intelligence or prudence in general.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 92, 94, 95; Dec. Dig. § 68.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1540-1547; vol. 8, p. 7617; vol. 3, pp. 2221-2222; vol. 8, p. 7643.]

11. TRIAL (§ 260*)—INSTRUCTIONS COVERED BY GENERAL CHARGE.

In a passenger's action for personal injuries in alighting while the train was moving at the porter's direction, defendant requested a charge that the standard for determining whether plaintiff used due care was the conduct of an ordinarily prudent person under the circumstances, and that, if plaintiff had not exercised the care of an ordinarily prudent and careful person under similar circumstances, she was guilty of contributory negligence, irrespective of her actual intelligence, prudence, etc. In refusing the charge the court stated that the statement of law therein was taken from a certain case, but he could not charge that as the law in this case; that in the other case a man who was seeing his family off stayed on the train too long and deliberately rushed off; and that, while the instruction was correct there, a railroad owed a passenger a higher degree of care than to a licensee, and the requested charge could not be given as applicable to the case of a passenger as here. *Held* that, notwithstanding that the jury were instructed substantially as requested in the general charge, the refusal of the requested charge was reversible error in view of the court's remarks as to its inapplicability; it being correct as a matter of law.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 260.*]

12. TRIAL (§ 194*)—CHARGES ON FACTS.

A requested charge in a railroad passenger's action for personal injuries in alighting that, if plaintiff attempted to alight when the train was moving so rapidly as to make the danger of alighting obvious to an ordinarily prudent person, and was not compelled to do so by defendant's agent, but did so of her own free will, she was guilty of negligence barring recovery if contributory, was not a charge upon the facts, and was correct.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

13. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—IRRELEVANT INSTRUCTIONS.

Irrelevancy in parts of the charge is not reversible error, unless prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

14. TRIAL (§ 194*)—INSTRUCTIONS ON FACTS.

An instruction that certain facts stated therein would not be considered contributory negligence by a railroad passenger was erroneous as a charge on the facts and invading the jury's province, where the question of contributory negligence was for the jury under the circumstances.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from Common Pleas Circuit Court of Barnwell County; R. W. Memminger, Judge.

Action by Julia Dobson against E. C. Duncan and others as receivers of the Seaboard Air Line Railway. From a judgment for plaintiff, defendants appeal. Reversed.

Wyman & Wyman and Lyles & Lyles, for appellants. Harley & Best, for respondent.

HYDRICK, J. Respondent recovered judgment on circuit for damages for personal injury sustained while alighting from a moving train. Her testimony tended to show that she bought a ticket at Olar, a station on

defendant's road, and got aboard the train as a passenger to Ulmers, another station on the same road; that the train did not stop at Ulmers long enough for her to get off; that after the train had started, and while it was moving pretty fast, the train porter urged her to get off, that he kept saying to her "get off," "get off"; that, in obedience to his orders, she attempted to get off, and was thrown or fell, and sustained a painful and permanent injury to her ankle joint.

At the close of plaintiff's testimony, defendants moved for a nonsuit on the ground that the only reasonable inference to be drawn from the testimony was that plaintiff was guilty of contributory negligence in attempting to alight under the circumstances. The motion was refused, and, at the close of all the testimony, defendants moved for the direction of the verdict; the motion being made in the form of requests to charge that plaintiff could not recover because of her contributory negligence as in the motion for nonsuit; that there was no evidence upon which punitive damages could be awarded; that there was no evidence that plaintiff had paid her fare, and therefore no evidence that she was a passenger; hence she was only a licensee, and there was no evidence of any breach of duty to her. These requests were refused.

[1, 2] In *Cooper v. Railway*, 56 S. C. 91, 34 S. E. 16, the court said: "A railroad company is in duty bound to stop its train at the station to which it has agreed to carry a passenger, and give reasonable time and opportunity for a safe landing. It is also a breach of the carrier's duty to expressly or impliedly invite a passenger to alight from a moving train. But the circumstances, as the slow motion of the train, the distance from the platform step to the landing, the smoothness of the landing place, etc., may be such as to justify a person of ordinary prudence and senses in acting on such invitation and alighting from a moving train. The complaint does not show that the train was moving so fast as to make it obviously dangerous to alight. The authorities show that it is not negligence per se, or as a matter of law, for a passenger to alight from a moving train on the invitation of the carrier's agent, unless the circumstances are such as to make the danger of alighting obvious to a person of ordinary prudence and senses." This rule was adhered to and applied in *Cooper v. Railway*, 61 S. C. 345, 39 S. E. 543; *Doolittle v. Railway*, 62 S. C. 130, 40 S. E. 133; *Creech v. Railway*, 66 S. C. 528, 45 S. E. 86; *Cooper v. A. C. L. R. Co.*, 69 S. C. 479, 48 S. E. 458; *Gyles v. Railway*, 79 S. C. 176, 60 S. E. 433; *Smith v. Railway*, 80 S. C. 1, 61 S. E. 206; *Sevier v. Railway*, 82 S. C. 311, 64 S. E. 390; *Stephens v. Railway*, 82 S. C. 542, 64 S. E. 601.

[3] There was conflict in the evidence as to the speed of the train at the time plaintiff got off. Some of the witnesses said it was going "pretty fast," and that they would not have attempted to get off. On cross-examination the plaintiff herself said it was going "fast," that she had never seen a woman try to get off a train going that fast, and that she thought it was dangerous, but that she was in the company's hands, and thought she had to get off, when they told her to do so. The train porter testified that, when plaintiff got off, the train had gone only about a car length, and the conductor said it had gone about a car and a half, and both said they got on about the time plaintiff got off. Notwithstanding plaintiff's own testimony that the train was going fast, and that she thought it was dangerous to attempt to alight when she did, in view of all the testimony as to the speed of the train at the time, and of the testimony that plaintiff was being urged, if not positively ordered, to get off by the porter, the court could not have said that the only reasonable inference to be drawn from the testimony was that it was obviously dangerous to a person of ordinary prudence and senses to attempt to alight under the circumstances, and therefore that plaintiff was guilty of contributory negligence. The plaintiff's own testimony that she thought it was dangerous was not conclusive of the question whether it would have so appeared to a person of ordinary prudence and senses. She may have been overly cautious and timid.

[4] The standard fixed by the law for the guidance of the courts in considering the conduct of one who is charged with negligence is the conduct of a person of ordinary prudence and senses under the given circumstances; and it is immaterial whether the party whose conduct is under consideration be exceedingly careful or exceedingly careless, his conduct must be tested by the same standard. *Smith v. Railway*, 80 S. C. 1.

[5-7] Moreover, if the train did not stop long enough for the plaintiff to get off, and if she was ordered by the train porter to get off while the train was going at such a rate of speed as made it obviously dangerous for her to do so, which were questions of fact for the jury, a case for punitive damages was made out, to which plaintiff's contributory negligence, if proved, was no defense; for, if the facts stated were true, they tended to show a reckless disregard of plaintiff's rights as a passenger. The ground that there was no evidence that plaintiff was entitled to the rights of a passenger was evidently taken under a misapprehension of the testimony.

Defendants' fifth and sixth requests to charge were as follows:

"(5) A passenger is under a duty to alight with reasonable promptness when the train reaches his or her destination, and a failure to do so constitutes negligence on her or his

part, and, if such negligence contributes to his or her injury as a proximate cause, without which it would not have occurred, then he or she cannot recover therefor from the carrier.

"(6) A passenger is under a duty to use due care to alight from a train in the usual, ordinary, and safe manner, and, if he or she fails to do so, it constitutes negligence on his or her part, and if such negligence contributes to his or her injury as a proximate cause, without which it would not have occurred, then he or she cannot recover therefor from the carrier."

In disposing of these requests, his honor said of the fifth: "The fifth I cannot charge, because it is a point blank statement of what constitutes negligence, and the law is that negligence is a mixed question of law and fact. So I cannot charge that in the shape in which it is." As to the sixth, he said: "The sixth, of course, I have to refuse for the same reason. That is stating to you what set of facts would constitute negligence and that is for you." We think these requests were properly refused for the reasons stated by the circuit judge.

[8] Under ordinary circumstances, a passenger ought to alight with reasonable promptness when the train arrives at his destination, provided, it stops long enough for him to do so with safety. The fifth request was faulty in omitting the proviso which we have added, which was a vital issue in the case. Moreover, the court could not lay it down as a universal rule, applicable under all circumstances, that a passenger who fails to alight with reasonable promptness when the train reaches his destination is guilty of negligence. Such a storm may be raging that a passenger could not leave the train promptly, except at the peril of his life. The sixth request as clearly involves the issuable fact whether it was negligence for plaintiff to alight from the moving train. The court was asked to charge that a passenger who does not alight in the "usual, ordinary, and safe manner" is guilty of negligence. That would have been equivalent to saying that one who alights from a moving train is guilty of negligence, which we have seen is not the law; because the "usual, ordinary, and safe manner" is to alight when the train is at a standstill.

[9] The substance of these propositions in so far as they did not involve the facts was given to the jury in the general charge, and plaintiff was not prejudiced by their refusal.

[10, 11] The defendant's seventh request was as follows: "In determining whether the plaintiff has used due care, the standard for the jury is the conduct of an ordinarily prudent, careful, and sensible person, under the circumstances in question. If the jury concludes that the plaintiff has not exercised the care that an ordinarily prudent, careful, and sensible person would have exercised for her own protection under similar

circumstances, then they must find that plaintiff has been guilty of negligence, irrespective of the particular intelligence, knowledge, or prudence of the plaintiff whose conduct is brought into question." In refusing this request his honor said: "Now that statement of the law, gentlemen, was referred to here during the trial, as taken from one of the law books, and is a direct citation from *Smith v. Railroad Company*, but I cannot charge you that as law in this case. It struck me as a remarkable proposition in this case. That is a case where a man went down with his family to see them off on a train, and he was on board the train seeing them off, and the law is that people have a right to do that, to go down with their families and see them off upon the train, and that they are not trespassers upon the train, but they are licensees. In that case the train started off, the man stayed too long on the train, and he deliberately rushed off the train and injured himself, and brought forth these propositions which is correct law in that case. In that case he was only a licensee on the car, with the permission of the railroad, and to him the railroad only owed ordinary care, whereas, with a passenger the railroad owes a higher degree of care with reference to his transportation and alighting than it does to a licensee. So, you see, there is where the difference comes in. I cannot charge you that proposition as applicable to a passenger; that is, if you find that she was a passenger, the plaintiff was a passenger." From a careful consideration of his remarks, it is apparent that the learned judge was momentarily confused as to the difference in the degree of care due to a passenger and due by a passenger for his own protection. The request stated a correct proposition, and should have been charged. As the jury were given in the general charge substantially the same proposition as that contained in the request, we would be inclined to hold that the refusal of the request was harmless error, but for the remarks of the court in refusing it, wherein the jury were explicitly and emphatically told that the proposition contained in the request was not sound law as applied to a passenger. Under the circumstances, we cannot safely say that the defendants were not prejudiced by the refusal of the request.

[12] The eighth request to charge was as follows: "If the jury find that the plaintiff attempted to alight from the train when the same was moving at such a rapid rate of speed as to make the danger of alighting therefrom obvious to an ordinarily prudent, careful, and sensible person, and shall further find that she was not compelled to do so by the agent of defendant, but did so of her own free will and initiative, then they must find that she was guilty of negligence, and if this contributed to her injury as a proximate cause thereof, without which it would not have occurred, then she cannot re-

cover." The circuit judge refused this request on the ground that it was a charge upon the facts. The court evidently overlooked the fact that the request was predicated upon the action of "an ordinarily prudent, careful and sensible person," whose conduct is the standard fixed by the law with which the conduct of all others must be compared in determining whether they are guilty of negligence. This request contained a correct statement of law, and should have been charged.

The tenth exception covers two pages of the "case," and contains a long extract from the charge, wherein the jury were instructed as to the duty of a carrier to a passenger who asks for or apparently needs assistance in getting on or off the train. The ground of the exception is that this part of the charge was misleading and confusing because it was inapplicable to the case as made by the pleadings and evidence. It is true that the portion of the charge quoted in the exception is not strictly relevant.

[13] But digressions of this sort cannot be made ground of reversal, unless it is made to appear that they were prejudicial, and it does not so appear in this case.

The eleventh exception complains of the following charge: "If it should appear that a passenger was on a train, having a ticket for a certain point, which the conductor had taken up, and it should appear to that officer that that party did not know that he or she had gotten to the station, or was not in such a condition apparently as to realize that the time had come and she must get off the train, and then the passenger should rush forward, under orders to get off the train, as charged in this complaint, and she was then rushed to the front of the train by the officers in charge, or porter in charge, charged with the duty of assisting passengers to alight, and then the train was moving, and although the train was moving at a rate of speed which was obviously dangerous for a person to deliberately undertake to jump off, but acting under the impulse and being driven to the steps, and being brought into that position of peril by the negligence of the railroad officers and then and there made a mistake of judgment and fell off the train, it would be for the jury to say whether or not that was not a breach of duty of the railroad officials in the exercise of the highest degree of care, the high degree of care due a passenger, in putting that person in that position, whereby an error of judgment at the last moment having been put in that position by the orders of the officials of the railroad company, that could not be held as contributory negligence on the part of the person to defeat her rights."

[14] We think his honor invaded the province of the jury and charged upon the facts when he told them that, under the facts and circumstances narrated in the first part of the

remarks quoted, "that could not be held as contributory negligence on the part of the person to defeat her rights." If the court cannot declare what facts, series of facts, or combination of facts constitute negligence, and we have seen that it cannot, except where only one inference is deducible from them, neither can it declare what facts, series of facts, or combination of facts constitute contributory negligence, unless they are susceptible of only one reasonable inference. Precisely the same rules and tests must be applied in determining whether a plaintiff is guilty of contributory negligence as in deciding whether a defendant is guilty of negligence.

The rule by which the conduct of a passenger is tested who is injured on account of obedience to the orders of a conductor, or other employé of the carrier, acting within the scope of his authority, is very much the same as that by which a servant's conduct is to be tested who is injured while obeying the orders of his master. In *Stephens v. Railway*, 82 S. C. 549, 64 S. E. 604, the servant's rule is thus stated: "To show contributory negligence, it is not sufficient that the employé receiving the order should have misgivings, and believe the act required to be hazardous, unless the danger is so imminent and obvious that a man of ordinary prudence would not incur it. If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of his superior whose orders he is required to obey, but he may rely on the judgment of such superior. The matter is thus well stated by Mr. Justice Holmes in *McKee v. Tourtelotte*, 167 Mass. 68, 44 N. E. 1071, 1072 [48 L. R. A. 542]: 'When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But, if against this judgment is set the judgment of a superior, one to whom from the nature of the callings of the two men and of the superior's duty seems likely to make the more accurate forecast, and if to this is added a command to go on with the work and to run the risk, it becomes a complex question of the particular circumstances, whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and degree of the danger, the extent of plaintiff's appreciation of it, and the exigency of the work all enter into consideration, and no universal rule can be laid down.' The numerous authorities sustaining this statement of the law are collated in the note in *Houston, etc., Ry. Co. v. De Walt*, 97 Am. St. Rep. 877." The rule applicable to a passenger is thus stated in 5 A. & E. Enc. L. (2d Ed.) p. 648: "Where a passenger acts in conformity to a permission or direction given by a conductor or other agent of the

carrier, acting within the scope of his authority, and such conduct on his part will not expose him to a known or apparent danger which a prudent man would not incur, he will not be guilty of contributory negligence, although his conduct may result in bringing injury upon him."

We think the court erred in taking from the jury the question whether plaintiff was guilty of contributory negligence in alighting under the circumstances.

Judgment reversed.

GARY, C. J., and WOODS, J., concur.

(90 S. C. 462)

LADSHAW et al. v. SOUTHERN RY. CO.
(Supreme Court of South Carolina. March 2, 1912.)

1. CARRIERS (§ 320*)—INJURY TO PASSENGER—CINDERS—NEGLIGENCE.

Where a passenger, who was injured by a cinder blown through an open door into her eye, alleged that the carrier was negligent in leaving the car door open, and also in failing to equip the engine with proper and suitable appliances to prevent the escape of such cinders, and to keep them in reasonably good repair, and there was evidence of a violation of a rule requiring that the vestibule doors of the cars must be kept closed while the train was in motion, and that such violation was a direct and proximate cause of plaintiff's injury, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.*]

2. NEW TRIAL (§ 52*)—GROUNDS—QUOTIENT VERDICT.

The court will not consider a motion for a new trial, grounded on affidavits that the jury settled the amount of damages by the quotient method, as the court will not take cognizance of what transpires in the jury room, unless the jury has been guilty of misconduct so great as to subject them to the animadversion of the court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 101-105; Dec. Dig. § 52.*]

Appeal from Common Pleas Circuit Court of Union County.

"To be officially reported."

Action by Mrs. Johann Ladshaw and others against the Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The exceptions referred to in the opinion are as follows:

"(1) In refusing motion made on the part of the defendant to direct the verdict in its favor; the errors being: (a) That there was no sufficient evidence of negligence on the part of the defendant to warrant his honor in sending the case to the jury. (b) Because the evidence is uncontradicted that the defendant used due care in providing its engine with proper appliances to prevent the escaping of sparks, and that on this occasion said engine was prudently and properly run and managed. (c) Because there is no

evidence tending to show any negligence on the part of the defendant in failing to properly equip its engine, or in failing to carefully and prudently run the same on this occasion. (d) Because the evidence shows that all proper efforts were made to prevent the escape of sparks, and that if any cinders did get into the eye of the plaintiff it was not a cinder which had been negligently allowed to escape from the engine of the defendant.

"(2) Because his honor erred in instructing the jury as follows: 'But if to the danger incident to the act of traveling under the circumstances and conditions of this particular case is added a danger caused by the negligence of the carrier, the passenger does not assume the risk of those combined dangers. If the catastrophe in question did not result alone from the danger incident to the act of traveling under the given circumstances and conditions, but resulted because to that danger was added the consequences of the negligent act of the carrier, there was no such assumption of the risks as would relieve the carrier from liability.' The errors being: (a) That his honor in so charging charged upon the facts, contrary to section 26, art. 5, of the Constitution, which prohibits judges from charging on the facts. (b) Because his honor in so charging instructed the jury in effect, as matter of fact, that the plaintiff was injured. (c) Because his honor in so charging instructed the jury as matter of fact that the defendant was negligent. (d) Because his honor in so charging intimated to the jury that there had been a catastrophe, and that the defendant was negligent. These all being questions of fact exclusively for the jury, and not for the court.

"(3) Because his honor, in connection with the first request of the defendant, to wit, 'If a railroad company equips its engine and smokestacks with a spark arrester of the latest and best pattern, and keeps the same in good order, and operates the engine in a careful and prudent manner, then it is not responsible for an injury which might come to a passenger from a spark escaping from the smokestack,' erred by charging the jury therewith as follows: 'If that is the only act of negligence alleged.' The errors being, as it is respectfully submitted: (a) That, as the plaintiff in her complaint charged the defendant with negligence in allowing a spark to escape from an engine that was improperly equipped and improperly managed, the request of the defendant contained a sound proposition of law applicable to the allegations of the complaint. (b) Because his honor, in instructing the jury as he did in connection with this request, led the jury to believe that, even if the defendant's engine was properly equipped and was properly managed, and that it was not negligent in allowing a cinder to escape, yet the plaintiff

could recover if the evidence shows she was injured by a cinder getting in her eye, even though it did appear that the defendant was not negligent in allowing such cinder to escape from its engine. (c) Because, under the allegations of the complaint, the right of the plaintiff to recover depended upon her being injured by a cinder which the defendant had negligently allowed to escape from the engine that was improperly equipped and improperly managed; and his honor erred, as it is respectfully submitted, in not charging the jury as requested by the defendant, without qualification or the addition of any word thereto.

"(4) Because, it is respectfully submitted, his honor erred in that connection with the defendant's second request, to wit, 'If the evidence shows that it is impossible, even by the highest degree of care, to so equip a smokestack as to prevent all sparks from escaping, then, if the evidence shows that a smokestack is equipped with a spark arrester of the latest and best pattern, and is kept in good order, and that the engine is managed in a careful manner, and notwithstanding this a spark does escape and inflict an injury upon a passenger, the railway company would not be responsible on this account,' and in instructing the jury in connection therewith as follows: 'If that is the only act of negligence alleged—you understand that I mean by that if the only act of negligence alleged is that a spark escaped from the smokestack—that would apply; but in this case there are other acts of negligence alleged; you have already heard the complaint.' The error being: (a) That, as the plaintiff in her complaint charged the defendant with negligence by allowing a spark to escape from an engine that was improperly equipped and improperly managed, the request of the defendant contained a sound proposition of law applicable to the allegations of the complaint. (b) Because his honor, in instructing the jury as he did in connection with this request, led the jury to believe that, even if the defendant's engine was properly equipped and was properly managed, and that it was not negligent in allowing a cinder to escape, yet the plaintiff could recover if the evidence shows she was injured by a cinder getting in her eye, even though it did appear that the defendant was not negligent in allowing such cinder in escaping from its engine. (c) Because, under the allegations of the complaint, the right of the plaintiff to recover depended upon her being injured by a cinder which the defendant had negligently allowed to escape from the engine that was improperly equipped and improperly managed, and his honor erred, as it is respectfully submitted, in not charging the jury as requested by the defendant, without qualification or the addition of any word thereto.

"(5) Because his honor, in connection with

the defendant's fourth request, to wit, 'If the evidence shows that the smokestack of the engine, which was attached to the train of cars on which the plaintiff was riding was equipped with a spark arrester of the latest and best pattern, and that the same was in good order, and that the engine was prudently managed, then the company would not be responsible if the evidence does nothing more than show that an employé of the company opened the door of the passenger coach preparatory to the stopping of a train at the station and the alighting of its passengers, even though it might further appear that a cinder which escaped from the smokestack did enter the eye of a passenger,' erred by charging the following: 'Provided that the door was opened at a time and in the manner that a prudent employé should have opened it, in the opinion of the jury, under the circumstances.' The errors being, as it is respectfully submitted: (a) That this was a sound proposition of law applicable to the facts of the case as disclosed by the evidence introduced. (b) Because this request contained a matter of law for the court, and his honor erred in submitting it to the jury, to be passed upon by them. (c) Because under the law it is the duty of employés of a passenger train to open the doors of the coaches preparatory to the stopping of a train and the alighting of its passengers, and it was error for the court to submit it to the jury to be passed upon by them.

"(6) Because, as it is respectfully submitted, his honor erred in not granting a new trial on the ground that the uncontradicted facts show that the verdict rendered by the jury was an illegal verdict, in that it was a verdict reached by the jury agreeing that each one should put down the amount he thought the plaintiff was entitled to recover, and then divide the same by 12."

Sanders & De Pass, for appellant. Stan-yarne Wilson, for respondents.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant.

The allegations of the complaint material to the questions involved are as follows: "That on or about March 14, 1905, plaintiff, Mrs. Johann Ladshaw, was a passenger on defendant's train going from Spartanburg to Pacolet, sitting about three seats from the front door of the car, and while in her seat, through the negligence of the defendant, a cinder came through said door and struck her right eye, imbedding itself therein, to her great expense, suffering, and injury, which she believes and alleges will be permanent, to her damage in the sum of \$2,000. That said injury was directly due to and caused by the negligence of defendant in the said door having unnecessarily and carelessly been left open by the employé of de-

fendant, to wit, its flagman, brakeman, or trainman on said train, who threw it open and left it open, while said train was in motion and cinders flying, at a point near East Spartanburg, and by defendant's failure to equip, and keep in reasonably good repair, the engine with proper and suitable appliances for the prevention of the escape of such cinder, and by its negligent operation of the engine at said place by rendering such escape possible, in the then condition of said engine, in not being so provided with such appliances." The defendant denied the allegations of negligence.

At the close of all the testimony, the defendant's attorneys made a motion for the direction of a verdict, on the ground that the evidence discloses no actionable negligence on the part of the defendant; but the motion was refused. The jury rendered a verdict in favor of the plaintiff for \$633, and the defendant appealed upon exceptions which will be reported.

[1] First exception:

The complaint specifies two particulars in which the defendant was negligent: (1) In carelessly leaving the door open, through which a cinder was blown into the plaintiff's eye; and (2) failure to equip, and keep in reasonably good repair, the engine with proper and suitable appliances to prevent the escape of such cinder. If there was testimony tending to sustain either of said specifications of negligence, then there was no error in refusing to direct a verdict.

S. D. O. Kelly, a witness for the defendant, who was flagman on the train when the plaintiff was injured, thus testified, on cross-examination: "Q. Is it not a rule of your company that these vestibule doors must be closed while the train is in motion—rules 314, 414? Isn't that a rule of your company? A. They must be closed on leaving a station, and kept closed until they arrive." There was testimony tending to show a violation of this rule, and that the failure to observe it was the direct and proximate cause of the plaintiff's injury.

Second exception:

When that portion of the charge set out in the exception is considered in connection with the entire charge, it will be seen that it is free from error.

Third, fourth, and fifth exceptions:

These exceptions are predicated upon the theory that the complaint only alleges negligence in a single particular, and are disposed of by what was said in discussing the first exception.

[2] Sixth exception:

The syllabus in the case of Sheppard v. Lark, 2 Bailey, 576, thus correctly states the rule therein announced: "The court will not consider a motion for a new trial, grounded upon affidavits that the jury had settled the amount of damages, in an action for a tort, by striking an average of the several sums suggested by each juror. To entertain such

a motion would lead to the assumption of a power to inquire into the process of reasoning by which the jury arrived at their verdict, and violate the discretion confided to juries by the law and Constitution. The court will not take cognizance of what transpires in the jury room, with a view to control the verdict, unless the jury have been guilty of misconduct so gross, and violations of law so obviously manifest, as to subject them to the animadversion of the court."

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(158 N. C. 277)

BAXTER v. IRVIN.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. JUDGMENT (§ 199*)—JUDGMENT NON OBSTANTE VEREDICTO.

A motion for judgment non obstante veredicto will not be allowed, unless it appears from the plea and the verdict, and not from the evidence, that the plaintiff is entitled to the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. JUSTICES OF THE PEACE (§ 188*)—APPEAL—TRIAL DE NOVO—JUDGMENT NON OBSTANTE.

In an action in a justice's court, plaintiff's claim was for rent of space in a storeroom, and defendant "denied the indebtedness, and alleged a breach of the contract by way of defense." In the superior court on appeal, after verdict for defendant, plaintiff moved for judgment notwithstanding the verdict. *Held*, that the motion was properly denied; the answer being not a plea in confession and avoidance, and not to be so construed, though in justice's court, but merely equivalent to the general issue.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 188.*]

Appeal from Superior Court, Craven County; H. W. Whedbee, Judge.

Action by J. J. Baxter against Mrs. B. A. Irvin. From a judgment for defendant, plaintiff appeals. Affirmed.

R. A. Nunn, for appellant. D. E. Henderson and A. D. Ward, for appellee.

WALKER, J. This action was brought in the court of a justice of the peace of Craven county to recover the sum of \$100, with interest from July 31, 1910, and the plaintiff complained in that court that it was due by contract for the rent of space in a storeroom. The defendant "denied the indebtedness, and alleged a breach of the contract by way of defense." The plaintiff recovered in the justice's court, and defendant appealed to the superior court, where there was a trial by jury. Both parties introduced evidence, and the jury returned a verdict for the defendant. Plaintiff thereupon moved for judgment non obstante veredicto. The charge of the court is not in the record, and it appears that no exceptions were taken during the course of the trial, before the verdict was

rendered. The court overruled the motion for judgment, and the plaintiff appealed to this court from a judgment for defendant.

[1] We think the ruling of his honor was correct. At common law a judgment non obstante veredicto would be allowed only when the plea confessed a cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. *Moye v. Petway*, 76 N. C. 327; *Ward v. Phillips*, 89 N. C. 215; *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364; *Riddle v. Germanton*, 117 N. C. 388, 23 S. E. 332. It was said in *Moye v. Petway*, *supra*, that the motion for such a judgment must, of course, be made after verdict, and the practice in such cases is very restricted. The motion will not be granted, unless it appears from the plea and the verdict, and not from the evidence, that the plaintiff is entitled to the judgment. Before the verdict, the plaintiff could sign judgment as on "nil dicit," or as if there had been no plea or defense, treating the plea, or now the answer, as a sham one, and even if he traversed the matter relied on in avoidance, and the issue was found against him, he was still allowed to take judgment notwithstanding the verdict; the practice having been adopted to discourage sham pleas and defenses. No such case is presented in this record. The plaintiff alleged that the defendant is indebted to him for rent in the sum of \$100, and the defendant simply denied the allegation, and alleged a breach of the contract as a bar to the action. This was not a plea by confession and avoidance; for it was tantamount to the general issue, or a direct traverse of the plaintiff's allegation. If there is no evidence to establish the plaintiff's case, the defendant should either demur to the evidence, or request the court to charge the jury that there is no evidence, and that therefore they should answer the issue in favor of the defendant, and likewise, if there is no evidence to establish the defense, the plaintiff should request the court to give a similar charge in his favor: but this must be done before verdict, and, as said by Chief Justice Pearson, in *Moye v. Petway*, *supra*, this practice "has not the slightest bearing upon a motion for judgment non obstante veredicto, which is made by the plaintiff, after verdict, for insufficiency of the defendant's matter in avoidance. There are no two matters of practice more entirely different in all respects." In addition to this, it is familiar learning that any defect or insufficiency in the evidence must be called to the attention of the court, by a prayer for instructions, before verdict, so that cases may be tried on their true merits, and to prevent the loss of rights by mere inadvertence. *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *State v. Kiger*, 115 N. C. 746, 20 S. E. 456; *State v. Hart*, 116 N. C. 977, 20 S. E. 1014. The party is not allowed to take two

(158 N. C. 274)

ARMOUR FERTILIZER WORKS v. McLAWHORN.

(Supreme Court of North Carolina. Feb. 28, 1912.)

chances; that is, he may not speculate on the verdict, hoping that it will be in his favor, and, if he loses or is disappointed in his expectation, move, after verdict, to set it aside, because of a failure or defect of proof, when, if he had called the attention of the court to the matter before the case was submitted to the jury, his adversary might have remedied the defect or supplied the missing evidence.

[2] The plaintiff's counsel contended, though, that this rule of practice or procedure should not apply to cases in the court of a justice of the peace, for the reason that no pleadings are there required, or rather no formal pleadings; but this, we think, is a misapprehension. It is true that the pleadings in that court may be oral; but it is expressly provided by Revisal, § 457, that the "pleadings in the courts of justices of the peace shall be (1) the complaint of the plaintiff, (2) the answer of the defendant," and, by section 1458, that "the pleadings may be either oral or written; if oral, the substance may be entered by the justice on his docket; if written, they may be filed by the justice and reference to them be made on his docket." It is further provided by section 1459 and section 1460 that "the complaint must state in a plain and direct manner the facts constituting the cause of action," and "the answer may contain a denial of the complaint or any part thereof, and also a statement, in a plain and direct manner, of any evidence constituting a defense or counterclaim." This court has been liberal in construing pleadings filed in a justice's court; but nevertheless they should conform to the requirements of the statute. Illustration of the degree of particularity required in justice's courts is found in the requirement that "the general issue entered on the justice's docket will be considered as [merely] a general denial of plaintiff's cause of action" (*Blackwell v. Dibrell*, 103 N. C. 270, 9 S. E. 192); that the pendency of another action must be specially pleaded in the answer or deemed to be waived (*Montague v. Brown*, 104 N. C. 163, 10 S. E. 186; *Hawkins v. Hughes*, 87 N. C. 115); that a former judgment must be specially pleaded, as it will not be considered under an answer merely denying indebtedness to the plaintiff. *Smith v. Lumber Co.*, 140 N. C. 375, 53 S. E. 233; *Harrison v. Hoff*, 102 N. C. 128, 9 S. E. 638; *Blackwell v. Dibrell*, supra. It appears in this case that the general issue was pleaded, and on the face of the answer there is no suggestion of any confession of the plaintiff's claim, with a statement of matter in avoidance. The case must therefore be governed by the general rule of practice, and we cannot examine the evidence for the purpose of determining whether there was a confession of the indebtedness and insufficient matter pleaded in avoidance.

No error.

1. SALES (§ 418*)—FERTILIZER—DEFICIENCY IN QUALITY—BUYER'S REMEDY.

In an action for the price of fertilizer, defendant buyer was not entitled to recover for crop shortage resulting from a deficiency in the quality of the fertilizer; he being entitled, under Revisal 1905, § 3949, to a proportionate abatement of the price.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

2. EVIDENCE (§ 158*)—BEST EVIDENCE.

In an action for the price of fertilizer, defended on the ground of the fertilizer's deficiency in quality, evidence as to the difference in the appearance and nature of crops on different farms on which the fertilizer was used and the crops under which defendant used other fertilizers was properly excluded, as calling for remote and speculative inferences; the best evidence being the official analysis.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 471-526; Dec. Dig. § 158.*]

3. EVIDENCE (§ 420*)—PAROL EVIDENCE—EFFECT—WRITINGS—ADMISSIBILITY.

In an action for the price of fertilizer, testimony that, when or before defendant signed the contract, it was agreed that, if the official analysis should show that the fertilizer did not come up to plaintiff seller's representation, defendant should not pay anything was properly excluded, as contradicting the terms of the written contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1929-1944; Dec. Dig. § 420.*]

Appeal from Superior Court, Pitt County; Carter, Judge.

Action by Armour Fertilizer Works against Charles McLawhorn. Judgment for plaintiff, and defendant appeals. Affirmed.

F. G. James & Son, F. C. Harding, and Albion Dunn, for appellant. L. I. Moore and Harry Skinner, for appellee.

CLARK, C. J. Under a written contract with the defendant as a del credere agent, the plaintiff shipped him certain fertilizers at prices specified in said contract, which the answer admits that he duly received. The defendant used a portion of these fertilizers himself, sold some to his tenants, and a large portion to other persons. For nearly all that which he sold, he has collected payment, except from his relatives, who are solvent. The fertilizers were analyzed by the Agricultural Department at the request of the defendant, and a small deficiency in quality found, for which the defendant has received the proper abatement in price.

[1] The defendant assigns 24 errors, but in his brief abandons the first 5, and groups the other assignments into 4 classes. The first class, consisting of the sixth, nineteenth, and twentieth assignments of error, is to the holding of the judge upon the pleadings that no defense was open to the defendant, except to show total failure of consideration. The deficiency in value was allowed him in

abatement of price. The claim of consequential damages resulting in the alleged shortage in his crop was properly disallowed by the court. *Carson v. Bunting*, 154 N. C. 532, 70 S. E. 923, where the court holds that the measure of damages is in the abatement of the price, as is also provided by Revisal 1905, § 3949.

[2] Assignments of error 8, 9, 10, and 11 are to the refusal of the judge to allow defendant to prove, on the question of damages, the difference in the looks and nature of crops on different farms on which this fertilizer was used and the crops under which he used other fertilizers. This is essentially the same point as one above discussed. To consider the variety of soil and attendant circumstances would be purely speculative. The only pertinency of such evidence would be the inference that the ingredients were not as represented. This would be too remote, depending upon the nature of soil, weather, cultivation, and the like. The best evidence is the analysis by the Agricultural Department. When the defendant ascertained therefrom the deficiency in the quality of the fertilizers, it was his duty to have bought fertilizing materials or ingredients to make good the deficiency. Not having done so, he can properly claim only the abatement of the price by reason of such deficiency, and that he has been allowed.

[3] Assignments of error 7 and 15 are to the refusal of the judge to allow defendant to prove that, at or before the time he signed the contract, it was agreed that, if the analysis of the Department of Agriculture should show that the fertilizer did not come up to the representations as to the quantity of each ingredient set out in the contract, he should not pay anything. In *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510, it is said: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and in such case the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous oral agreement shall not contradict that which is written. The written word abides." This has been cited with approval in *Bowser v. Tarry*, 156 N. C. 38, 72 S. E. 74. If the alleged oral contract was prior to the writing, the latter governs.

Assignments of error 12 and 13 are because the court sustained the plaintiff's objection to the defendant giving his reasons for refusing to execute his notes or pay the claim of the plaintiff. These are not pressed by the defendant in his brief, which states that the ruling of the court upon the other exceptions renders it unnecessary.

The defendant relies strenuously upon *Pratt v. Chapin*, 136 N. C. 350, 48 S. E. 768. But we do not think that case is in point. There it was in evidence that the contract

was not to be effective until it had been approved by another party; and hence the contract was incomplete until this condition precedent was complied with. In this case, the defendant undertakes to sustain the proposition that the terms of the contract which required him to pay so much money per ton can be contradicted by a parol agreement that he was not to pay anything at all, unless the ingredients came up to the full analysis set out in the contract. The court properly held that he could not show such agreement to contradict the written contract, and that his remedy was to abate the price to the extent of the deficiency, and that he could only defeat recovery altogether by showing a total failure of consideration.

No error.

(158 N. C. 156)

E. T. JENNETTE & CO. v. CITY HAY & GRAIN CO.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. CONTRACTS (§ 176*) — CONSTRUCTION — PROVINCE OF COURT.

It is for a trial court to determine the meaning of a written contract in controversy.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 176.*]

2. SALES (§ 84*) — CONTRACTS — CONSTRUCTION.

In response to defendant's letter offering to sell corn at a fixed price but not fixing time for shipment, plaintiffs wired: "Book 400 cracked corn. Shipment thirty days if possible." Defendant replied by wire: "Booked cracked corn." Held, that the telegrams constituted a contract by defendant to sell plaintiffs 400 sacks of cracked corn of the grade mentioned in the letter at the price mentioned therein on orders made within 30 days, but that plaintiffs could not call for shipment of any part of the 400 sacks after that time.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 234, 235; Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 1064*) — HARMLESS ERROR — INSTRUCTIONS.

In an action on a contract to sell sacks of cracked corn, plaintiff buyers were not prejudiced by an instruction that a particular shipment became plaintiffs' property after it was shipped, and, when it was seized and condemned by the department of agriculture in the hands of plaintiffs' customer, they were bound to release the corn and look to defendant seller for the difference in the value of the corn contracted for and that delivered together with plaintiffs' reasonable costs and charges, the evidence showing that plaintiffs discovered that earlier shipments were short in weight and defective in quality, and yet continued to receive shipments, and made no effort to release corn from seizure, permitting it to remain in a warehouse until it became worthless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

Appeal from Superior Court, Beaufort County; J. S. Adams, Judge.

Action by F. T. Woolard and another, partners as E. T. Jennette & Co., against the City Hay & Grain Company. From the judgment, plaintiffs appeal. Affirmed.

The plaintiffs, F. T. Woolard and E. T. Jennette, trading as E. T. Jennette & Co., bring this action to recover \$150, alleged to be due as damages on a contract for the purchase of 400 sacks of cracked corn. The plaintiffs contend that the contract between them and the defendant required the defendant to ship 400 sacks of corn at a stipulated price within 30 days from March 26, 1909, as ordered out by them, and to ship on orders after the 30 days upon adding two cents per sack, which addition was called "carrying charges," and the defendant contends that the contract was to ship 400 sacks if ordered out within 30 days. It is admitted that 150 sacks were shipped under said contract within 30 days from its date, and that the plaintiffs ordered out the remaining 250 sacks on the 29th day of April, 1909, after the expiration of the 30 days, which the defendant refused to deliver, and the plaintiffs offered evidence of their damages, sustained by reason of such refusal. The 150 sacks shipped by the defendant were in three shipments of 50 sacks each, the last shipment being about April 7, 1909. All of these shipments were made upon drafts with bills of lading attached, and the plaintiffs were compelled to pay the drafts before they could receive the corn, and tags, containing an analysis as required by chapter 149, Laws 1909, were not attached to the sacks, and the plaintiffs offered evidence that the sacks were less in weight than was required by said statute.

One of the plaintiffs testified that the first and second shipments were defective in quality and short in weight; that, when the third shipment was received, they sold 45 sacks of it to Smith Paul, who carried it to his place of business from the depot, and, after it had been in his possession about two weeks, it was seized and condemned by the department of agriculture on account of the shortage in weight and the defective grade; that after the seizure the plaintiffs never offered to sell it, and had nothing more to do with it; that they replaced the corn taken from Paul, and the last time they saw the corn seized it was rotten and worthless. The said plaintiff also testified that the order for the 400 sacks of corn was a telegram of date March 26th, 1909, at 9:28 p. m., which was as follows: "Letter 23rd. Book 400 cracked corn. Shipment thirty days if possible. Answer immediately by wire"—to which the defendant replied at 10:10 a. m. of March 27, 1909: "Booked cracked corn." The letter of March 23d, referred to in the first telegram, is one from the defendant to the plaintiffs, offering corn and naming the price, but making no statement as to time of shipment. On April 8th the plaintiffs wrote the defendant, complaining of the quality of the corn and the deficiency in weight, and on April 9th the defendant replied, saying, among other things: "We request that you dispose of these goods to the best advantage, sell it in bulk, or in any

other way that you think best, and send us account of sales, and, if you so desire, we will cancel the contract with you for the balance, as the margins we are able to get on your contract are not adequate to all of the trouble we are having." The defendant sent to the plaintiffs the analysis tags required by the statute soon after the shipments began, and such tags were on the 45 sacks at the time of seizure. On the 24th day of April, 1909, the day of the said seizure, the plaintiffs notified the defendant thereof, and soon thereafter (the exact time not stated) the defendant paid the department of agriculture the charges assessed by it.

His honor charged the jury that the plaintiffs were not entitled to recover anything on account of the refusal to ship the last 250 sacks, because ordered after the expiration of the contract, and the plaintiffs excepted. The plaintiffs requested his honor to charge the jury as follows: "It is contended by plaintiffs that of one shipment of 50 sacks 45 sacks were seized and condemned by the department of agriculture, and became a total loss to the plaintiffs, and that they replaced the same with other corn which they purchased at a higher price, or \$1.65 per sack; that this shipment so seized was made by defendant, bill of lading attached, and was paid for by plaintiffs before the bill of lading was obtained and before the corn had or could have been examined in the usual course of business of this kind; that the same was taken direct from the depot to customer's place of business, and was thereafter found in defective condition and condemned; that said shipment was defective in quality and short in weight, and so much below the corn contracted for in grade as to be practically valueless on this market; that defendant was notified of this condition, and thereafter undertook to settle the matter with the department itself. If you find these contentions to be true from the evidence, the court charges you that the plaintiffs would be entitled to recover \$1.50 per sack for the corn condemned, or so much thereof as was shipped by defendant, and, in addition thereto, would be entitled to recover the difference between \$1.50 per sack on said shipment of 50 sacks and the market price of No. 2 cracked corn at the time and place of delivery, if you find from the evidence that such price had advanced." This was refused, and plaintiffs excepted. There are other exceptions in the record, but they embrace the same questions covered by the two exceptions stated. There was a verdict in favor of the plaintiffs for \$38.25, and from a judgment rendered thereon, they appeal.

Small, MacLean & McMullan, for appellants. Rodman & Rodman, for appellee.

ALLEN, J. [1,2] The contract between the plaintiffs and the defendant is in writing, and consists of the telegram of March

26, 1909, sent by the plaintiffs, and the reply of the defendant of March 27, 1909, and, being in writing, it was for the court to determine its meaning. We think his honor held correctly, as he charged the jury, that "the contract between the parties was that the defendant would sell to the plaintiffs 400 sacks of No. 2 cracked corn, delivered in Washington, at \$1.50 per sack, provided that the same was ordered out by the plaintiffs within 30 days, and plaintiffs were not entitled to call for shipment of any part of the 400 sacks after the 30 days had expired." This seems, also, to have been the understanding of the plaintiffs at the time this action was commenced, as they wrote the defendant on the 3d day of May, 1909: "We are reasonable and do not expect anything unreasonable, now if you will refer to the purchase of this goods, you will find that we ordered some of this shipment out at once, we could have put the entire shipment off until thirty days, it looks as this should give us consideration." They made no claim then that they had the right under the contract to order out any of the corn after 30 days.

This being the correct construction of the contract, there can be no recovery for refusal to ship the 250 sacks ordered by the plaintiffs after the expiration of 30 days.

[3] Instead of the prayer requested by the plaintiffs, in reference to the 45 sacks, his honor charged the jury: "As to the 45 sacks seized and condemned, the court charges you that, after this corn was shipped, it became the property of the plaintiffs, and, when it was seized and condemned in the hands of one of their customers, it was their duty to release the same, and the measure of damages in such case was the difference in value between No. 2 cracked corn, weighing 100 pounds per sack, at the time and place of delivery, and the corn which was actually delivered, together with such reasonable costs and charges as plaintiffs incurred on account of the seizure and rehandling of the corn in question. After this corn was delivered to the plaintiffs and seized by the state, it was the duty of the plaintiffs to do the best they could with it, and to pay the cost of forfeiture and other necessary expenses incurred, but it is admitted in this case that defendant paid the costs of the forfeiture, and the plaintiffs are therefore not entitled to recover anything on that account, but only the difference in the value between this corn and No. 2 cracked corn, as above stated, together with any other expenses actually incurred by them in its handling." In view of the evidence of the plaintiffs and the admitted facts, this instruction was as favorable to the plaintiffs as they were entitled to. They say they discovered that the corn being shipped by the defendant had no tags on it, and was short in weight and defective in quality, be-

fore the shipment containing the 45 sacks was made, and that they continued to receive and sell it. The defendant sent the analysis tags to the plaintiffs as soon as notified of the necessity for them, and wrote them on April 9th to dispose of the corn in any way they thought best. The corn seized by the department of agriculture was in the possession of Smith Paul two weeks before the seizure, and he says he made no complaint about the corn, and the defendant paid the charges to the department. During this time the plaintiffs made no effort to release the corn from seizure, and, as they say, they had nothing more to do with it and permitted it to remain in the warehouse until it became worthless.

We find no error.

No error.

(153 N. C. 186)

NEWTON et al. v. SCHOOL COMMITTEE OF CITY OF CHARLOTTE et al.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. INJUNCTION (§ 77*)—SUBJECTS OF RELIEF—MUNICIPAL ACTS.

Courts cannot control municipal corporations in the discretionary matters and powers conferred upon local administrative boards for the public welfare, unless their action amounts to an oppressive and manifest abuse of discretion.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 77.*]

2. INJUNCTION (§ 128*)—SUBJECTS OF RELIEF—MUNICIPAL ACTS.

In an action to enjoin a board of school commissioners from selecting a certain school site for a graded school district, evidence held to show that the board fairly exercised its vested discretion in selecting a site.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 128.*]

Appeal from Superior Court, Mecklenburg County; W. J. Adams, Judge.

Injunction by J. A. Newton and others against the School Committee of City of Charlotte and others. From a judgment dissolving a restraining order, plaintiffs appeal. Affirmed.

Clarkson & Duls, El. R. Preston, and Maxwell & Keerans, for appellants. Burwell & Cansler and Tillett & Guthrie, for appellees.

HOKE, J. This was an action to restrain defendant the Board of School Commissioners of the city of Charlotte from the selection of a certain school site for the graded school district of North Charlotte, heard before his honor, W. J. Adams, on December 9, 1911. There was judgment dissolving restraining order, and plaintiffs, citizens and taxpayers of the district, excepted and appealed, assigning for error, first, that the power of supervising the action of defendant board and of ultimate decision in the premises was vested by law in the board of

aldermen of the city; second, that, if vested in defendant board, they had selected a site so unsuitable and in such flagrant disregard of the rights and interests of the patrons of the school as to render their action illegal and void. On appeal by the board of aldermen of the city of Charlotte in a case just decided, and for the reasons therein stated, the first exception must be resolved against the plaintiff, and, this being true, and on the facts as they appear in the present record, we are of opinion that like decision must be made as to plaintiffs' second position.

[1] In numerous and repeated decisions, the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Jeffress v. Greenville*, 154 N. C. 499, 70 S. E. 919; *Board of Education v. Board of Commissioners*, 150 N. C. 116, 63 S. E. 724; *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 809; *Ward v. Commissioners*, 146 N. C. 534, 60 S. E. 418, 125 Am. St. Rep. 489; *Small v. Edenton*, 146 N. C. 527, 60 S. E. 413, 20 L. R. A. (N. S.) 145; *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; *Brodnax v. Groom*, 64 N. C. 244. In some of the opinions, decided intimation is given that, in so far as the courts are concerned, the action of these administrative boards must stand, unless so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of persons affected. It is undesirable and utterly impracticable for the courts to act on any other principle. Speaking to this question in *Ward v. Commissioners*, our present Chief Justice quotes with approval from the opinion in *Brodnax v. Groom*, *supra*, as follows: "In *Brodnax v. Groom*, 64 N. C. 244, Pearson, C. J., discussed this subject, and said: 'The case before us is within the power of the county commissioners. How can this court undertake to control its exercise? Can we say such a bridge does not need repairs, or that in building a new bridge near the site of an old bridge it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? In short,' the court continued, 'this court is not capable of controlling the exercise of power on the part of the General Assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our govern-

ment and the usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This court has no power, and is not capable, if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities.'"

[2] Considering the evidence presented in the light of these authorities, the court below has clearly made correct decision on the rights of these litigants; while the plaintiffs, acting, no doubt, under full belief that their rights and interests have been entirely disregarded, have filed strong affidavits tending to show that another place for a school site should be selected, and, in fact, that in the present state and placing of the population there should be two schools maintained in the district. There is satisfactory evidence on part of the defendants tending to show that the site determined on is near the physical center of the school district; that it is a most attractive site, having desirable elevation and affording ample space for the buildings for the school and playgrounds for the children.

Among other affidavits in support of their position, defendants offer that of Alexander Graham, Esq., the superintendent of the city schools. The affiant, who has now held this position for the past 23 years, and whose administration has been again and again approved by his associates and fellow citizens, makes oath as follows: "That he was in attendance, in his capacity as superintendent of the schools, at the several meetings of the board of school commissioners when the location of the school spoken of in the complaint was determined by these commissioners, and he verily believes that in the selection of this site they, and each one of them, were actuated solely by their interest in the promotion of the cause of education in the city of Charlotte, and the proper use of the fund which the people have put at the disposal of the board for the purpose of buying sites for buildings and erecting houses thereon. He further swears that he is acquainted with the other sites for buildings selected by the board, and he verily believes that each one of these sites is the proper site for school buildings, and will serve the community as proper sites for schools. He further swears that he is familiar with the other sites mentioned in the complaint, and which the plaintiffs in this action allege should have been selected, instead of the one offered by the Pegram-Wadsworth Land Company, and he expresses the opinion that the board, in rejecting each one of these sites, did that which was best for the interests of the public and the children of that vicinity. He further swears that he believes that the best interests of the administration

of the fund of the city will be promoted by consolidating, as much as possible, those few to be well equipped, and, at the same time, to be so located as to be convenient, as far as they may be, to the children of the different portions of the city, and that these selections of sites, in his opinion, should be made, and, as he believes, have been made thus far, by the board, with a view to the convenience and interest, not only of the present generation, but of those who are to come after, and who will hereafter attend these schools. He further swears that, before the Pegram-Wadsworth Land Company had made any offer whatever in regard to the site in question, he had looked over this school district with a view to determining, in his own mind, what would be the best location for a school building for these two wards, and that he had selected the very site that has been selected by the board; his impression being that the site must be purchased, and would not be donated."

In view of this and other supporting evidence, we think his honor might well hold, as he did in his judgment, "that the board of school commissioners has fairly and properly exercised the discretion vested in the board in respect to the selection of the site for the school building referred to in the complaint." And certainly there is nothing in the record to justify the courts in undertaking to disturb the conclusion they have reached.

There is no error, and the judgment of the superior court is affirmed.

Affirmed.

(158 N. C. 587)

THOMPSON et al. v. APPALACHIAN POWER CO.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. SPECIFIC PERFORMANCE (§ 95*)—CONTRACTS RELATING TO REALTY—INDEFEASIBLE TITLE.

Specific performance of a contract for the purchase and sale of land will not be decreed where the plaintiffs are unable to make a good and indefeasible title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

2. SPECIFIC PERFORMANCE (§ 106*)—PROCEEDINGS—PARTIES.

Where persons who seek the specific performance of a contract to purchase land are merely trustees thereof, and the cestuis que trust are not parties, specific performance will not be granted.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

Appeal from Superior Court, Polk County; Long, Judge.

Submission of controversy between David A. Thompson and others and the Appalachian

Power Company. From a judgment for plaintiffs, defendant appeals. Action dismissed.

The plaintiffs seek to compel the defendant to specifically perform a contract for the purchase of a large tract of land, and to pay to the plaintiffs the sum of \$40,000 purchase money. The judge below rendered a judgment in favor of the plaintiffs, decreeing specific performance of the contract, and requiring the payment of the purchase money. The grounds upon which specific performance is resisted by the defendant is that the plaintiffs are unable to make a good and indefeasible title to the property.

Bomar & Osborne and Tillett & Guthrie, for appellant. Smith & Shipman and Jas. H. Merrimon, for appellees.

PER CURIAM. [1, 2] In view of the doubtful character of the title offered by the plaintiff, and further considering the fact that the cestuis que trust have not been made parties to this action, the court is of the opinion that, under the circumstances of this case, specific performance should not be decreed.

The action is dismissed without prejudice. Dismissed.

(158 N. C. 231)

TERRELL v. CITY OF WASHINGTON.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. MASTER AND SERVANT (§ 124*)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.

A telephone, telegraph, or electric light company owes a duty to its employés to inspect poles before using them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

2. MUNICIPAL CORPORATIONS (§ 733*)—LIABILITY—GOVERNMENTAL OR CORPORATE POWERS.

When a city operates an electric light plant, its duties toward its employés are the same as those of an individual in like circumstances, since it is exercising a corporate, and not a governmental, function.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

3. MASTER AND SERVANT (§ 124*)—MUNICIPAL CORPORATIONS (§ 847*)—DUTIES TOWARD SERVANTS—INSPECTION.

A city operating an electric light plant does not perform its whole duty by merely selecting sound and safe poles for use, but must, by proper inspection, keep them safe for the use of its employés and the protection of the public.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.* Municipal Corporations, Dec. Dig. § 847.*]

4. MASTER AND SERVANT (§§ 101, 102*)—DUTIES TOWARD SERVANT—PLACE AND APPLIANCES.

A master owes to his servant the duty of using ordinary care to provide reasonably safe instrumentalities of service suitable to the work to which they are applied, and properly

adjusted to each other, among which instrumentalities are safe places to work or to stay while awaiting orders, reasonably safe ways of entrance and departure, and an adequate supply of sound and safe materials, implements, and accommodations, with such other appliances as may reasonably be required to assure their safety while at work or passing over his premises to or from work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171, 172, 180-184; Dec. Dig. §§ 101, 102.*]

5. MASTER AND SERVANT (§ 125*)—UNSAFE PLACE OR DEFECTIVE APPLIANCES.

If a master knows, or with ordinary care would have known, that the buildings, ways, machinery, tools, or materials which he provides for the use of his servants are unsafe, and the servant, without contributory fault, suffers injury thereby, the master is liable, but he is not liable without actual or constructive notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

6. MASTER AND SERVANT (§ 124*)—DUTIES OF MASTER—INSPECTION.

When appliances are defective when put in use, a master is not entitled to time to discover the defects, but should examine them before using, and he cannot evade his responsibility by directing his servants to inspect them before using.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

7. MASTER AND SERVANT (§ 130*)—UNSAFE POLES—WHAT CONSTITUTES.

A master fails to provide a safe place for work, if he allows work to be conducted there habitually in a manner needlessly dangerous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 130.*]

8. MASTER AND SERVANT (§ 103*)—DUTY OF INSPECTION—PERFORMANCE.

A master's duty of inspection must be continuously fulfilled and positively performed, and is not discharged by directing its performance or by employing competent and careful persons for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

9. MASTER AND SERVANT (§ 125*)—DEFECTS—DUTY TO REPAIR.

A master is not liable for failure to repair defects when he had neither actual nor constructive notice of their existence, and this notice must be proved, but he is chargeable with constructive notice of whatever he might have discovered by ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

10. MASTER AND SERVANT (§ 126*)—DUTY TO REPAIR—REASONABLE TIME.

A master is entitled to a reasonable time after notice of a defect to make repairs, and if, during that period, a servant is injured, the liability of the master depends upon his diligence under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 253; Dec. Dig. § 126.*]

11. MASTER AND SERVANT (§ 235*)—INSPECTION—DUTY OF SERVANT.

A lineman employed by a city, which was operating an electric light plant, was not chargeable with negligence for failure to inspect a pole before climbing it, especially where the defect was below the ground and would not have been discovered except by digging, since

he was given an implied assurance that it was safe when he was ordered to climb it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

12. MASTER AND SERVANT (§ 231*)—MASTER'S DUTIES—RELIANCE ON PERFORMANCE.

A servant, in the absence of warning or knowledge of a defect, has a right to rely upon the safety of instruments and appliances which he is required to use, since he may assume that the master has performed his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

13. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—EVIDENCE.

In an action by a lineman against a city operating an electric light plant for injuries from a falling pole, evidence held sufficient to justify submission to the jury whether the city was negligent in selecting and maintaining the pole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

14. MUNICIPAL CORPORATIONS (§ 1022*)—PRESENTATION OF CLAIMS—EXCUSE.

A failure to present a claim against a city within the time fixed by its charter does not defeat the right of action where the claimant was mentally and physically unable to present it during that period, and did present it within a reasonable time after he was able to do so.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2193; Dec. Dig. § 1022.*]

Appeal from Superior Court, Beaufort County; Cline, Judge.

Action by Joe Terrell against the City of Washington. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. Plaintiff was employed by the defendant as a lineman in connection with the operation of its electric lighting plant, and on the day of his injury he was directed by his foreman to climb one of the poles for the purpose of repairing or removing one of the wires attached thereto. In order to perform his work, it was necessary for the defendant to wear spurs or spikes on his feet, and to fasten himself with his belt to the pole, and, while he was near the top doing his work, the pole fell to the ground, rebounded, and caused him serious injury, by reason of which he became unconscious and was confined to the hospital under medical treatment for a long time. There was evidence tending to show that the pole was rotten and in very bad condition several inches under the ground, and that it broke three or four inches below the surface of the ground. It was a juniper pole and should have lasted, so as to be used with perfect safety, from 6 to 20 years, and it had been standing only three years when it fell with the plaintiff. There was no rule or custom imposing upon the plaintiff the duty of inspection before ascending the pole,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and there was nothing in its appearance calculated to put him on notice as to its condition. Above the ground it seemed to be sound and trustworthy, except, as one of the witnesses testifies, at the very top it was rotten, but that part of it which he was required to use was apparently sound and safe. There is ample evidence in the record to show that the pole was not one which should have been selected in the beginning, and after ordinary inspection, as sufficiently sound and strong for the uses to which it was intended to be applied. An arc light was suspended from the pole by a wire, the other end of which was attached to another pole on the opposite side of the street. A witness for the plaintiff gave the following description of the pole: "I looked at the pole after he fell. I do not know what became of it. The pole was rotten. It was as rotten as it could be. It broke off between three and four inches under the ground. They did not have any guy wires supporting the pole at that time. They did not have any braces of any sort on it to support it. It had the strain of the light on it. They did not have anything on it to relieve that strain; they only had the pole set back like this. It was leaning from the lamp. The lamp pulled it in the street. If it had not been for the lamp on it, it would have fallen like it started. It was a juniper pole. It was rotten between three and four inches below the ground. It was rotten on the outside." This witness further stated that the pole was not rotten above the ground and that, if an inspection had been made, it would have been taken down, and that no inspection was made to his knowledge. Another witness gave this description of the pole: "The pole was broken off three or four inches under the ground, and was decayed or rotten. You could take little pieces of the wood in your hands and break it up into dust. It had heart that looked sound, but you could take it in your hands and break it up. No one passing there could tell whether the pole was rotten or not, on account of the shell on the outside being hard. You could not tell whether the pole was rotten by the outside, nor unless you pried into the skin on the outside. You could tell by digging around it. There were no guy wires or braces supporting the pole." The defendant introduced the affidavit of Manly Pearson, made a few days after the pole fell, and therein, among other things, he made this statement: "There was grass grown around the pole at the bottom. Pole seemed to be solid. Showed no appearance of decay above ground, or above grass. Pole broke off about three inches under ground. Where pole broke—that is, place on pole—it was rotten and decayed; you could stick your finger in it; it was spongy, soft, thoroughly decayed; and the only solid spot in pole was a streak in center, the heart, about an inch or so in diameter. There was no support to

poles. There were no 'guy' wires on poles. The only wire on pole that fell was wire running from it across street to other pole, from the center of which in the middle of street was suspended an electric 'arc' light; weight about 50 pounds. Distance from pole to pole about 40 feet. There was a powerful strain on poles, pulling against each other, and weight of light, and no supports, 'guy' wires, or anything behind poles to resist this pressure. I have been engaged in this kind of work for 18 years. Have worked in South Carolina, Georgia, Alabama, and other states, and most all poles had 'guy' wires on back of poles to support them. These 'guy' wires are necessary to hold poles in position. It is not customary for a lineman to examine poles under the ground when working on them. That is always done by another man." There was evidence to the effect that it was not customary to guy poles like the one in question with no more strain on them than it had, and that the appearance of the pole above the ground did not indicate that it was rotten or unsound, and the city did not have its poles inspected except in a casual or general way; "that is, by passing and looking at them." If the pole had been guyed, it would not have fallen, though there was evidence it was not customary to guy such poles. There was much additional evidence introduced by the parties to sustain their respective contentions, but it is not necessary to an understanding of the case that we should set it out.

The court, among other instructions, charged the jury as follows: "If Terrell was an experienced lineman and there was no regular pole inspector employed by the defendant, the duty of inspecting a pole, as to its safe or dangerous condition, rested as much upon the plaintiff, Terrell, as it did upon the defendant town, and if you find from the evidence that the plaintiff was a person of ordinary information and had experience in the business in which he was engaged, and the town employed no regular or special pole inspector, then he assumed the risk of the breaking of any pole which he was called upon in the line of his duty to climb, not due to any defect in the original setting, and the town owed him no duty to inspect it and inform him of its defects, or to keep it sound, and if you find these to be the facts, you will answer the first issue [as to negligence] 'No.' If you find from the evidence that the pole, at the time it was set in the ground, was sufficiently sound and solid and of sufficient size not to have broken with the plaintiff and was properly erected, as has been explained to you, and you should further find that the plaintiff was an experienced lineman, then the changes by time and exposure produced in the pole was a risk the plaintiff assumed, and you will answer the first issue, 'No.' If you find from the evidence that the pole which

broke and fell with the plaintiff was properly set originally and the breaking was not from any negligence in the original setting, but only from failure to keep it inspected and examined, and the plaintiff was an experienced lineman, you will answer the first issue, 'No.' If you find that the plaintiff had the experience, which I have spoken of, as a lineman, and that the pole was properly erected in the first instance, as I have heretofore fully instructed you, then I say that no further duty of its inspection from time to time rested upon the town, and if, under such circumstances, he was hurt by the falling of the pole, it would not be negligence attributable to the defendant, and you would answer this first issue, 'No.' Or if the pole fell because there was some rottenness in it and below the surface of the ground, and it was concealed by reason of any hard shell on the outside of the pole, so that if the ordinary inspection of poles of this kind, either by the defendant or the plaintiff, or both of them, would not have disclosed the defect and the consequent danger in climbing it, as it was, and because of this hidden defect in the pole, when it was subjected to the additional weight of his body and the necessary movements of his arms, and handling the wires, etc., it fell and injured him, his fall would be an accident for which no one would be blamable in law, and in such case you will answer the first issue, 'No.'"

The jury rendered a verdict for the plaintiff, and, judgment having been entered thereon, the defendant appealed.

Ward & Grimes and H. C. Carter, Jr., for appellant. Norwood L. Simmons and Small, MacLean & McMullan, for appellee.

WALKER, J. (after stating the facts as above). The court, in addition to the instructions we have taken from the charge, told the jury that if the defendant set a pole in the ground which was unsound or unfit for use, or the defectiveness of which it could have ascertained at the time by the exercise of ordinary care, and also failed to brace or guy the pole, if the jury found that persons of ordinary prudence used the guy or brace under such circumstances, they would answer the first issue, as to the defendant's negligence, in the affirmative, provided they also found that the pole fell with the plaintiff, and its fall was caused directly and immediately by its unsoundness and the failure of defendant to brace the same, and that guys or braces were appliances which were approved and in general use for securing a pole like this one in a safe position. It is evident that the jury found, under the evidence and the instructions of the court, that the pole was originally defective, either to the actual or constructive knowledge of the defendant, and was not such a one as should have been

used for the purpose to which it was applied. We emphasize the foregoing instruction of the court and the fact found by the jury to distinguish this case in limine from those cited by the defendant's counsel, as authorities for his contention that the duty of inspection rested upon the plaintiff and not upon the defendant.

[1] We believe that they all hold that this principle does not apply if the pole was originally unsound and unfit for use, and that it is the duty of a telegraph or telephone or electric light company, when it selects a pole for use in its line, to inspect it for the purpose of ascertaining if it is sound and fit.

[2] By parity of reason, the same is the duty and obligation of a city to its employes when it constructs and operates an electric light plant of its own, for it is not a public or governmental function, but a private and corporate duty, in the discharge of which the municipality will be held to the same degree of liability as an individual in like circumstances. *Fisher v. Newbern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857.

[3] But we are of the opinion that a city does not perform its whole duty by merely selecting a sound and safe pole in the beginning, but it must, by proper and reasonable inspection, keep it sound and safe for the use of its employes and the protection of the public, and in this respect we can perceive no valid reason why its duty should be less strict than is generally required of a master to exercise reasonable precaution for the safety of his servant. This general duty has been thoroughly settled by the authorities.

[4] The master personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among these are a reasonably safe place in which to do their work or to stay while waiting orders, reasonably safe ways of entrance and departure, an adequate supply of sound and safe materials, implements, and accommodations, with such other appliances as may reasonably be required to insure their safety while at their work or passing over his premises to or from work. These things must, moreover, be adapted to the work in hand. It is not enough that they should be good under ordinary conditions. They must be suitable for the work to which they are applied by the master, and properly adjusted to each other.

[5] If, therefore, the master knows or would have known if he had used ordinary care to ascertain the facts that the buildings, ways, machinery, tools, or materials which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor, although he is not

thus liable in the absence of actual or constructive notice.

[6] The master is not entitled to time to discover defects in things which are defective when put in use. He should examine them before putting them in use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, material, etc., furnished by him. The fact that a servant could, by care and caution, so operate a defective and dangerous machine as not to produce injury to his fellow servants does not exempt the master from his liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances.

[7] The master fails to supply a "safe place" for work if he allows work to be conducted there habitually in a manner needlessly dangerous to servants. The master is also personally bound, from time to time, to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence, and skill to keep them in good and safe condition.

[8] The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Such duty is not discharged by giving directions for its performance, or by promulgating rules requiring it to be performed, or by employing competent and careful persons for that purpose.

[9] The master is not responsible for the want of repairs when he has neither actual nor constructive notice of their need; and this notice is not presumed, but must be proved, by the servant. And it must be proved that he was chargeable with notice of the particular defect complained of. But he is chargeable with constructive notice of whatever, by the use of ordinary care and diligence, he might have discovered, and thereby avoided the danger incident thereto.

[10] He is entitled to reasonable time, after a notice of a defect, within which to make repairs, and if, during that period, or while he is repairing, an injury occurs to a servant, the question of a master's negligence depends upon his diligence under all the circumstances. This statement of the law has been adopted in *Sh. & Redf. on Negligence* (5th Ed.) § 194, and in the main is sustained by our own decisions. *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093, and cases cited; *Leak v. Railroad*, 124 N. C. 455, 32 S. E. 884. We think the principle applies to the case in hand. The question in one form was presented in *Harton v. Telephone Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, and we then said: "The duty of reasonably careful construction is followed by like care in maintenance and inspection. *Joyce, Elec. Law*, 605. The duty of inspection, in regard to its frequency, cannot be made definite, but regard must be had to the character of the soil, the condition of the weather, the season of the

year, and such other conditions as may affect the security of the poles and the safety of the traveling public."

[11] It is contended, however, by the defendant that the duty of inspection belonged to the plaintiff, and his failure to discover the defect in the pole was his own and not its fault. The proof is that the unsoundness of the pole was not apparent to the naked eye. It was below the ground and would not be discovered except by digging around the pole and removing the earth which concealed it. We cannot yield assent to the argument, at least under the circumstances of this case, that such a duty was imposed upon the plaintiff in caring for his own safety, and we discover nothing in the evidence to indicate that the plaintiff was guilty of any contributory negligence. In *Barkley v. Waste Co.*, 147 N. C. 585, 61 S. E. 565, Justice Brown, in discussing the liability of the defendant for injuries to one of its employes who, while performing his work, fell from a defective scaffold and was injured, said: "The defendant owed to its employes, who were directed to work on this scaffold, the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. 2 *Labatt*, § 614; *Bushwell on Personal Injuries*, §§ 196, 391, 392; *Brewing Co. v. Wood*, 87 S. W. 774 [27 Ky. Law Rep. 1012]; 4 *Thompson, Neg.* § 3957, note 30; *Stanwick v. Butler* [93 Wis. 430] 67 N. W. 723; *Phoenix Bridge Co. v. Castleberry*, 181 Fed. 181 [65 C. C. A. 481]. If defendant delegated the performance of this duty to Michael, it is responsible for the manner in which he discharged it. *Tanner v. Lumber Co.*, 140 N. C. 475 [53 S. E. 287]; *Avery v. Lumber Co.*, 146 N. C. 562 [60 S. E. 646]; *McCarthy v. Clafin* [99 Me. 290] 59 Atl. 293. The evidence of witness Wooten is to the effect that the scaffold was built of old material that was scorched in the fire when the building was burned. There is also evidence that the wood was knotty, and that the piece which gave way broke at a knot. These facts, if true, do not per se constitute negligence, but we think they are some evidence to be considered by the jury as bearing upon the inquiry as to whether the defendant exercised reasonable care in selecting material suitable for the construction of a lofty scaffold upon which its servants were required to work. We fail to see any evidence of contributory negligence. The plaintiff took no part in selecting the material or in erecting the scaffold, and knew nothing of the character of the material out of which it was constructed. The scaffold was a completed instrument and supposed to be safe when plaintiff was directed to work upon it. The fact that he made only a casual examination does not make plaintiff culpable. He had a right to rely upon the assurance of the foreman that the scaffold was safe, as he was unacquainted with either the character of the construc-

tion or the quality of the material. *Liedke v. Moran* [43 Wash. 428] 86 Pac. 646 [117 Am. St. Rep. 1058]; *Ingram v. Railway Co.*, 99 S. W. 666 [30 Ky. Law Rep. 713]; *Silver- sen v. Jenks* [102 App. Div. 313] 92 N. Y. Supp. 382; *Standard Oil Co. v. Bowker* [141 Ind. 12] 40 N. E. 128." There are two propositions stated in the quotation: (1) That the condition of the material, or lum- ber, which entered into the construction of the scaffold, was at least evidence of neg- ligence; (2) that the plaintiff was not re- quired, himself, to make more than a casual examination of the scaffold, and his failure to do so was not contributory negligence, as he had the right to rely on the assurance of the foreman that the scaffold was "all right"—that is, a safe one. There is no sub- stantial or practical difference between the two cases. We do not see why a master should be excused from setting an unsound and unsafe pole or for permitting it to be- come and remain so, when he would not be, under similar circumstances, for erecting a scaffold, both having been constructed for the use of his servant. There is one differ- ence between the two cases, for in the case of the scaffold the servant was expressly told that it was safe, while in the case of the pole he was given an implied assurance that it was sound and safe when he was ordered to climb it for the purpose of re- moving or adjusting the wires; but this is a difference in form and not in substance.

[12] It is a general rule that the servant, in the absence of any warning from his mas- ter, or knowledge of a defect, has a right to rely upon the safety of instruments and ap- pliances which he is required to use in the service, because it may fairly be presumed that the master has performed his primary duty—that is, care in the original selection and subsequent inspection of such instru- mentalities. In *Electric Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427, the company was held not to be liable for injuries to the plaintiff, Kelly, produced by the falling of a pole, but for the reason that the fall was caused by a weakness in the pole, brought about by a previous fall or by a defect which the evidence showed was not discovered by "the most rigid scrutiny." But, in deciding that case, the court, by Justice Magie, said very much that is applicable to our case: "There was no pretense in this case that the company had been guilty of any willful wrong to Kelly. His claim was, and is, that the injury he received was the result of a breach of a duty which the company owed him. The better view of a master's duty to a servant is that which, taking into con- sideration the well-settled doctrine that a servant, by accepting employment, consents to take the risk of all dangers obviously or naturally incident to such employment, im- poses on the master a positive duty to take reasonable care and precaution not to sub- ject the servant to other or greater dangers.

The rule thus formulated is of wide applica- tion, but, with reference to such cases as that now under consideration, may be thus stated: The master must take reasonable care to have the tools and appliances with which, and the places on or about which, the servant is to be employed reasonably safe for the work the latter is employed to do. *Shear. & R. Negl.* §§ 92, 93; *Smith, M. & S.* 236; *Harrison v. Central Railroad Co.*, 31 N. J. Law, 293; *Hutchinson, Y. N. & B. Rail- road Co.*, 5 Exch. 843. Applying the rule thus stated to the case before us, it is obvious that, to justify the submission to the jury of the liability of the company to Kelly, the facts established must have warranted the inference that the breaking of the pole, which was the cause of his injury, resulted from a breach of the company's duty to him in respect to that pole. The company did not guarantee the safety of the pole, nor was it the duty to pro- vide a sufficient pole, as was erroneously held below. Its duty was less extensive and would have been satisfied if it had taken reason- able care to provide a pole of sufficient strength to bear the strain of the wires and the weight of the servant employed thereon to do what was required to fit them for the service of the company." While there is no evidence in this case upon the question whether the company made any inspection or not, the court virtually told the jury that it was not its duty to do so if plaintiff was an experienced lineman (of which there was no doubt), and the duty of inspection was his, provided the pole was not originally defective. This instruction was, in our view, favorable to the defendant, because it made its duty "less extensive" than in law it really was. The city was required to inspect its poles at reasonable intervals of time, for the safety of its employes and the public, as we have shown, and its failure to do so was negligence, and nothing appears in the evi- dence to show that it was not the prox- imate cause of the injury. If it had made the proper inspection, the rottenness of the pole below the surface of the ground could easily have been discovered, for the wood was so badly decayed that it would crumble in the hand under the slightest pressure.

Edison Co. v. Street Railway Co., 17 Tex. Civ. App. 320, 42 S. W. 1009, was a case in which it appeared that one Dixon, the appel- lee, who was a lineman or repairer, was in- jured by the falling of a pole belonging to another company but used, with its permis- sion, by the defendant, appellant. The pole proved to be rotten near its base and broke in two and Dixon fell with it to the ground and was injured. In an elaborate opinion, the court reviews the facts and the law, and comes to this conclusion: "Where the de- fects in the materials or resources of the work are obvious and known to the servant, or he had the same opportunities of knowing that the master had, and he is injured by rea- son of such defects, he cannot recover, for

the reason that he assumed the risk in undertaking the work. But where, as in this case, the master could, by the use of ordinary care in testing the condition or strength of the pole, have ascertained its defect, and its defect was not known to appellee, and was obvious to him, the master is guilty of a breach of duty to his servant, and is liable for the consequences of it." The following facts, among others, were found by the lower court in that case: "On December 28, 1895, appellee, J. W. Dixon, with other hands, was employed by appellant to take down and remove a feed wire from the poles on the west side of Pine street, and put the same in a new position on its poles on the east side of that street. It was necessary for the appellee, in the pursuance of his employment, to climb the poles for the purpose of detaching the feed wire from the brackets to which it was attached, and for that purpose he climbed one of the poles on the west side of Pine street, and, while engaged in loosening the feed wire from the brackets at the top of the pole, it broke near its lower end, and appellee was thereby with great force and violence thrown upon the ground and seriously injured. The place where the pole broke was rotten at and from its center near to its circumference, the unsound part at that place being surrounded only by a thin shell of sound wood, through which hacks had been cut before the pole was erected. On account of its rottenness, the pole was unfit and unsafe for the purpose for which it was used, and too weak to sustain appellee's weight in the performance of his duty in taking down the wire. Its defective condition was not obvious or patent to the eye, and appellee was unaware of it. By the exercise of ordinary care and inspection, which it was appellant's duty to appellee to perform, it could, by testing the pole in the ordinary manner, have ascertained its defects and known the danger to any one in discharging the duty it had employed the appellee to perform." The court held that "in failing to discharge its duty in inspecting and ascertaining the defect in the pole, which it could have done by the use of ordinary care, it was negligent, and this negligence was the proximate cause of appellee's injury. The appellee was guilty of no negligence contributing in any way to the accident." This judgment, as we have seen, was affirmed on appeal.

In *S. W. Telegraph & Telephone Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575, the court held, upon a state of facts much like those in this case, that it was the duty of the defendant (plaintiff in error) to have used reasonable care and diligence by an inspection to discover latent defects, and, if ascertained to exist, then to warn its employé of the probable danger in ascending the pole. These are the words of the court: "While he does not insure the safety of his servants, yet he is bound to take heed that

he does not, through his own want of care and prudence, expose them to unreasonable risks or dangers, either from the character of the tools with which he supplies them, or the place in which he requires them to operate. He is in duty bound not to expose them to danger of which he knows or has reason to know they are not aware. Before ordering them to perform any service, he should warn them fully of the latent dangers incident thereto, if there be any, of which he knows, or in the exercise of proper diligence ought to know; and this duty 'extends even to patent dangers when he knows the servant, by reason either of his youth or his inexperience, is not aware of the danger to which he is exposed, or * * * which are unknown to the servant from any cause, and which cannot readily be ascertained except by a person possessed of peculiar knowledge, which he has no reason to suppose the servant possesses'"—citing many authorities. The appellate court awarded a new trial in that case, because the instruction of the lower court made it the absolute duty of the company to discover the defect without any regard to the question of care or diligence in attempting to do so. Unless we hold that the duty of seeing that this pole was in proper condition rested upon the plaintiff, Terrell (and we have shown that the contrary is the true rule), the case of *Ward v. A. & P. Telegraph Co.*, 71 N. Y. 83, 27 Am. Rep. 10, is in point, and is to this effect: "The defendant had the right to place its line in the street, and hence it can be made responsible for the accident only by proof of culpable negligence on its part, either in the construction of the line or its maintenance. If the post which broke and fell was originally not reasonably sufficient, or if it was permitted carelessly to become and be insufficient by decay, then responsibility attaches to the defendant for the accident."

Applying the law to facts similar to those in this case, the court in *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437, said: "If the pole had injured a passer-by, it would be no answer for the defendant to say that it did not own the pole. It was bound, both as to third parties and as to its own workmen, to erect and maintain a reasonably safe structure, and it had no right to use for that purpose an unsafe appliance, whether its own or that of a third party. By using the pole as part of its line, it adopted it as its own. As it would have been liable had the pole when first used been decayed and insufficient for the purpose of carrying its wires and supporting its linemen, it was equally liable when the pole subsequently became unsafe from decay, which reasonable inspection would have discovered. The duty of the defendant was just as great to safely maintain as to safely construct, and that duty cannot be delegated so as to exempt the master from liability." As said by the court in the case just cited, "If each

lineman was to dig around and test every pole before he ascended it, a large part of his time would be taken up by this work alone, and repeated tests would soon impair the stability of the pole itself," and from this consideration it was deduced by the court that the advantage to the company in undertaking itself to make the inspection is plain.

There are authorities in other jurisdictions which hold that it is the lineman's duty to make the inspection, but the ruling in most, if not all of them, was influenced by facts or considerations not applicable to the case at bar. The uncontroverted proof shows conclusively, we think, that the pole was not originally sound, and consequently not safe. In fact, we do not see why a casual inspection in the beginning would not have discovered its defective condition, for it had scarcely survived one-sixth of its allotted span of life, and, when it was broken, it had become decayed and rotten almost entirely through its base. The lineman had no reason whatever to suspect its bad condition, and was not required by his contract or any custom or usage to inspect the pole before he climbed it to adjust the wires, but had every right to rely upon the original careful selection and inspection of his employer. *Clairain v. Telegraph Co.*, 40 La. 178, 3 South. 625; *McDonald v. Telegraph Co.*, 22 R. I. 131, 46 Atl. 407.

[13] We conclude, therefore, that the motion of the defendant to nonsuit the plaintiff was properly overruled, and that there was no error in refusing the peremptory instructions it requested, to find for the defendant. There was evidence that the pole had not been inspected by defendant; that it fell three years after it was first set in the ground, when it should have lasted from 6 to 16 or 20 years; that its condition, on inspection after it fell, was found to be very bad, it being rotten to the core; that the strain on it was apparently not sufficient to have broken a sound pole—these and other facts and circumstances, of which there was some evidence, were sufficient to carry the case to the jury, it being a primary and non-delegable duty of the master to see that his servants are not subjected to unnecessary risk or hazard by any failure on his part, in the exercise of due and proper care, to furnish a plant with instrumentalities adapted to the performance of the work, and reasonably sound and safe, at least in original structure, and this the defendant failed to do.

[14] One other question calls for notice. The defendant alleged that the claim of the plaintiff had not been presented within the time fixed by its charter. But the jury have found, under proper instructions, that by reason of his injuries, which affected him both mentally and physically, the plaintiff was unable, during that period, to transact ordinary business or to present his claim, and

that he did so within a reasonable time after he was restored sufficiently to do so. This, we think, excused the delay. The general rule in such cases seems to be that, in order to excuse a strict compliance with the provision, it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person, by any ordinary means at his command, to procure service of the notice or a filing of the claim, whichever is required, and, if there is an actual incapacity, it can make no practical difference in reason whether it is mental or physical in its nature. *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Barclay v. Boston*, 167 Mass. 597, 46 N. E. 113. It may very properly be said that it would, in truth, shock the sense of justice and right if this provision was construed so as to hold the notice of the plaintiff's claim insufficient under the circumstances. It is an accepted maxim that the law does not seek to compel that to be done which is impossible. It cannot reasonably be presumed that the intention of the Legislature, in enacting this charter, would lead to any such unjust conclusion, and it is a fundamental canon of interpretation that a thing which is within the letter of a statute is not within the statute itself, unless it is within the intention of the makers. *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466. Speaking of a similar statute, the court said in *Forsyth v. City of Oswego*, 191 N. Y. 441, 84 N. E. 392, 123 Am. St. Rep. 605: "In the absence of any explanation of plaintiff's delay in this respect, the direction of the statute would have been conclusive and final. There was an explanation, however, and it was for the jury to say whether it was credible and satisfactory. If the plaintiff was, as he claimed, physically and mentally unable to prepare and present his claim, or to give directions for its preparation and presentation during the whole of the three months within which he was required by the defendant's charter to present it, then he was entitled to a reasonable additional time in which to comply with the charter in that regard. This is because the law does not seek to compel that which is impossible." Numerous cases support this reasonable doctrine. *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827; *Williams v. Port Chester*, 97 App. Div. 84, 89 N. Y. Supp. 671, affirmed 183 N. Y. 550, 76 N. E. 1116; *Webster v. Beaver Dam (C. C.)* 84 Fed. 280; *Hungerford v. Waverly*, 125 App. Div. 311, 109 N. Y. Supp. 438. The court in *Green v. Port Jervis*, 55 App. Div. 58, 66 N. Y. Supp. 1042, used strong language upon the subject: "The provision of the charter requiring preliminary notice of an intention to sue attaches only, as has been said, as a condition precedent to the commencement of an action against the village (*Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Curry v. City of Buffalo*, 135 N. Y. 366, 32 N. E. 80), and, if compli-

ance with the condition is rendered temporarily impossible by the wrongful act of the defendant, it would be monstrous to allow the defendant to assert that fact as a defense to the action. The requirement of notice necessarily presupposes the existence of an individual capable of giving it, and not one deprived of that power by the operation of the very wrong to be redressed. That the defendant should be permitted to take advantage of its own wrong is clearly not within the purview of the law." On this branch of the case, we decide, upon principles of reason and justice and from high authority, that, under the facts as presented, the defendant cannot rely upon the failure to give notice of the claim within the time limited as a bar to the action.

The other assignments of error we think are without merit.

No error.

(158 N. C. 180)

**TRIPP et al. v. COMMISSIONERS OF
PITT COUNTY.**

(Supreme Court of North Carolina. Feb. 28, 1912.)

**1. ANIMALS (§ 50*)—RESTRAINT—STOCK LAW
TERRITORY—STATUTES—OBLIGATION.**

Pub. Loc. Laws 1911, c. 702, to enlarge the stock law territory of Pitt county, referred and was only intended to enlarge the territory embraced within the description of Laws 1901, c. 386, entitled, "An act to consolidate and enlarge the stock law territory of such county."

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 50.*]

**2. COUNTIES (§ 62*)—FENCE COMMISSIONERS
—APPOINTMENT.**

County commissioners at their regular meeting on the first Monday in January, 1912, elected three men new fence commissioners, two of the old commissioners holding over, and adjourned, "subject to the call of the chairman." Two of the fence commissioners failed to qualify, whereupon the commissioners were called in session at an adjourned meeting and two others were elected in their place. Held, that the commissioners so last elected were at least de facto officers whose title could not be collaterally questioned on the ground that they could not legally be elected at a special meeting without notice.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 62.*]

**3. COUNTIES (§ 85*)—FENCE COMMISSIONERS
—ELECTION.**

Where the election of a majority of a board of fence commissioners was unquestioned, their action was valid, notwithstanding the election of a minority of the board might be illegal.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 85.*]

**4. STATUTES (§ 47*)—CERTAINTY AND DEF-
INITENESS.**

Since stock law territory to which new territory was added by Pub. Loc. Laws 1911, c. 702, was the territory described in Laws 1901, c. 386, and the penalties therein prescribed are the same as those in the Revisal, the act of 1911 was not invalid as indefinite and uncertain as to the penalties that would

apply, because there were other inclosures in the county constituting stock law districts as to which different penalties were applicable.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 47.*]

**5. ANIMALS (§ 50*)—STOCK LAW DISTRICT—
FENCES.**

Where county commissioners were grading, building, and widening the public road along which a new boundary fence, inclosing a stock law district created by Act Gen. Assem. 1911 (Pub. Loc. Laws 1911, c. 702), ran, the commissioners were entitled to construct a fence on the territory of the road as provided by Laws 1905, c. 714, it being also the duty of the commissioners to build the fence under the general law.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 50.*]

**6. ANIMALS (§ 50*)—STOCK LAW DISTRICT—
FENCES—ASSESSMENT—REFERENDUM VOTE.**

An assessment for the building of a stock law fence is not a tax which must be submitted to a referendum vote of the people.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 50.*]

**7. CONVICTS (§ 10*)—CONTRACTS FOR LABOR
—STOCK LAW FENCE.**

The county commissioners having hired the county convicts out to fence commissioners to construct a fence along a county road, as they were authorized to do by Pub. Laws 1907, c. 87, it was no objection to their employment thereon that the fence was also to form a boundary of a stock law district.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 10.*]

Appeal from Superior Court, Pitt County;
H. A. Foushee, Judge.

Suit by H. E. Tripp and others against J. P. Quinerly and others, as Commissioners of Pitt County, and W. S. Moye and others, Fence Commissioners, to restrain the enforcement of Public Laws 1911, c. 702, enlarging the stock law territory of Pitt county. An injunction granted against the County Commissioners was dissolved but sustained as against the Fence Commissioners, and both parties appealed. Modified and affirmed.

W. F. Evans and Harry Skinner, for plaintiffs. F. G. James & Son and Albion Dunn, for defendants.

CLARK, C. J. The General Assembly of 1911 (Pub. Loc. Laws 1911) enacted chapter 702 "to enlarge the present stock law territory of Pitt county." Section 1 provides that "the following prescribed line shall constitute a part of the boundary line of the stock law territory of Pitt county." Then follows a well-defined description of the only line (which is about 14 miles long), and it is added "all of the territory west of said boundary line not included within the stock law territory shall be established and added to and consolidated with the present stock law territory of said county." The new territory has only this one boundary, as all the other boundaries of that territory are those which were the eastern boundary of the "stock law territory" created by chapter 386,

Laws 1901, with which it was consolidated. Section 2 provides that "on and after January 1, 1912, the territory so becoming a part of the now existing stock law territory of Pitt county shall be subject to all the provisions of the law that now apply or may hereafter apply to the stock law territory of said county."

Prior to 1901 there were several small stock law inclosures in Pitt county. The Legislature that year passed chapter 886, entitled "To consolidate and enlarge the stock law territory of said county." The territory so styled "the stock law territory of Pitt county" is the only one which, in the language of chapter 702, Laws 1911, could be "enlarged" by this newly-added territory, for it is the only stock law inclosure which the newly-added district would touch and of which the prescribed line could become "a part of its boundary line," and the only one to which (in the language of the act) it could be "added to and consolidated with the present stock law territory of said county." Said "stock law territory of Pitt county," as it is styled in said chapter 886, Laws 1901, is also the only stock law territory which would come within the description of chapter 702, Laws 1911, "west of said boundary line."

The "stock law territory" described by that term in Laws 1901, c. 886, covers something over four townships and lies wholly on the south side of Tar river, and is the only considerable body of stock law territory in Pitt county. It touches and reaches half way round the new district added by the act of 1911, which therefore, as already said, requires only one boundary, the 14-mile line above referred to. The other stock law districts in Pitt county are inconsiderable in area and are not contiguous to the new district nor to each other. They are: (1) Part of Belvoir township on the other or north side of Tar river and does not lie "west" of the new boundary line as required by the act of 1911. (2) A narrow strip about two miles wide lying on the south side of the river and running down to the Beaufort line and east of the new boundary. (3) A small territory around each of the towns of Ayden and Winterville, but these are within the limits of the new territory and themselves fall within the terms of section 2 of the act of 1911.

[1] It is thus plain that chapter 702, Laws 1911, "to enlarge the present stock law territory of Pitt county" refers to, and can only refer to, "the territory" embraced in chapter 886, Laws 1901, entitled "To consolidate and enlarge the stock law territory of Pitt county."

This action is brought by three plaintiffs who aver that they own land embraced within the district to be added to the aforesaid stock law territory by the act of 1911. They seek to enjoin the commissioners of Pitt

county and the fence commissioners from building a fence along said boundary described in the act of 1911. Owing to the great curve in the eastern boundary of the "stock law territory" embraced in the act of 1901, c. 886, it is averred that the fence hitherto kept up on said eastern boundary is some 80 miles long. The county commissioners in their affidavit aver that the new 14-mile fence required by the new act relieves them from at least 50 miles of fence—that is, that the old eastern boundary was at least 64 miles long. This act of 1911 was doubtless passed with some view to that economy.

[2-5] The plaintiffs ask the restraining order on the following grounds: (1) That the appointment of the fence commissioners by the county commissioners was illegal. The facts are that at the regular meeting on the first Monday in January, 1912, the county commissioners elected three men new fence commissioners, two of the old commissioners holding over, and the board of county commissioners adjourned "subject to the call of the chairman." Two of the fence commissioners failing to qualify, the county commissioners were called in session in an adjourned meeting and two others were elected in their places. The plaintiffs contend that said meeting was illegal and therefore the board of fence commissioners is an illegal body because a special session of the county commissioners could not be held except after public notice in the manner required by Revisal 1905, § 1817. The object of this provision is to protect the county against excessive per diem on the part of the county commissioners. These fence commissioners were de facto officers, recognized by the elective body as such, and their title cannot be called in question in this injunctive proceeding and in this collateral way. Besides three of the commissioners have an unquestioned title and their action would be valid. (2) The plaintiffs contend that the act is invalid because it is indefinite and uncertain what penalties would apply because there are other inclosures in Pitt county of stock law districts. But as we have seen the "stock law territory" to which this new territory is added is that described in chapter 886, Laws 1901, and the penalties therein prescribed are "the same as those in the Revisal," as, indeed, are also the penalties in the stock law district in Belvoir township north of Tar river and nearly so there in the district east of the new boundary. The penalties in the two little inclosures around Ayden and Winterville are slightly different, but they are inside the territory newly added, and therefore would come within the terms of the act of 1911 which makes applicable the penalties in the other stock law districts, which as is above said are those of the Revisal. Besides all this, the penalties to be imposed are not a matter which arises in this pro-

ceeding which is to restrain the erection of the stock law fence. That matter would properly come up in any proceeding to impose a penalty. (3) The plaintiffs further contend that the county commissioners have no right to trespass on private property to erect the fence. The county commissioners are grading and building and widening the public road along which the new boundary fence runs. And they are erecting the fence on the territory of said road. The road is being graded by virtue of chapter 714, Laws 1905, which provides how the right of way shall be acquired, as also does the act of 1901, c. 386, in regard to the fence. Even if this last did not apply, it would be the duty of the commissioners to build the fence under the provisions of the general law. *Busbee v. Commissioners*, 93 N. C. 143.

[6] The plaintiffs further contend that the act is unconstitutional because the tax for building the fence is laid without being submitted to a vote of the people. It has been settled by repeated decisions of this court (*Busbee v. Commissioners*, *supra*, and cases there cited) that an assessment for the building of a stock law fence is not a tax which requires a referendum vote by the people. Besides, it is not contradicted that no assessment has been made, or is now necessary, to build this 14 miles of new fence, because there is in hand the sum of \$4,000 raised in the "stock law territory" created by chapter 386, Laws 1901, which has been saved by it becoming unnecessary to maintain the long line of 64 miles of fence which was formerly the eastern boundary of that territory and which has now been allowed to go down. Should it become necessary in the future to lay an assessment, it would be laid under the act of 1901, c. 386, for the repair of this 14-mile fence in common with the other fencing required for said territory, or it could be laid under the general statute. *Busbee v. Commissioners*, *supra*.

[7] The last ground of the plaintiffs is that county commissioners had no right to use the county convicts to build said fence. It appears that the county convicts are grading the county road and that county commissioners have hired them out to the fence commissioners to put up this fence alongside the road, as they are fully authorized to do by virtue of chapter 87, Pub. Laws 1907.

This is the not unusual case where those living within territory to which the stock law is applied are more or less divided in regard to the advisability of a stock law. Very often the General Assembly in passing such acts submit, as in the general act in the Revisal, the question of the acceptance of the act by a referendum to the people. In 25

states there are provisions which give the people a right to call for a referendum or a popular vote to decide whether any act passed by the Legislature shall be approved or not, at the ballot box. But in this state there is as yet no such provision in the Constitution, except as to taxes in certain cases (Const. art. 7, § 7), nor by statute, and whether an act of this kind shall be submitted to the people or not is as yet left to the discretion of the General Assembly. The courts have no power to require that an act be submitted to popular approval of the people interested by a referendum. The courts all hold that assessments for building stock law fences, paving streets, and the like, do not come within the Const. provision, art. 7, § 7, which requires a submission to a referendum. *Cain v. Commissioners*, 86 N. C. 8, and cases citing it in Anno. Ed.; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330. The courts are required to hold every act constitutional unless, as the United States Supreme Court says, it is unconstitutional "beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606. It is the bounden duty of the courts also not only to hold an act valid, if by any reasonable construction it can be so held, but they should give to every statute a reasonable construction and effectuate as far as possible the intention of the Legislature.

However desirable it might be that there should have been a referendum vote on this measure by the people of the territory added by the act to the "stock law territory of Pitt county," the Legislature did not see fit to so order and the court has no power to change the action of the Legislature.

The injunction as to the county commissioners was properly dissolved as should also have been done in regard to the fence commissioners.

Modified and affirmed.

(158 N. C. 586)

EVANS et al. v. FORBES.

(Supreme Court of North Carolina. Feb. 28, 1912.)

Appeal from Superior Court, Pitt County; O. H. Allen, Judge.

Suit by Annie M. Evans and others against W. A. Forbes, superintendent. From a judgment dissolving a restraining order, plaintiffs appeal. Affirmed.

W. F. Evans and Harry Skinner, for appellants. F. G. James & Son and Albion Dunn, for appellee.

PER CURIAM. The subject-matter of this action is the same as in *Tripp v. Commissioners*, 73 S. E. 896, at this term, and it is governed by the decision in that case.

The judgment dissolving the restraining order is affirmed.

(158 N. C. 175)

THOMAS v. BUNCH et al.

(Supreme Court of North Carolina. Feb. 28, 1912.)

DEEDS (§ 182*)—DOWER (§ 18*)—HOMESTEAD (§ 81*)—CONSTRUCTION OF DEED—ESTATES CREATED—RIGHTS OF WIDOW OF GRANTEE.

Where a deed specified that the grantee was obligated to care for the grantors during their natural life, and that a life estate was reserved by the grantors, and that the deed should be void if the grantee failed to comply with its terms, and at the grantee's death one of the grantors was yet alive, the grantee was merely the owner of an estate in remainder, so that his widow was not entitled to dower or to a homestead.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366-373; Dec. Dig. § 132;* Dower, Cent. Dig. §§ 63-65; Dec. Dig. § 18;* Homestead, Cent. Dig. §§ 114-118; Dec. Dig. § 81.*]

Appeal from Superior Court, Bertie County; Justice, Judge.

Action by George W. Thomas, administrator of Charles B. Bunch, against Hattie Bunch and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a proceeding by the administrator of Charles B. Bunch to sell land for assets, and the only question presented by the appeal is the right of the widow of the intestate to dower or to a homestead in the land described in the petition. A jury trial was waived and the following facts agreed to: "First. That on the 9th day of March, 1899, Asa Cooper was the owner in fee simple and in possession of the following described tract of land in Bertie county, N. C., to wit: The Asa Cooper tract of land which is bounded by the lands of H. W. Bazemore and Mrs. J. J. Cobb, and by the public road leading from Republican Church to Windsor, and being the tract of land Asa Cooper that day was living on, and containing 40 acres, more or less. Second. That on the said 9th day of March, 1899, Asa Cooper and wife, S. A. Cooper, conveyed said land to Charles B. Bunch by deed of record in Book 94, page 397, Bertie register of deeds office, a copy of which deed is annexed as part hereof. Third. That immediately upon the execution of the said deed Charles B. Bunch and wife moved upon said land and took charge thereof, and in all respects cared for and supported the said Asa Cooper and his wife, S. A. Cooper, until the death of C. B. Bunch, and then his heirs at law continued to do so. Fourth. That Asa Cooper died on the 21st day of June, 1906, and his wife, S. A. Cooper, died on the 2d day of January, 1910. Fifth. That Charles B. Bunch died intestate and without leaving any children, on the 29th day of December, 1909, leaving his wife, Hattie I. Bunch, him surviving. Sixth. That Hattie I. Bunch does not own any real estate of any kind and has no homestead of her own. Seventh. That Geo. W. Thomas has been regularly appointed and is now the duly

qualified administrator of all and singular the rights and credits, goods and chattels of the said Charles B. Bunch. Eighth. That the personal property of the said Charles B. Bunch has been exhausted in the payment of his debts, and there is indebtedness still outstanding, and for the payment of which it will be necessary to sell the land of the said Bunch. Ninth. That Hattie I. Bunch claims to own and demands a homestead in the said tract of land, and in the surplus arising from the sale of the same, which is under mortgage, and she consents that the administrator sell said land for assets to pay said debts, costs, and charges of administration, and asks for a homestead in the excess. Tenth. That if the said Hattie I. Bunch is not entitled to a homestead in said land, she demands her dower therein, and she consents to a sale and to have the value of her dower calculated and paid to her. Her age is 28 years. Eleventh. That James H. Bunch, Wm. Bazemore, Mattie Bazemore, and Thos. H. Bazemore are the heirs at law of Charles B. Bunch."

The deed referred to is dated March 9, 1899, and the grantors therein are Asa Cooper and S. A. Cooper. It conveys the land described in the petition to Charles B. Bunch and his assigns, and after the description of the land contains the following clause: "The terms and conditions of this deed is as follows: That the said Charles B. Bunch obligates on receipt of this deed executed to him by said Asa Cooper and wife, S. A. Cooper, to support and care for them during their natural life time, and a life estate is hereby reserved by said Asa Cooper and S. A. Cooper, his wife. Should the said Chas. B. Bunch, party of the second part, fail to comply with the terms of this deed, then the same shall be null and void." The habendum follows, and then covenants of seisin and warranty.

His honor held that S. A. Cooper was entitled to a life estate in said land under said deed, and as she was living at the time of the death of Charles B. Bunch, he was not seised of said land, and his widow was not entitled to dower or a homestead therein, and she excepted and appealed.

Winston & Matthews, for appellants. Pruden & Pruden, S. Brown Shepherd, and Gilham & Davenport, for appellee.

ALLEN, J. The right of the widow of Charles B. Bunch to dower or to a homestead depends on the estate and interest in her husband at the time of his death. If there was an outstanding life estate, there was no seisin in him which would entitle her to dower. *Houston v. Smith*, 88 N. C. 313; *Barnes v. Raper*, 90 N. C. 190; *Redding v. Voght*, 140 N. C. 562, 53 S. E. 337. Nor was he entitled to a homestead in the remainder. *Murchison v. Plyler*, 87 N. C. 79; *Stern v.*

Lee, 115 N. C. 427, 20 S. E. 736, 26 L. R. A. 814. And it is only in the contingency that the husband is the owner of a homestead at the time of his death, leaving a widow but no children, that the exemption from debts inures to her benefit. Const. art. 10, § 5. The decision of this appeal depends, therefore, on the construction of the deed from Asa Cooper and S. A. Cooper to Charles B. Bunch, and if, by correct interpretation, a life estate is reserved therein to S. A. Cooper, the widow of Bunch would not be entitled to dower or a homestead, because S. A. Cooper was living at the time of the death of Bunch, and his estate would be in remainder.

It is true that, under the modern rule of construction, little importance is attached to the position of the different clauses in a deed, and the courts look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties. *Gudger v. White*, 141 N. C. 512, 54 S. E. 386; *Featherstone v. Merriman*, 148 N. C. 205, 61 S. E. 675; *Triplett v. Williams*, 149 N. C. 396, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Real Estate Co. v. Bland*, 152 N. C. 231, 67 S. E. 483. But rules of construction can only be resorted to when the meaning is doubtful, and each and every part of the deed must be given effect, if this can be done by any fair or reasonable construction. *Davis v. Frazier*, 150 N. C. 451, 64 S. E. 200.

Language of similar import and almost identical with that in the deed before us was considered in the case of *In re Dixon*, 156 N. C. 26, 72 S. E. 71, and it was there held that the grantee took an estate in remainder after the death of the husband and the wife. In this deed the language is, "and a life estate is hereby reserved by said Asa Cooper and S. A. Cooper, his wife," and in the deed in the *Dixon Case*, "I, the said R. A. L. Carr, reserving a life interest for myself and wife, Sarah A. L. Carr, in the above described land," and it was said in the latter case: "The reservation in the deed is valid, and said deed did not become effective till after the death of the grantor and his wife." And again: "Construing the whole deed as written, there is here a reservation of the whole for the life of the grantor and his wife, with remainder in fee to their daughter." If there is any difference in the meaning of the clauses in the two deeds, there is stronger reason for saying that the deed in this case conveys an estate in remainder to the grantee, because in the deed in the *Dixon Case* the husband alone was the grantor, and a life interest was reserved, while in this the husband and wife are the grantors, with the reservation of a life estate.

The provision for support is in consideration of the conveyance of the remainder, and the clause of forfeiture was inserted to compel performance of the obligation.

We conclude that a life estate was reserved to Asa Cooper and S. A. Cooper, and that Charles B. Bunch was, at the time of his death, the owner of an estate in remainder, the said S. A. Cooper being then alive, and that the widow of said Bunch is not entitled to dower or a homestead therein.

Affirmed.

(153 N. C. 170)

BERRY, Tax Collector, v. DAVIS et al.
(Supreme Court of North Carolina. Feb. 23, 1912.)

1. TAXATION (§ 502*)—LIEN—VALIDITY OF STATUTE.

Revisal 1905, § 2863, as amended by Pub. Laws 1911, c. 207, providing that no mortgage or deed of trust upon personal property shall create a lien thereon superior to the lien of a subsequent levy upon the property for taxes, is not invalid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 502.*]

2. TAXATION (§ 599*)—COLLECTION OF TAXES—ENFORCEMENT OF LIEN—PERSONAL PROPERTY.

Under Revisal 1905, § 2866, and section 2863, as amended by Pub. Laws 1911, c. 207, providing that mortgages on personalty shall not be superior to subsequent tax liens acquired by levy thereon for taxes, a tax collector is given no right, prior to making a levy, to resort to the process of claim and delivery against the personal property of taxpayers who are in full and undisputed possession of the property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 599.*]

3. MUNICIPAL CORPORATIONS (§ 978*)—TAXATION—PAYMENT BY TAX COLLECTOR—SUBSEQUENT RIGHT TO ENFORCE PAYMENT.

Where the tax collector for a municipal corporation paid over to the corporation the amount of delinquent taxes before he had collected the same, he did not thereby lose his statutory right to collect the tax against the personal property of the delinquent taxpayers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.*]

4. MUNICIPAL CORPORATIONS (§ 978*)—TAXATION—COLLECTION—TIME ALLOWED.

In view of the statute conferring upon tax collectors the same rights and powers in collecting corporation taxes as are conferred upon sheriffs, and of Revisal 1905, § 2869, providing that the sheriff is allowed only one year from the day prescribed for his settlement and payment of taxes within which to furnish the collection of all taxes, a tax collector for a municipal corporation has no right to enforce the collection of a tax after the expiration of the year.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 978.*]

5. TAXATION (§ 599*)—COLLECTION—LIEN ON PERSONAL PROPERTY—JUDGMENT.

Where a tax collector brought claim and delivery to enforce a tax lien on personal property without having first made a levy thereon, and judgment was entered by default and without exception, establishing the plaintiff's ownership, and a mortgagee intervened, and the parties proceeded with the trial as though a proper levy had been made, and submitted the question of the superiority of their claims, the plaintiff was entitled, notwithstanding

ing the want of a levy, to a judgment giving him priority over the mortgagee for the amount of such taxes as he was not barred by limitations from recovering.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 599.*]

Appeal from Superior Court, Pasquotank County; E. B. Cline, Judge.

Action by M. W. Berry, as Tax Collector of Elizabeth City, against W. T. Davis and another, and G. H. Wood, intervener. From a judgment for intervener, plaintiff appeals. Modified.

One G. H. Wood, holding a mortgage on the property seized in the cause, having intervened, it was adjudged that the plaintiff owned the property to an amount sufficient to pay the taxes due from the delinquents, to wit, \$84.68—\$42.74 for 1909 and \$41.94 for 1910—and the question of the right to this sum, as between the plaintiffs, the tax collector of Elizabeth City, and the mortgagee, being reserved, the property was turned over to the mortgagee, who sold the same as per agreement B made, of date, August 11, 1911, and paid \$100 of proceeds into court, subject to the judgment. On the hearing, it appeared that the tax collector, before bringing suit, had paid over the amount of tax to the city, and that the property was not sufficient to pay the debt secured by mortgage and the taxes; that action was commenced on August 11, 1911, mortgage executed June 7, 1911, verbal notice given of amount of taxes due to mortgagee's attorney, when agreement B was made, to wit, August 11, 1911. On question reserved, judgment was given in favor of mortgagee, and plaintiff excepted and appealed.

J. Kenyon Wilson, for appellant.

HOKE, J. (after stating the facts as above). Plaintiff, the tax collector of Elizabeth City, having by statute all the rights and powers conferred upon sheriffs by the general revenue laws, held a claim for unpaid taxes against W. T. and G. M. Davis to the amount of \$84.68, \$42.74 of which was for unpaid taxes for 1909, and \$41.94 was for taxes for 1910. Having settled with the corporation of Elizabeth City, plaintiff, holding the tax lists and the claim arising thereon, on August 11, 1911, instituted claim and delivery in enforcement of the demand, and under process seized a considerable lot of personal property owned and in the possession of the principal defendants. Thereupon, and on the day the action was instituted, G. H. Wood, having a mortgage on the property, duly registered in said county on June 7, 1911, on application, was allowed to intervene and claim the property under said mortgage. Plaintiff and the intervener, with the assent of defendants, thereupon entered into an agreement in the cause (Ex-

hibit B), by which the property was turned over to the mortgagee for purpose of sale under the mortgage, and \$100 of proceeds were paid into court, "to abide the results of the cause as to the claim of said G. H. Wood." Judgment was entered that plaintiff was owner of the property seized to the extent of the \$84.68, subject to the rights of the mortgagee. On question reserved, the court, being of opinion that the mortgagee had the superior claim, entered judgment in his favor, and plaintiff excepted and appealed.

[1] As heretofore stated, the present plaintiff, the tax collector of Elizabeth City, has been given all the rights and remedies for collection of taxes possessed by the sheriffs under the general revenue laws of the state, and it may be well to note that this right of collecting taxes is a statutory right, and, as a rule, the collecting officer is confined to methods which the statute specifies. True we have held in this state that, where these methods are unavailing or inadequate, the authorities are allowed to resort to a civil action, a modification of the more general principle applied and sustained in a forcible opinion by the present Chief Justice in *Guilford County v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485, though in that case decided intimation is given that as to the executive officers, and under ordinary conditions, the remedies provided by the statute must be pursued. Recurring, then, to the portions of the statute more directly relevant, it is provided by section 2863 that taxes shall not be a lien on personal property, except where otherwise provided by law, but form a levy thereon. By section 2886, all personal property, subject to taxation, shall be liable to be seized and sold for taxes, etc., and all transfers of personal property by any taxpayer, made after his taxes are due, by way of gift or mortgage, or deed of trust, or of assignment for creditors, or bequest by will, or any other way, or for any other purpose than a bona fide sale for value in the ordinary course of dealing, shall be null and void as to said taxes, and shall have no effect upon the rights, powers, and duties of the sheriff to levy upon and sell such property for such taxes, provided such levy be made within 60 days after such transfer.

By chapter 207, Public Laws 1911, section 2863 of the Revisal 1905 is amended as follows: "Provided, that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon said property for the payment of the state, county and municipal taxes, assessed against the same; but the sheriff or other tax collector levying upon such property, for the purpose of collecting the taxes due thereon, shall give due notice to

the mortgagee or trustee of such property of the amount of such taxes at least ten days before the sale of the same, and such trustee or mortgagee shall have the right to pay said taxes and the costs incident to making said levy, when the sheriff or tax collector shall release the same to such trustee or mortgagee, and the amount so paid by said trustee or mortgagee shall constitute a part of the debt secured in said mortgage or deed of trust."

[2] There is no doubt as to the power of the General Assembly to enact legislation of this character, certainly as to mortgages and deeds of trust, etc., made subsequent thereto (37 Cyc. p. 714), and a proper consideration of these and other sections of the Revisal bearing on the subject leads to the conclusion that, while the Legislature intended to make the claim for taxes, in the cases and to the extent specified, a superior claim on personal property, such claim, as a rule, could only be made efficient by proper levy on same. A different rule exists in reference to real estate. By section 2864, the tax list is made a lien on all the real estate of a taxpayer within the county from and after June 1st in every year, and, in addition to the remedies by summary process, provides, in certain cases, for a foreclosure of the lien by action (Revisal, § 2866); but, as heretofore stated, there is no such provision as to personal property, and the only remedy expressly given is that by seizure and sale, and, in the absence of some exceptional conditions rendering such remedies inadequate and unavailing, an executive officer, holding the tax list and charged with the duty of collection, is confined to this. A tax list here is in the nature of an execution, and until levy made an officer may not resort to process of claim and delivery in enforcement of his claim. 34 Cyc. p. 1392, citing *Mulheisen v. Lane*, 82 Ill. 117. There were no exceptional circumstances present in this case justifying a departure from the ordinary methods, the principal defendants being in full and undisputed possession of the property as owners; and we would feel constrained to dismiss the action but for the fact that judgment by default, and without exception, has been entered, establishing plaintiff's ownership, and the mortgagee having intervened, the parties treating the proceedings as a proper levy, have submitted the question of the superiority of their claims on the facts heretofore stated.

[3] It was chiefly urged for the mortgagee that the plaintiff had lost his rights as collecting officer, because he had accounted to the corporation for the taxes claimed; but authority with us is against defendants' position. *Jones v. Arrington*, 94 N. C. 541. In that case it was held, in effect, that, when a sheriff or collecting officer had advanced the amount of taxes in settlement with the

county, this would not constitute a payment, and that the remedies provided by the law for the enforcement of collections would still exist. To the extent, then, that the plaintiff retained the statutory powers conferred for this purpose, his claim must be upheld. As we have seen, he had all the rights and powers in collecting corporation taxes conferred by the general law on sheriffs.

[4] By chapter 72, § 2869, "the sheriff, and in case of his death, the sureties on his tax bond, is allowed one year and no longer from the day prescribed for his settlement and payment of taxes, within which to finish the collection of all taxes." As to the taxes for 1909, the time allowed by this section had expired, and, plaintiff having no further right to enforce collection by levy as to this, his demand must fail.

[5] As to the taxes due for 1910, to wit, the sum of \$41.94, the right of collection coming within the provisions of the statute, the claim, to that extent, must be sustained, and judgment will be entered for that amount and costs.

Judgment modified.

(158 N. C. 161)

ROPER LUMBER CO. v. RICHMOND CEDAR WORKS et al.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. INJUNCTION (§ 46*)—TRESPASS—DEFENDANT'S SOLVENCY—MATERIALITY.

Under Revisal 1906, § 807, which obviates necessity for pleading defendant's insolvency in an action to enjoin a continuous trespass or a destruction of timber trees, a complaint, which alleges both kinds of trespass and unauthorized appropriation of part of plaintiff's land for operation of a steam railroad, is sufficient without allegation of defendant's insolvency.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 98-106; Dec. Dig. § 46.*]

2. EASEMENTS (§ 12*)—GRANTS—SUFFICIENCY.

A letter from a landowner, stating that if the addressee should desire to remove timber cut on the landowner's land he would not be unwilling to give permission, is insufficient to entitle the addressee to construct a steam railroad over the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-41; Dec. Dig. § 12.*]

3. EASEMENTS (§ 44*)—CREATION—EXTENT—CONSTRUCTION OF JUDGMENT.

An order, in a suit where both parties claimed title to a particular tract, that each might remove such timber as had already been cut, did not grant a right of way across the other's land for a steam railroad.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

4. EASEMENTS (§ 44*)—CREATION—EXTENT—DECREE—CONSTRUCTION—"CARTING."

A decree in partition in 1817, when steam railroads were unknown, giving each tenant the right of "carting" timber across the other's land, does not authorize a present owner of a tract of the land to construct a steam railroad over an adjoining tract, especially since

the privilege was not incorporated in conveyances subsequent to the decree under which the parties claimed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 1, p. 984.]

5. EASEMENTS (§ 61*)—WAYS BY NECESSITY—PLEADING.

In pleading a way by necessity, the facts on which it is based must be specially pleaded.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 61.*]

6. EASEMENTS (§ 18*)—WAY BY NECESSITY.

Under grants without reservation of a way, way of necessity passes as an incident to the grant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

7. EASEMENTS (§ 18*)—"WAY BY NECESSITY."

A "way by necessity" arises only between grantor and grantee; none arising where there is no privity of title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7418, 7419.]

8. EASEMENTS (§ 18*)—WAY BY NECESSITY—REQUISITES.

An owner of timber is not entitled to an easement for its removal as a way by necessity on the ground of mere inconvenience in adopting any other possible way, and a plea of such way is insufficient where it fails to show no other possible way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

9. PRIVATE ROADS (§ 2*)—REMOVAL OF TIMBER—ACQUISITION OF RIGHT OF WAY—METHOD.

Except as to ways by necessity, the right to establish cartways, tramways, etc., over the lands of another for the removal of timber, depends upon a purchase or acquisition under Revisal 1905, § 2686.

[Ed. Note.—For other cases, see Private Roads, Dec. Dig. § 2.*]

Appeal from Superior Court, Camden County; O. H. Allen, Judge.

Actions by the Roper Lumber Company against the Richmond Cedar Works and others were consolidated. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Angus D. MacLean, and W. M. Bond, for appellant. Aycock & Winston and Starke, Venable & Starke, for appellees.

BROWN, J. It is admitted for the purposes of this appeal that the plaintiff is the owner of lots 2, 3, and 12, and the defendant of Nos. 7 and 8, in the division of the lands known as the New Lebanon estate, and it also appears that defendant has purchased an interest in lots 1 and 4 of said division. It also appears that the defendant claimed the Allen swamp, lying south of the New Lebanon lands, in which defendant had cut certain timber before the beginning of this suit. Neither the Cedar Works Corporation, or its codefendant and subsidiary, the Dismal Swamp Railroad Company, are common car-

riers, and they do not assert any right of eminent domain. All of the evidence shows, plaintiff's affidavits being uncontradicted in this respect, that defendants were constructing and operating railroads and carrying away timber over plaintiff's land, occupying the camps thereon, and cutting out trees and undergrowth along the roadways.

The defendant contends that the injunction was properly dissolved for five reasons:

[1] 1. Because the complaint fails to allege the insolvency of the defendant.

We disagree with counsel that plaintiff's allegations do not bring its case within the spirit of section 807 of the Revisal. That act distinctly relieves the plaintiff in an action to enjoin a trespass upon land from alleging insolvency "when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." *Lumber Co. v. Cedar Co.*, 142 N. C. 418, 55 S. E. 306. The complaint in this case alleges both species of trespass, and an appropriation of a part of plaintiff's property, without authority, for the purpose of operating a steam railroad over it. Such trespasses as those alleged would have been enjoined at common law without the aid of the statute. *Gause v. Perkins*, 56 N. C. 181, 69 Am. Dec. 728; *Tise v. Whitaker*, 144 N. C. 511, 57 S. E. 210. Even a railway corporation, a common carrier, possessing the power of eminent domain, may be enjoined from an extension of its track unauthorized by its charter. The right to enjoin in such cases does not depend upon the insolvency of the corporation, but the remedy is given because of the extraordinary character of the act sought to be enjoined. 1 High on Injunctions, § 599; *People v. Railroad Co.*, 45 Barb. (N. Y.) 63. It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no power of eminent domain, could seize the lands of another, to which it had no semblance of title, and appropriate them to its own use, simply because it was able to respond in damages. This contention of the defendant is, in our opinion, without support in reason or authority.

[2] 2. Because the defendant had the permission of the plaintiff to remove its timber from the Allen swamp, and this permission carries with it the power to remove it by the usual and ordinary methods.

The only foundation for this claim is a letter from C. I. Millard, written to W. J. Parrish, general manager of defendant in reference to the litigation concerning Allen swamp (no part of the New Lebanon lands), in which this expression is used: "Should there be any desire on your part to remove the timber which you have cut, you will not find us unwilling to give our permission." We are cited to no authority by defendant tending

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to support this contention. Assuming that the letter was authorized by plaintiff, its language is too indefinite to convey any right on estate in lands, much less a right of way for a railroad across plaintiff's New Lebanon lands, or even to be effective by way of an estoppel.

[3] 3. The defendant rests its third claim upon an order at spring term, 1911, made by Ward, judge, in a suit in the superior court of Gates county, wherein this defendant was plaintiff, and this plaintiff was defendant, in which is this paragraph: "It is further ordered and adjudged that each party shall have the right to remove such timber as it has already cut on said land."

It is admitted that the suit in which this order was made concerned the Allen swamp only, and had no connection with the New Lebanon lands. The record in that case shows that both parties claimed title to the Allen swamp and had cut timber in it at the time the order was made. While the learned counsel for defendant in their brief profess to rely on this order "above and beyond all other contentions," they cite no authority and give no substantial reason why such order can reasonably be construed to include the grant of a right of way across lands not connected in any way with the subject of litigation. Both parties had cut timber in the Allen swamp, the title to which was in litigation, and the order was intended to give to each party the right to remove such timber as it had already cut from the swamp, and does not purport to go beyond that. The order does not undertake to provide any means of transportation for the timber after it is removed from the confines of the swamp.

[4] 4. It is again contended that the partition proceedings of the New Lebanon estate gives defendant authority by virtue of its ownership of lots 7 and 8 to construct and operate its railroad across plaintiff's lots 2, 3, and 12.

The facts are that in the year 1817 the New Lebanon estate, a large tract of land in Camden county, was partitioned among the several tenants in common. The Cross Canal runs through this land eastwardly and is tributary to the Dismal Swamp Canal. It was used to float juniper logs down to the Dismal Swamp Canal, a navigable waterway, and in order that this use of the Cross Canal might be preserved, it was provided in the division that "it will be a convenience in carting to the Cross Canal, or Crooked Ditch, for one proprietor to cross the land of another; therefore every proprietor is to have the free privilege of carting across another proprietor's share, but not to have any privilege to cut any timber except for the making or repair of the road." This provision was not incorporated nor the privilege specially reserved or granted in any of the subsequent conveyances under which either party derives its title in severalty to

parts or shares of said land. It is contended by defendant that the word "carting" was used by the commissioners who made partition of the New Lebanon estate in a broad or generic sense and comprehended any method of carrying off timber which might thereafter be generally adopted. In 1817 steam railroads were unknown, and we cannot suppose that transporting timber by such instrumentality could have been in contemplation of the commissioners who divided the lands. Even in this day and generation a grant of a cartway would hardly be construed to include a right of way for a railroad. The use of a cartway may be general and enjoyed by a neighborhood, while that of a railroad is of necessity exclusive and confined to the proprietor operating it. We think that an examination of the map and of the division itself clears up any doubt as to the meaning and purpose of the commissioners. They evidently intended that the proprietors, who theretofore owned the land in common, should thereafter have the same access to the Cross Canal or Crooked Ditch as they before enjoyed, and the right to use it was thereby made appurtenant to each tract instead of in gross. As is well said in the plaintiff's brief: "If in place of the Cross Canal there had been a public road running through the land, with the right reserved to each proprietor, in severalty, to cross the land of another, 'as a convenience in carting,' to the public road, no different principle would be invoked, and yet it is difficult to imagine that this would confer the right of building a private railroad and operating log trains thereon in order to cart timber from Gates county to Virginia, in a direction and manner opposed to use of the public road altogether."

[5-8] 5. The last reliance of the defendant is upon a "way by necessity."

We think the defendant could not avail itself of any such plea without setting it up in an answer and setting out the necessary facts. To plead a way by necessity in general terms will not suffice. *Bullard v. Harrison*, 4 M. & Sel. 387. But we will consider it as fully and sufficiently pleaded and undertake to show that the defendant cannot justify under it. What constitutes a "way by necessity" is not very clearly defined or agreed upon by the early sages of the law. Sergeant Williams was of opinion that there is no such thing as a right of way by necessity except when it is pleaded by way of prescription or grant. *Pomfret v. Ricroft*, 1 Saund. 323, note 6. Chancellor Kent agrees with Sergeant Williams, and says "that it places the doctrine upon a reasonable foundation, and one consistent with the general principles of the law." 3 Kent, Com. 341. This learned judge and commentator says: "A right of way may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded

by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his own land. The way is a necessary incident to the grant, and without which the grant would be useless." 3 Kent, Com. (13th Ed.) p. 421. What is meant by the term "way by necessity" is laid down by Woolrych as follows: "All the authorities support the doctrine that, in the case of a grant of land without a reservation of any way, a way of necessity will pass as incident to the grant." Treatise on Ways, p. 21. This way of necessity as known to the common law arises only by implication in favor of grantees. Since the way is founded on a grant, it can arise only between grantor and grantee. No way of necessity can be presumed or acquired over the land of a stranger. It does not arise where there is no privity of title. *Trump v. McDonnell*, 120 Ala. 200, 24 South. 353. Without privity of estate and unity of ownership there will be no way of necessity. *Ellis v. Blue Mount Ass'n*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; *Powers v. Hefferman* (Ill.) 122 Am. St. Rep. 210, note C, where the authorities are collected; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 464, and notes; *Woolridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233.

There is nothing in the record to show that there is any privity of estate between the plaintiff and defendant in respect to the Allen swamp or any other land from which defendant is removing the timber. Even if that were so, there is nothing to show that defendant has no other possible way to remove the timber. Even where there is a grant from which the law may possibly imply a way of necessity, a mere inconvenience is not enough to justify it. It is necessity not inconvenience that gives the way. *Pettingill v. Porter*, 8 Allen (Mass.) 1, 63 Am. Dec. 676; *Powers v. Hefferman* (Ill.) 122 Am. St. Rep. 211, note D. So far as we can see, the case cited by defendant in support of this contention (*Lumber Co. v. Hines Bros.*, 127 N. C. 130, 37 S. E. 152) has no bearing upon this question, as it was a controversy over the location of an unlocated floating right of way granted to plaintiff. The doctrine of a way by necessity does not appear to be discussed in the opinion.

[8] The right to establish cartways, tramways, etc., over the lands of another, when no such right arises by implication of law, as herein pointed out, is in North Carolina regulated by statute, and one who desires to cross the land of another for the purpose of removing his timber, or for other purposes, must follow the statute or else purchase the right. *Revisal*, § 2686. The General Assembly has attempted to clothe private lumber railways with the power of eminent domain and the right to condemn property for a very limited period, impelled to

do so by the immense growth of the timber industry and the consequent necessity for the operation of steam railways in such enterprises. But the court has held such legislation beyond the power of the General Assembly, upon the principle that private property can only be taken for a public use, and not for private gain. *Cozard v. Hardwood Co.*, 139 N. C. 296, 51 S. E. 937, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779. In concluding the opinion of the court in that case, Mr. Justice Conner uses the following expressive language: "While, as found by his honor, it is reasonable and even necessary to the successful operation of defendant's enterprise that they carry their timber over the plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the other is weakened."

We are of opinion, upon a review of the record, that the defendants have shown no semblance of right to operate their railroad over plaintiff's land, or to cut and remove timber therefrom, and that plaintiff is entitled to an injunction as prayed. The cause is remanded to the superior court of Camden county, with directions to the judge resident or the judge riding the district to issue the injunction until the final hearing, as prayed upon the plaintiff giving the undertaking required by law.

Reversed.

(158 N. C. 191)

SCHOOL COM'RS OF CITY OF CHARLOTTE v. BOARD OF ALDERMEN OF CITY OF CHARLOTTE et al.

(Supreme Court of North Carolina. Feb. 28, 1912.)

1. MANDAMUS (§ 72*)—ENFORCEMENT OF EXERCISE OF DISCRETIONARY POWER.

Mandamus does not lie to enforce the exercise of discretionary power in any specific way.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.*]

2. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The object of the construction of a statute is to ascertain the meaning of the Legislature as contained in the statute, and the court must resort primarily to the language itself; and where the statute is free from ambiguity the court must give effect to it as written.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 259; Dec. Dig. § 181.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 110*)—

SCHOOL FUNDS—RIGHTS OF COMMISSIONERS.

Charlotte City Charter of 1907 (Priv. Laws 1907, c. 342), providing for a system of public schools under the control of the board of school commissioners, who are intrusted with the exclusive control of the schools with power to purchase sites and provide necessary buildings, and requiring the board of aldermen to provide for the expenses incurred by the school commissioners, gives to the school commissioners exclusive control of the public schools with power to purchase sites; and the board of aldermen, though under the charter they have general control of the city finances and property, may not control the action of the commissioners, and funds arising from a sale of school bonds, issued by the city under Priv. Laws 1911, c. 317, must be turned over to the treasurer of the commissioners.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 261-264; Dec. Dig. § 110.*]

4. STATUTES (§ 207*)—CONSTRUCTION—GENERAL INTENT.

Where a general intent is expressed in a statute which also expresses a particular intent incompatible with the general intent, the particular intent must be considered in the nature of an exception.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 284; Dec. Dig. § 207.*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Mandamus by the School Commissioners of the City of Charlotte against the Board of Aldermen and Treasurer of the City of Charlotte to compel the turning over to the treasurer of the school board proceeds of the sale of school bonds. From a judgment awarding the writ, defendants appeal. Affirmed.

Civil action, instituted by the school commissioners of the city of Charlotte to compel the board of aldermen and treasurer of said city to turn over to treasurer of the school board the proceeds arising from the sale of certain school bonds, issued by the city of Charlotte, under and by virtue of chapter 317, Priv. Laws 1911, heard before his honor Judge C. C. Lyon, at January term, 1912, superior court, Mecklenburg county. On the hearing, judgment was rendered in manner and form as follows: "This cause coming on to be heard pursuant to the summons issued therein, and the court having heard and considered the pleadings in the cause and argument of counsel: Now, therefore, upon motion of Burwell & Cansler and Tillet & Guthrie, attorneys for the plaintiff, it is adjudged that the plaintiff is entitled to have the proceeds of the school bonds referred to in the pleadings paid over to its treasurer as soon as the said treasurer shall give bond in proper form and in the amount required by the statute; and the said defendants and each of them are hereby commanded to turn over and deliver to the treasurer of the plaintiff all of the proceeds of the said school bonds now under their

custody and control as soon as the treasurer of the plaintiff shall give a bond approved by the plaintiff. It is further adjudged that the plaintiff recover the costs of this action, to be taxed by the clerk of this court. Heard, considered, and decided upon this 24th day of January, 1912. C. C. Lyon, Judge Presiding." Defendants having duly excepted, appealed to Supreme Court.

Chase Brenizer, for appellants. Burwell & Cansler and Tillet & Guthrie, for appellees.

HOKE, J. Chapter 317, Private Laws 1911, conferred upon the board of aldermen of the city of Charlotte the power, on approval of the popular vote, to issue bonds for various purposes, not to exceed in the aggregate the sum of \$1,065,000, and specified that a portion of these bonds, not to exceed in amount the sum of \$100,000, should be known as "school bonds," and to be used for the purpose of purchasing lands for schools and of building schoolhouses for the graded schools of the city. The act also providing "that moneys arising from the sale of the bonds" should be used for no other purpose than that for which they were authorized to be issued. In taking the sense of the qualified voters, the different purposes were to be submitted as separate propositions, and the votes taken in five different ballot boxes, and, in reference to the effect of the election, the act in question further provides: "If a majority of such qualified voters shall vote 'issue' on any one or more of the five propositions submitted for issuing bonds for the purposes aforesaid, then it shall be deemed and held that the proposition receiving a majority of such votes is favored and approved by a majority of the qualified voters of the city of Charlotte, and the board of aldermen shall cause bonds to be prepared and issued for the purposes so approved of by a majority of qualified voters of the city, and levy a tax in accordance with the provisions of this act." The measure having been approved by the popular vote, the bonds in question were issued and sold, and the proceeds are now held by defendants, subject to the provisions of the law and the judgment of the court on the questions presented.

[1] It further appears that the plaintiffs, the school board of the city of Charlotte, having made selection of certain sites for school purposes, have made demand on defendants that the fund in question be turned over to their treasurer, and defendant the board of aldermen, professing a willingness to turn over \$80,000 of said fund, the amount apportioned for four of the school sites, has refused to turn over the remaining \$20,000, the amount apportioned for the public school of North Charlotte, contending that the site selected for school purposes in that section of the city is not a suitable or proper one,

and that, under the charter of the city of Charlotte and other acts relevant to the inquiry, and by reason of the powers conferred in said acts on the board of aldermen of the city, said body must of necessity have a discretionary supervision of these matters and the ultimate power of determining whether the moneys in question shall or shall not be expended in the purchase of the site selected. If defendants are correct in their position that they are possessed of discretionary power in the premises, the present action must fail; for it is familiar doctrine that mandamus does not lie to enforce the exercise of discretionary power in any given or specified way. Board of Education v. Board of Commissioners, 150 N. C. 116, 63 S. E. 724; Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737; Ewbanks v. Turner, 134 N. C. 77, 46 S. E. 508. Coming, then, to this, the principal question presented, the revised charter of the city of Charlotte, enacted by the General Assembly in 1907 (Priv. Laws 1907, c. 342), in reference to the public school system of the city and on matters more directly relevant to the inquiry, makes provision as follows:

"Sec. 193. That there shall be maintained in the city of Charlotte a system of public schools to be kept open not less than nine months in each year, without charge, for the education of the children of the said city within the ages of six and twenty-one years.

"Sec. 194. That said system of public schools shall be under the control of a board of school commissioners composed of seventeen members, who shall be elected biennially at the general election held for mayor and other city officers, and shall hold office for two years and until their successors are duly elected and qualified, and shall serve without compensation. Any vacancy in said board of school commissioners shall be filled by an election held by said board, and the person so elected shall hold office for the unexpired term.

"Sec. 195. Said board of school commissioners shall be a body corporate and politic under the name of 'The School Commissioners of the City of Charlotte,' with all rights and powers of the school committees of the respective townships in addition to the powers in this act granted.

"Sec. 196. That the mayor of the city of Charlotte shall be ex officio chairman of said board of school commissioners, and shall be entitled to vote in any of the meetings of said board only in the case of a tie; and in all meetings of said board a majority of the membership thereof shall constitute a quorum for the transaction of business.

"Sec. 197. That said board of school commissioners shall have exclusive control of the public schools of the city of Charlotte, and shall have full and ample powers to purchase sites, to provide necessary school buildings and facilities, to appoint examiners, employ teachers and fix their salaries, pre-

scribe courses of study and in general to do everything that may be necessary and proper to open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city of Charlotte. And it shall be lawful for said board of school commissioners, in its discretion to receive into the public schools of the city of Charlotte, upon such terms as they may think reasonable, any children of school age residing beyond the limits of said city."

"Sec. 201. The said board of school commissioners shall appoint a treasurer and prescribe his duties and compensation. He shall give bond for the faithful performance of his duties in such sum as the said board may prescribe, which bond shall not be less than double the amount which may reasonably come into his hands at any one time, and with sufficient security to be approved by said board.

"Sec. 202. It shall be the duty of the board of aldermen of the city of Charlotte to provide for the payment to said treasurer of all moneys collected under this act; and it shall be the duty of the treasurer of Mecklenburg county to pay to the treasurer of said board of school commissioners, to be used in carrying out the objects of this act, all school moneys in his hands from time to time to which the city of Charlotte shall fairly be entitled."

"Sec. 204. That the board of aldermen shall provide for all expenses arising from permanent repairs and improvements made from time to time by said board of school commissioners upon any of the buildings and premises in use for school purposes within the city of Charlotte."

"Sec. 206. That the board of aldermen of the city of Charlotte shall levy an annual tax for the support and maintenance of said system of public schools in the city of Charlotte, which annual tax shall not exceed twenty cents on the hundred dollars valuation of property and sixty cents on the poll."

[2] Considering these sections, it is the well-recognized principle that the object of all interpretation is to ascertain the meaning of the Legislature as contained in the statute, and to this end resort must primarily be had to the language of the act itself. Where the statute is free from ambiguity, explicit in terms, and plain of meaning, it is the duty of the courts to give effect to law as it is written, and they may not resort to other means of interpretation. The position, as applied to the present case, is very well stated in Black on Interpretation of Laws, as follows: "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought, first of all, in the language of the statute itself. For it must be presumed that the means employed by the Legislature to

express its will are adequate to the purpose, and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be interpreted literally. Even though the court should be convinced that some other meaning was intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the Legislature is the law, and the courts must not depart from it"—and numerous decisions here and elsewhere are in approval of the principle as stated. *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747; *In re Applicants for License*, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288; *Commissioners v. Pkg. Co.*, 135 N. C. 70, 47 S. E. 411; 11 *Ency. U. S. Supreme Court Rep.* p. 110; *Sedgwick, Statutory Constructions*, p. 231. In *Kearney's Case*, *supra*, it was held: "In interpreting a statute, the intent is to be first sought in the meaning of the words used, and when they are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instruments, no other means of interpretation should be resorted to." And in the citation to *Sedgwick*, the author quotes with approval from *United States v. Fisher*, 2 Cranch, 399, 2 L. Ed. 304, as follows: "When a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

[3] This charter of the city of Charlotte, and its framers, recognizing the prime importance of affording education to its people, have provided that these schools shall be kept open nine months in each year, without charge, for the children of the city, etc. For the control and management of the school system, a board of commissioners is established, to be elected by the people of the city. The mayor, while chairman *ex officio*, is not allowed to vote, except in case of a tie. The aldermen are required to provide by taxation for the support of the schools and for all expenses arising from permanent repairs and improvements made, from time to time, by said board of commissioners, and, as bearing more directly on the question, section 197 of the charter enacts: "That said board of school commissioners shall have exclusive control of the public schools of the city of Charlotte, and shall have full and ample power to purchase sites, to provide necessary school buildings and facilities, to appoint examiners, employ teachers and fix their salaries, prescribe courses of study, and, in general, to do anything that may be necessary and proper to

open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city of Charlotte." The Legislature could not have selected language more explicit. There is no ambiguity nor room for construction, and, applying the principle, we are constrained to hold that in giving the board of school commissioners "exclusive control of the public schools of the city," and conferring upon them "full and ample power" to purchase sites, etc., and "do everything that is necessary and proper to open and conduct" these schools, the Legislature intended what this language means, and that the board of aldermen are without discretion in the matter. This, in our opinion, being the clear import of the words used in the statute, the position is not affected because, in other portions of the charter, general powers are given to the board of aldermen, looking to the control and well ordering of the city and its government, more particularly section 48, which provides that said board shall have control of the "finances and of the property, real and personal, belonging to the city," and confers upon said board power to provide for the city's obligations for lighting streets and constructing sewers, etc.

[4] There is no necessary conflict of powers presented in the record, and, if there were, the ordinary and accepted rule of interpretations is that, when a "general intent is expressed in a statute and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception. 1 *Lewis, Sutherland on Statutory Construction* (2d Ed.) § 268; *Rodgers v. U. S.*, 185 U. S. 83; *Stockett, Adm'r. v. Bird*, 18 Md. 484; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197. Doubtless, as suggested by defendants, if the board of school commissioners should select a site so remote, or enter on schemes so extravagant, that to carry them out would threaten bankruptcy or serious embarrassment to the city in its financial and business life, these conditions would be relevant as tending to show such manifest abuse of discretion on the part of the commissioners as would render their action illegal; but these considerations would involve the abuse of admitted powers, and in no way affect the existence of the powers themselves; this being the question presented here. In view of the fact admitted that these funds have been devoted exclusively to school purposes, and of the comprehensive and definite power expressly conferred by the law upon plaintiff board, we are of opinion, as stated, that the board of aldermen are without discretion in the matter, and the judgment of the superior court, directing payment to plaintiffs, should be affirmed. *Battle v. Rocky Mount*, 156 N. C. 329, 72 S. E. 354.

Affirmed.

(70 W. Va. 284)

BENNETT et al. v. BOOTH.(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)*(Syllabus by the Court.)***1. WATERS AND WATER COURSES (§ 165*)—RESERVATIONS—EASEMENTS.**

If an owner of land erect a milldam upon it for the purpose of operating a gristmill, and thereafter convey a portion of the land, including a part of the millpond, there is an implied reservation of an easement upon the land granted, as appurtenant to the gristmill.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 213, 215; Dec. Dig. § 165.*]

2. COVENANTS (§ 100*)—GENERAL WARRANTY—BREACH.

A covenant of general warranty of title is not broken by the existence of such an easement.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139-155; Dec. Dig. § 100.*]

3. JUDICIAL SALES (§ 50*)—RIGHTS AND LIABILITIES OF PURCHASERS.

A purchaser of land at a judicial sale is privy in estate with him who owned it at the time of sale, and takes the land subject to its burdens.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 90-94; Dec. Dig. § 50.*]

4. EASEMENTS (§ 30*)—ABANDONMENT.

An easement appurtenant to land is not lost by failure of the owner to use it for a period less than ten years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

Appeal from Circuit Court, Barbour County.

Bill by Arthur F. Bennett and another against F. M. Booth. Decree for defendant, and complainants appeal. Affirmed.

Ware & Viquesney and Wm. T. George, for appellants. Warren B. Kittle and C. M. Murphy, for appellee.

WILLIAMS, J. Arthur F. Bennett and Lloyd J. Booth filed their bill in the circuit court of Barbour county, praying for a mandatory injunction to compel defendant to remove a milldam, located on his own land across a stream of water flowing through plaintiffs' land, causing the overflow of plaintiffs' land above. The case was heard upon pleadings and proof, on the 6th of October, 1906, and the temporary injunction, which had been previously awarded, was dissolved, and plaintiffs' bill dismissed. They have appealed.

Defendant claims the right to flood plaintiffs' land, as a right appurtenant to his own land. Frederick Booth, grandfather of defendant and of one of the plaintiffs, was originally the owner of both tracts of land, and while such owner he erected a gristmill and built a dam on a portion of the tract. Some time thereafter, in the year 1887, he conveyed to his son, Jeremiah Booth, by deed with general warranty of title, 102 acres, which is the land now owned

by plaintiffs, and a portion of which is submerged by the millpond. Plaintiffs purchased the land at a judicial sale, made and confirmed, in 1906, in a suit by J. N. B. Crim against Jeremiah Booth and others. About the year 1901 a part of the forebay washed away, and it was not repaired until six or seven years thereafter, which was a short time prior to the bringing of this suit, and after Frederick Booth had conveyed the land with the mill on it to his son William, who, in turn, conveyed it to his son, the defendant.

One of the plaintiffs is a son, and the other a son-in-law, of Jeremiah Booth, the former owner of the land burdened with the easement, if, indeed, it is so burdened, and notwithstanding the dam was out of repair and the mill not in use, at the time of their purchase, still they took the land subject to whatever burden, if any, existed upon it in the hands of Jeremiah Booth to whose title they succeeded. By their purchase they became his privies in estate. 24 Cyc. 62; Hurxthal v. Boom Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954; Long v. Weller, 29 Gratt. 347.

[1, 2] When a landowner has created a servitude upon one portion of his land for the benefit of another portion, and conveys the servient part, there is an implied reservation of the easement, if it is essential to the use and enjoyment of the land reserved, and such right passes with the dominant estate, as appurtenant thereto. Nor does the existence of such an easement constitute a breach of the covenant of general warranty, if the easement is so open and apparent that the contracting parties must have known of it. In such case the parties are presumed to have contracted with reference to the condition in which the land then was, and it is not to be supposed that the purchaser agreed to pay any more for the land than he thought it was worth with the burden on it. Such a burden has been held not to constitute a breach of covenant against incumbrances. Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Devlin on Deeds, § 908; Prescott v. Williams, 5 Metc. (Mass.) 429, 39 Am. Dec. 688. If not a breach of covenant against incumbrances, a fortiori it is not a breach of a covenant of general warranty, which relates more particularly to the title than it does to incumbrances.

The decisions of other states are not uniform upon the doctrine of an implied reservation in favor of a grantor; but we think the rule, as we have stated it, is supported by the better considered cases, as well as by the more modern text-writers on the subject. See the following: 10 A. & E. E. L. 427; Prescott v. Williams, supra; Cary v. Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; Seibert v. Levan, 8 Pa. 383, 49 Am. Dec. 525; Kutz v. McCune, supra; Jones on

Easements, § 136; *Lampman v. Milks*, 21 N. Y. 505; *Mason v. Horton*, 67 Vt. 266, 81 Atl. 291, 48 Am. St. Rep. 817.

[3] A milldam is essential to a water power gristmill. Without it the mill, which is a part of the realty on which it stands, would be useless. Plaintiffs' predecessor in title knew that it backed the water upon his land. It had done so for many years before he bought it, and he is presumed to have taken the land subject to a continuation of that condition. Plaintiffs, his privies in estate, took the land subject to the burden upon it as appurtenant to the other tract of land with the mill on it, and the mill, together with the appurtenant easement, passed to defendant.

[4] The fact that the mill and dam were in a dilapidated condition at the time plaintiffs purchased does not affect the case. Defendant's right was appurtenant to the dominant land and passed with it. It was such a right as could be lost only by adverse possession by the owner of the servient land, for such length of time as would bar an action of ejectment. *Clark v. Beard*, 71 S. E. 188.

Appellants contend that defendant, in repairing the dam, raised it higher than it was before, and caused more of his land to be overflowed. This, of course, he could not lawfully do. But their contention, in this regard, is not supported by the evidence. Two or three of their own witnesses testified that the dam was about as high as it was before, and some of defendant's witnesses say that it is no higher than it was at first. We will affirm the decree.

(70 W. Va. 325)

NEASE v. SMITH, Sheriff, et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 549*)—COLLECTORS—COMPENSATION—INTEREST ADDED TO TAX BILL.

A sheriff has no right to retain as his own the 10 per cent. interest added to tax bills of those taxpayers not paying until after the 1st day of January by Code 1906, c. 30, § 8, but must account to the public treasuries therefor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1043-1050; Dec. Dig. § 549.*]

2. TAXATION (§ 545*)—COLLECTORS—COMPENSATION—STATUTES.

A sheriff is entitled to a commission of 7½ per cent. on collections of road taxes under Acts of 1909, c. 52, § 68 (Code Supp. 1909, c. 43).

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 545.*]

3. SHERIFFS AND CONSTABLES (§ 71*)—COMPENSATION—COMMISSION—AMOUNT PAYABLE TO COUNTY.

Under chapter 15, § 9, Acts Ex. Sess. 1908 (Code Supp. 1909, c. 137), commissions on taxes collected by a sheriff are to be in-

cluded in making up the sum on which he is to pay 15 per cent. to the county.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 98; Dec. Dig. § 71.*]

4. SHERIFFS AND CONSTABLES (§ 29*)—COMPENSATION—STATUTORY PROVISIONS—REPEAL.

Section 9, c. 15, Acts Ex. Sess. 1908 (Code Supp. 1909, c. 137), is not repealed by section 31, c. 69, Acts of 1909 (Code Supp. 1909, c. 30).

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 46; Dec. Dig. § 29.*]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"FEES"—"ALLOWANCE."

"Fees" are sums fixed by law, while "allowances" are those made under the discretion of court, and not fixed.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 347-348; vol. 3, pp. 2712-2716.]

Poffenbarger, J., dissenting in part.

Error from Circuit Court, Kanawha County.

On settlement between S. P. Smith, sheriff of Kanawha county, and the county, district, and district school funds, H. E. Nease, as citizen and taxpayer, intervenes. From a judgment of the circuit court on certiorari to review the judgment of the county court, Nease brings error, and the sheriff cross-assigns error. Reversed in part, and affirmed in part.

Fred O. Blue, for plaintiff in error. Williams, Scott & Lovett, Dillon & Nuckolls, and W. G. Mathews, for defendants in error.

BRANNON, J. In a settlement between S. P. Smith, sheriff of Kanawha county, and the county, district, and district school funds, the county court, acting upon a report of such settlement made by commissioners for the year ending June 30, 1910, refused to charge the sheriff with the interest collected by him on taxes unpaid until after January 1st, and refused to charge him with 15 per cent. on commissions on taxes collected, and allowed him 7½ per cent. commission on road taxes. H. E. Nease, as citizen and taxpayer, intervened in the proceeding in the county court, and excepted to such action of the court, and carried the matter to the circuit court by writ of certiorari. The judgment of the circuit court allowed Smith to retain the 10 per cent. collected by him as interest on taxes not paid until January 1st, and allowed him 7½ per cent. on road taxes, and charged him with 15 per cent. on commission on taxes collected. Nease brought the case to this court, complaining that the circuit court had not charged Smith with the 10 per cent. penalty collected by him on taxes collected after January 1st, and had allowed him 7½ per cent. on road taxes, instead of 5 per cent., as Nease claimed was legal commission. Smith cross-assigned er-

ror in the action of the circuit court in charging him with 15 per cent, on commission on taxes collected.

[1] Is Smith chargeable with that 10 per cent. per annum interest imposed as a penalty to compel prompt payment on all taxpayers in default of payment before January 1st? Code of 1906, c. 30, § 8, demands payment of taxes by November 30th. On taxes in default, it says "interest" at the rate of 10 per cent. per annum on the amount of each tax bill shall be added thereto from said 1st day of January until payment. One question will answer the claim of the sheriff to this interest. Whose money is it bearing that interest? Not the sheriff's, but money of the public. Who ever heard of any one getting interest on money not belonging to him? We would expect that for such an extraordinary claim some statute allowing it should be shown; but it is admitted that no express statute doing so can be found. But the argument is that by implication the sheriff may retain such interest, because Code, c. 39, § 33, charges the sheriff with the *amount of the county levy*, and because section 139, c. 27, Acts 1908 (Code Supp. 1909, c. 45) charges him with *amount of taxes* levied by the board of education, and because Code, c. 49, charges him with *amount of district levies*; in other words, only the amounts of levies shown by assessment books, and those statutes do not say that he shall pay interest. Two answers here. One is that when such books of levies are made no interest has accrued or collections made. Another is that those charging statutes and settlements surely mean to charge all taxes, and interest is a part of the taxes, first, because interest is an increment or increase of money, following it as shadow follows its substance, adhering to it. The letter of the statute is that "interest shall be added thereto." Another cogent answer to this claim is that chapter 69, § 31, Acts 1909 (Code Supp. 1909, c. 30), fixes what commissions on taxes the sheriff shall get, and does not give him that 10 per cent. interest. He is limited to that commission. And it is undeniable law that a sheriff can get no reward from the public, unless statute concedes it. 35 Cyc. 49. I find that 25 Am. & Eng. Ency. of Law, 730, says that a sheriff, at common law, could receive no compensation, other than that received from the king. "His right to it is wholly derived from statutes which, being in derogation of common law, must be strictly construed."

[2] What commission shall Smith receive on road taxes? Section 31, c. 69, Acts 1909, fixes 5 per cent. commission on county levy, district levies, and district levy for schools. This would apply to road taxes. But chapter 52, § 66, Acts 1909 (Code Supp. 1909, c. 43), a later act by four days, says that commission on road levy shall be the same as on state taxes, which, by chapter 69, Acts 1909,

is 7½ per cent. So it is clear that the sheriff gets that commission on road taxes.

[3] Must the sheriff pay the county treasury 15 per cent. of his official emolument? This depends on section 9, c. 15, Acts of 1908 (Code Supp. 1909, c. 137). It reads as follows: "Each sheriff, clerk of the county court, clerk of the circuit court, or clerk of the circuit and criminal or intermediate court and prosecuting attorney in the counties of the state, shall receive as compensation for his services as such sheriff, clerks and prosecuting attorney, the following sums, to wit: (a) The salaries authorized by law to be fixed by the county court of the respective counties and paid out of the county treasury. (b) Such allowance or allowances as may be made by the county court of the different counties to such officers by authority of law now in effect. (c) Eighty-five per centum of all other fees, costs, percentages, perquisites, commissions and emoluments: Provided, however, that such sheriff, clerks and prosecuting attorney shall receive all fees, costs, percentages, perquisites, emoluments and commissions collected or received by him, until the gross income of his office from all sources including salaries and allowances as aforesaid shall equal the following sums, that is to say: For the office of sheriff, three thousand dollars. For the office of clerk of the county court, two thousand dollars. For the office of clerk of the circuit court, two thousand dollars. For the office of clerk of the circuit court and criminal court or intermediate court, three thousand dollars. For the office of clerk of the county and circuit court when held by the same person, two thousand dollars. For the office of prosecuting attorney, fifteen hundred dollars. When said salaries, allowances, fees, costs, percentages, perquisites, emoluments and commissions exceed the sum hereinbefore mentioned to be retained by such officers, then such officers shall pay to the sheriff as treasurer of his county, fifteen per centum of all fees, costs, percentages, perquisites, penalties, commissions and emoluments collected by him, excluding therefrom the salaries of such officers paid out of the county treasury, and allowances made by authority of law as aforesaid: Provided, however, should the gross income from all sources, aforesaid, for any of the said offices, exceed the amounts hereinbefore specified, but insufficient to net said amounts so specified, after deducting the said fifteen per centum aforesaid, then in such event said officers shall retain respectively, said amounts specified as aforesaid, and the residue of said gross income pay into the county treasury."

[4] It is first said that the provision of this statute, if calling on the sheriff to pay this 15 per cent., has been repealed by section 31, c. 69, Acts of 1909. We do not think so. The acts are on different subjects. Section 31 of chapter 69 has for its purpose the

fixing commissions of sheriff on money coming to his hands from taxes, while section 9, c. 15, Acts of 1908, does not fix commissions, but deals with what the sheriff shall retain of his emoluments from all sources, what is the minimum he shall receive therefrom, and what part he shall pay into the county treasury. Both statutes can stand in harmony.

What is the purpose of this section? The purpose is to fix minimum incomes, prescribe their sources, and raise revenue by imposing what I may call a "tax" upon the income of the officers named in it. Its plain purpose is to require payment to the county treasury of 15 per cent. of official income. In conference upon this case, the point of discussion was whether sheriff's commission on taxes should bear the 15 per cent. exaction; must it be included or excluded in the sum subject to that 15 per cent.? The statute does not fix the sheriff's commission. It does fix the minimum of emolument which he is entitled to receive clear from all sources. It says he shall receive (a) salaries fixed by the county court, and (b) such allowances as may be made by the county court, and (c) 85 per cent. of all other fees, costs, percentages, perquisites, commissions, and emoluments. Here are three distinct sources of income. The proviso says that he shall receive and keep free of tax all fees, costs, percentages, perquisites, emoluments, and commissions until they, with salaries and other county court allowances, shall amount to a certain sum. Having fixed what the officers shall receive from all sources up to at least certain sums, the section, proceeding to say what they shall pay out of the total into the county treasury, says that when the income from salaries and allowances by the county court, fees, costs, percentages, perquisites, emoluments, and commissions exceeds \$3,000, in the case of sheriff, he shall pay the treasury 15 per cent. thereof, excepting from the sum total of taxable receipts, salaries, and allowances by the court. It is contended that commissions on taxes shall not be counted in ascertaining the sum taxable or chargeable with 15 per cent. To exclude it, we must make it an "allowance" under clause "b." It is so claimed. But this cannot be so. The word "allowance" does not mean "commission." It means an allowance mentioned in clause "b," made by order of the county court. Clauses "a," "b," and "c" specify the only sources of income under the act. Observe that clause "c" gives the sheriff 85 per cent. of all "other fees, costs, percentages, perquisites, commissions and emoluments"; that is, all receipts, other than those specified in clauses "a" and "b." The use of the word "other" just after those clauses shows that it is things not named in them on which he gets 85 per cent.; shows that commissions are included in those things on which he gets 85 per cent.; in other words, shows that

commissions are not allowances by the county court. If commissions are allowances, then clause "c" does the useless thing of giving 85 per cent. of them, since it would be simply specifying the same thing the second time, when the language is "other fees, costs, percentages, perquisites, commissions," etc. Commissions are not allowances.

Note that the close of the section, before the repealing clause, says that, when said salaries, allowances, fees, costs, percentages, perquisites, emoluments, and commissions exceed the sum to be retained by the officer allowed him as a minimum, then he shall pay the county treasury 15 per cent. of all fees, costs, percentages, perquisites, penalties, commissions, and emoluments collected by him, excluding therefrom salaries of such officers paid out of the county treasury, and allowances made by authority of law, "as aforesaid." Here we see that in making up the sum taxable commissions are in words included, and, while salaries and allowances made by authority of law, "as aforesaid," are excluded from the tax charge, commissions are not excluded. Allowances and commissions are both counted in making up the total income; but only allowances and salaries are released from the tax. They are excepted from the tax, but commissions not. If the intention was to exempt commissions from the tax, why not exempt them by name, as they are included by name in total income? They are left taxable. The real question is, Do commissions come under the head of allowances, under clause "b"? They do not. The allowances meant are those (not salaries) fixed by the court, in its discretion, by special order, not a commission fixed by positive statute, as commissions on taxes. Commissions are not allowances under clause "b."

It is said the commissions charged with the 15 per cent. are commissions on execution or other process. The section does not so limit or declare. It used the generic word "commissions," which applies to taxes. There is no subject to which it more plainly applies under statute law and common understanding. The question was asked, What allowances are meant in clause "b"? and it was asserted that there are no such allowances under existing law, but salaries and commissions. I think the word "allowances" was intended as a safety clause to include any allowances that could be made, not salaries. Again, the Legislature thought there might be in this county or that allowances lawfully made under special local acts. I further answer that question by saying that, if there are no allowances that can be made to a sheriff, there are allowances that can be made to the clerk; for instance, the reasonable allowance which the county court can make to him for the financial statement under Code of 1906, c. 39, § 35. Both the words "commissions" and "allowances" are used to meet the case of both. Sheriff's com-

missions on taxes are not "allowances" made by the court, but are fixed, without any order of allowance by the court, by chapter 69, Acts of 1909, § 31; the court having no power over them. If a clerk pays this 15 per cent. on fees, why should not the sheriff pay on commissions? Both are emoluments coming from public service. The tax is levied on clerk's fees. If this were not so, there would be little revenue from that source. Did the Legislature intend to tax clerk's fees and release the large amount of sheriff's commissions? The bulk of clerk's income is fees, and the bulk of sheriff's income is commission. We say that the intent of said section is to impose a tax on incomes from office, when such incomes amount to certain sums, for revenue, and we cannot think that the Legislature intended to emasculate the act and defeat it largely as a revenue measure by excluding from the 15 per cent. large sums of commissions.

[5] Just here I note that section 31, c. 69, Acts 1909, instead of repealing, by either expression or implication, the act of 1908, regards it as still to continue. "Every sheriff or collector shall be allowed a commission of five per cent. on the amount of all county levies, district levies, and district levies for free school purposes, collected from the taxpayers, except those taxes for said purposes paid through the auditor's office from railroads and other persons and corporations, on which last mentioned taxes he shall receive a commission of one and one-half per cent.; provided however, that in any county where the gross income of the sheriff's office, including the salaries authorized by law to be fixed by the county court of the respective counties, and paid out of the county treasury, the commissions allowed by this section, and all other allowances, fees, costs, percentages, perquisites, commissions and emoluments, amounts to less than three thousand dollars, the sheriffs of such counties may be allowed such additional commissions," as will make up \$3,000. Observe that it fixes \$3,000 as a minimum. That is the sum fixed by the act of 1908. And it uses the same words found in that act to make that sum—salaries, commissions, allowances, fees, costs, percentages, perquisites, commissions, and emoluments, evidently regarding it. But, moreover, note that, making up the \$3,000, it includes "the commissions allowed by this section, and all other allowances, fees, costs, percentages, perquisites, commissions and emoluments." Both tax commissions and allowances are named, showing that they are different things. This feature of this case has been much contested, and but for this I would not have written this prolix discussion of it, as, in my humble opinion, it presents no serious difficulty. I think the statute plain, and it is only a matter of obeying its plain letter to execute its plain intent. We cannot put into the statute what is not there. Therefore the sheriff is required to pay the

county treasury 15 per cent. on commissions on taxes. Everything that is a fee is counted in the taxable sum; fees are those sums fixed by law. Allowances are those made under the discretion of court, not fixed, as, for instance, the reasonable compensation for financial statement under Code 1906, c. 39, § 35. They are not allowances. Allowance is where the court must make an order fixing the amount. The sheriff pays this tax of 15 per cent. on gross income, except salaries and county court allowances, if any. But by a proviso of the statute, if the imposition of the tax would leave him less than the minimum sum prescribed by the statute, he is entitled to retain up to that sum, though the treasury may not get that per cent., and it gets what is left over that sum.

Our conclusion is to reverse the judgment of the circuit court, in so far as it allows the sheriff said 10 per cent. interest, amounting to \$160.48, and affirm it, in so far as it allows the sheriff 7½ per cent. on road taxes (\$158.37), and in so far as it charges the sheriff with \$2,963.06 for the 15 per cent. on commissions on taxes collected.

POFFENBARGER, J. (dissenting in part). From so much of this decision as requires the sheriff to return to the county treasury 15 per cent. of his commissions on county, district, and school district levies, I am compelled to dissent. The proposition violates both the spirit and the letter of the statute, and deviates from the obvious purpose of the Legislature.

In the cases of each of the officers to which the act in question applies (the sheriff, county clerk, circuit clerk, and prosecuting attorney), two items of income are admittedly excepted from the 15 per cent. deduction or concession to the county treasury—the salary and allowances made to the officer out of the county treasury by the county court by authority of law. As to what constitutes the salary, there is no difference of opinion. Now, does anybody doubt that the allowance mentioned in clause "b" is a different and additional thing? In other words, the salary and the allowance are not one and the same thing. The only controversy or difference of opinion is as to what constitutes an allowance, within the meaning of clause "b," and whether commissions allowed the sheriff by the county court on county, district, and school district taxes are such allowances. The solution of this question, in accordance with sound legal principles, involves consideration of the general policy of the act and its terms.

These officers all derive considerable compensation from sources other than the county treasury. All receive fees from private individuals for services performed for them. The sheriff is allowed commissions on sales and collections in proceedings between private individuals, or by the state and munic-

ipal bodies against private persons, and vice versa, and on state and license taxes, with which the county court has nothing to do, and is not in any way concerned. Some or all of the other officers may receive commissions, not allowed by the county court. These sources of income are clearly within clause "c." There are both commissions and fees, therefore, not allowed by the county court, and there are, no doubt, perquisites, percentages, and allowances to some or all of these officers that cannot or may not be covered by the terms "fees" and "commissions." It was the clear intention of the Legislature to require all of them to pay into the county treasury 15 per cent. of all of these classes of fees, commissions, perquisites, percentages, and allowances, emanating from sources other than the county, when it can be done without reducing the compensation below the amount specified in clause "c" of section 9.

It is clear that all of these officers receive salaries, and most of them fees, and the sheriff undoubtedly commissions, which are allowed by the county court. In one form or another, these allowances come out of the county treasury. The salaries are paid by orders expressly drawn upon the treasury in favor of the officers. Some of the fees are paid in that way. Possibly some commissions are so paid. But the sheriff's commissions are allowed to him by way of credit in his settlement. No order is drawn for them. There is no reason why there should be an order in his case, since he has the money in his hands, and his settlements, showing how much is allowed, are entered upon the record of the county court, after confirmation by an order of that body. This order of confirmation is the practical equivalent of an order drawn upon the treasury for so much money, and turned in by the sheriff as a voucher by way of credit in his settlement. It is as distinctly and substantially an allowance to him by the county court as would be an order for the amount of his commission. The statute providing for the sheriff's commissions, using a term corresponding with the one used in clause "b," says the sheriff "shall be allowed" certain commissions on county, district, and school district levies, and certain fees, payable out of the county treasury. As the sheriff must settle the levies with the county court, the commissions to which he is entitled are necessarily allowed by the county court. Thus these commissions comply fully and strictly with the description contained in clause "b," saying these officers shall receive for their services, in addition to their salaries, "such allowance or allowances as may be made by the county court of the different counties to such officers by authority of law now in effect." All fees, payable out of the county treasury to the sheriffs and the other officers to whom the act applies,

are allowed by special orders drawn upon the treasury. Some, if not all, of the other officers receive certain fees, payable out of the county treasury. Here, then, we have a second class of fees, perquisites, percentages, commissions, and emoluments, coming to these officers from a source from which their other compensation in various forms does not come, namely, from the county court, by authority of law, and the clause just quoted relates to the income from that source alone; and clause "c" says that, from the obligation to pay 15 per cent. into the treasury, the salary mentioned in clause "a" and the allowances mentioned in clause "b" shall be excluded.

The shibboleth of the argument for the construction adopted by the majority of the court is lack of reference in clause "b," in express terms, to commissions, and the presence of such reference in clause "c." This argument wholly fails, for the reason that clause "b," necessarily relating to fees, perquisites, percentages, allowances, and commissions, covering in general terms all of the income of these officers from the county treasury, does not mention any of them in express terms. An allowance must be for something. An allowance without any basis therefor, such as a fee, a commission, a percentage, a perquisite, or an emolument, would be as illegal and unwarranted by law as it would be ridiculous and absurd. The language of clause "b" was adopted for convenience. General terms were used to cover any and all of these things, coming to the officer from the county treasury by authority of law. It is not disputed here that certain "fees" allowed by the county court to the sheriff and the other officers are allowances, within the meaning of clause "b," because they are allowed by the county court. On the same principle and for the same reason, a commission allowed to any of them by the county court must fall within the meaning of clause "b." It was practicable, as the legislative draftsman observed, to express the legislative intent in general terms, by describing the common source from which certain kinds of income emanate, and thus to avoid unnecessary and useless verbiage, incident to an attempt to enumerate and specify them. Intending that no officer should be required to pay back into the county treasury any part of any sum derived by him from that treasury, be it a "fee," "commission," or what not, it amply sufficed to say so in the terms employed in clause "b." General terms could have been used and a large saving in words and space effected in clause "c" by simply declaring the officers should pay into the county treasury 15 per cent. of all their incomes derived from sources other than the county, subject to the limitation guaranteeing certain minimum compensation if the salaries and other compensation, without deduction, should prove to be

sufficient to make it. Why different methods of expression were selected for the two clauses is immaterial; but that the legislators, like judges and all other persons, may and do have wide latitude in the selection of terms to express their thoughts and intentions must not be overlooked. We must also remember the advantages of generalization and its prevalence, when practicable, as a means of combining perspicuity and comprehensiveness in short time and limited space. All courts, legislators, attorneys, and other writers adopt it, and the proper use of it is evidence of skill and ability.

Viewed in the light of the positive and unequivocal classification of income, made by the general scope and import of the act, the word "other" in clause "c" is highly significant. It qualifies and limits "fees," "costs," "percentages," "perquisites," "commissions," and "emoluments," of which officers are to receive, under certain conditions, only 85 per cent. Not all fees, costs, percentages, perquisites, commissions, and emoluments are included in or contemplated by clause "c"; but only those that are "other" than some others. What others? Not fees and commissions, other than those covered by clause "a," for that clause includes only salaries; but they are "emoluments," more than emoluments—emoluments and salaries at the same time—as a commission or fee may be that and an allowance at one and the same time, or a fee or commission before allowance and as the basis for an allowance, and ultimately and finally an allowance. Not other than salaries, but necessarily other than those included in and covered by clause "b"; for that is the only provision, going before clause "c," that can include fees, costs, percentages, perquisites, and commissions. That it may do so is too plain for argument—so plain that nobody denies it. It not only may, but the adjective "other," qualifying, limiting, and distinguishing fees, costs, percentages, perquisites, commissions, and emoluments in clause "c," proves that it does. If not, why were they so limited and distinguished? Clauses "a" and "b" and the first sentence of clause "c" give the officers absolutely (1) their salaries, (2) their allowances by the county court, and (3) 85 per centum of "all other fees, costs, percentages, perquisites, commissions and emoluments." This is the minimum. It is then provided that, under certain circumstances, they may have the salaries and allowances and 100 per centum of all other fees, etc. Then all of this is virtually repeated and further elaborated by the last paragraph of clause "c," requiring each officer, when his entire compensation, accruing from all sources, shall exceed a certain sum, to pay into the county treasury 15 per centum of "all fees, costs, percentages, perquisites, penalties, commissions and emoluments collected by him, excluding therefrom" his salary, "paid out of the county treasury, and allowances made by authority

of law as aforesaid." This express exclusion of salaries and allowances in the last paragraph dispensed with the necessity of the use of the word "other" before "all" in that paragraph, and consequent omission thereof shows careful adherence to the plan or scheme of legislation previously expressed, and makes section 9 systematic and harmonious from beginning to end.

Salaries are given in full and absolutely, because they come out of the county treasury. Salaries coming from other sources, if any, as from the state, must suffer an abatement of 15 per centum; for they are "emoluments." Clause "a" allows in full only salaries "paid out of the county treasury." Clause "c" exonerates from the abatement only salaries "paid out of the county treasury." Clause "b" gives in full only allowances "made by the county court * * * by authority of law." Clause "c" exonerates from abatement only allowances "made by authority of law as aforesaid"—necessarily those mentioned in clause "b"; for none are elsewhere mentioned by that description. All this evinces intent to adopt the reasonable and consistent plan of allowing county officers to retain what comes to them from the county treasury, and avoids the conflict and contradiction involved in permitting them to receive money from the county, and then requiring them to pay it back.

As the county court is, for the most part, a police and fiscal board, having no actual custody of funds with which to pay anything, and adjudges nothing, the word "allow" more fittingly expresses its action than, perhaps, any other. As to claims and disbursements, its real function is to audit and order paid, or, in statutory phraseology, "allow" claims and demands, upon whatever account, consideration, or basis they may be due, or however they may arise. Thus section 40 of chapter 39 of the Code says, as to claims: "The clerk shall present the account or statement to such court at its first meeting thereafter, which shall *allow* the whole or such part thereof as they may deem just, or *disallow* the whole." Section 41 of said chapter says no suit shall be brought on such claim until the court shall have *disallowed* it. Section 37 thereof, prescribing the forms of county orders, says each shall order the sheriff to pay — dollars and — cents, *allowed* by special order. Section 18 of chapter 39a says the sheriff shall have certain sums for certain services on the *allowance* of the county court. Section 29 of chapter 63 says the clerk of the county court shall be *allowed* certain fees to be paid out of the county treasury. Section 35 of chapter 39 says he shall be *allowed* a reasonable compensation for preparing a statement. Section 11a of chapter 29 says he shall be *allowed* the actual cost of making up the land book. Section 93 of chapter 3 says he shall be *allowed* a reasonable compensation for keeping the registration of voters.

Section 31 of chapter 30 says every sheriff or collector "shall be *allowed*" certain commissions for collecting the county, district, and school district levies. Finding the term "allow" so often and so aptly used in the statutes to express the function of the county court in appropriating money to pay claims, fees, and demands of all kinds, and authorizing or confirming credits or deductions by the sheriff from funds in his hands as treasurer, I have no difficulty in ascertaining the meaning of its derivative "allowance," embodied in clause "b" of section 9 of the act we are considering, inserted by the same tribunal that has used its parent in so many other places to cover and include fees, commissions, and compensation for services. As the Legislature made it applicable to fees elsewhere, why not here? As it applies to commissions elsewhere, why not here?

If any of these items of income from the county treasury are included in clause "b," they are all so included; for any reason justifying the inclusion of one will necessarily sustain inclusion of all. They all come from the county treasury as compensation to county officers, and are allowed out of the treasury by the county court. While they arise out of divers kinds of county service and under divers designations, they all reach a point at which they fall under the common and general designation of "allowances." Moreover, there are no other allowances materially differing from them in character. The law justifies all of them and obliges the county court to make them. They are not discretionary allowances; nor are there any such. Just a few days ago we decided, on an application for a writ of error, that a county court cannot allow any claim on any account, or to anybody, without express or clearly implied statutory authority. No officer can obtain anything out of the county treasury by the mere grace of the county court. The law must give it; else he is not entitled to it. Though the law gives it, the county court must appropriate the money to him by an "allowance" in the form of an order or otherwise, before he can obtain payment. No instance of a discretionary allowance to any officer has been pointed out, and I apprehend that the members of this court uniting in the majority opinion would not for an instant sanction a claim of any such authority in any county court, unless it pertained to some of the county court's own rights or undertakings, and, in such cases, the allowances would necessarily be made to persons, other than the county officers, whose services may be demanded on account of the salaries allowed them, and without additional compensation. The statute itself impliedly forbids discretionary allowances to county officers. Section 49 of chapter 39 of the Code says: "The county court of every county shall allow annually to the county officers, hereinafter mentioned, *for their public services, for which no other fee or reward is allowed by law*, such sums to be paid out of

the county treasury as are deemed reasonable by the court, within the limits ascertained by law; that is to say"—and then sets forth maximum and minimum limits of salaries. Thus the salary mentioned in clause "a" covers all public services for which "no other fee or reward is allowed by law," and all the discretion the court has must be exercised in fixing that item, leaving none applicable to items falling under clause "b." In other words, all the discretion it has in favor of these officers must necessarily be exercised in fixing their salaries, falling under clause "a," which proves that allowances contemplated by clause "b" are such as the court are not only authorized by law to make, but are also legally bound to make.

Clause "b" therefore must apply to and include fees, commissions, perquisites, and emoluments charged by law upon the county treasury, but not payable, except upon allowance by the county court, which means appropriation of the money to pay them, or be denied any force or effect whatever. If it does not include such items, it is a dead letter, and performs no office or function whatever. It cannot be deprived of any function and made useless, consistently with the rules of construction. In construing a statute, the court must give to every clause, phrase, and word a meaning and effect, if it is possible to do so. *State v. Harden*, 62 W. Va. 313, 347, 58 S. E. 715, 60 S. E. 394; *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. 404; *Argand v. Quinn*, 39 W. Va. 535, 20 S. E. 576; *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78; *Jackson v. Kettle*, 34 W. Va. 207, 12 S. E. 484. Being elementary, this proposition requires no further discussion or citation of authorities.

The majority opinion seems to assert two supposed reasons for its refusal to adopt this construction. One of these is that the officer would get commissions twice, once under clause "b" and again under clause "c," and the other that both allowances and commissions go into the total sum upon which the 15 per centum is charged, and allowances only are excepted. As to the first objection, it is to be noted that the officer does not get his commissions twice. The totaling of salaries, allowances, fees, costs, percentages, perquisites, emoluments, and commissions in the last paragraph of clause "c" is not made for the purpose of determining a total sum out of which the 15 per centum is to be taken, but for the purpose of determining whether it can be taken out at all. Notice the terms: "When said salaries, allowances, fees, costs, percentages, perquisites, emoluments and commissions exceed the sum hereinbefore mentioned to be retained by such officer, then such officer shall pay to the sheriff as treasurer" of the county, not 15 per centum of any total sum, but 15 per centum of all of certain items, fees, costs, percentages, perquisites, penalties, commissions, and emoluments collected

by him, except such thereof as are salaries and allowances made by authority of law. This paragraph does not require all of the emoluments or compensation of the officer to be added up and certain deductions made (salaries and allowances), and then 15 per centum of the remainder of the total sum to be paid into the treasury. The abatement of compensation and augmentation of the treasury will be exactly the same, if 15 per centum of each of the several items is turned in. But, if it did require aggregation, fees and commissions constituting allowances under clause "b" would not be put in once as allowances and again as commissions and fees, and then stricken out only as allowances. They would go in only once under the general designation of allowances. After putting in salaries and allowances, which include fees and commissions allowed by the county court, only the *other* fees, commissions, etc., would be added; but the terms require no aggregation of these items into a sum total from which to take the 15 per centum for the treasury.

As to the second objection, we may say the same reasoning would prevent the exclusion of anything. The paragraph puts into the enumeration emoluments, and the excepting clause does not exclude them. Emoluments is broad enough to cover the salary, as well as all fees, costs, percentages, perquisites, penalties, commissions, and allowances. It would cover discretionary allowances, if there could be any. If commissions are not excepted, because they are put into the enumeration and not excluded in words, emoluments, covering salaries, allowances, perquisites, and every other conceivable thing, would not be excluded for the same reason, so that everything any of these officers get would be subject to a deduction in favor of the county treasury of 15 per centum. The theory of the majority, consistently applied, subjects all fees allowed by the county court to the 15 per centum deduction; for fees, as well as commissions, are specifically mentioned in the supposed aggregation, and not excluded by name. So does it cut out of clause "b" the allowance to the county clerk for preparing the financial statement, which is an *emolument* of the office, and not a salary; for emoluments are specified in the supposed aggregation, and not excluded by name. Yet the opinion, in violation of the theory and in flat contradiction of its own argument, says this item falls under clause "b." If so, why not a fee allowed by the county court? If so, why not a commission allowed by the county court? The argument applied to keep commissions on county and district levies out of clause "b," directly applicable to fees and emoluments, other than salaries, is thus cast to the winds, in the effort to find something for the operation of clause "b," other than these commissions. Is not the allowance to the clerk an emolument? Certainly.

Are not emoluments included in the alleged aggregation? Yes. Being so, is it excluded by name? No. Then if, because of these facts, the commissions in question are not excluded as being in clause "b," how can this emolument be excluded; the facts in each case being the same?

All such allowances are emoluments. How can any of them belong to clause "b," under the majority theory, let them be discretionary with the court or obligatory upon it? I repeat they are emoluments, and the argument that cuts out commissions cuts out emoluments, other than salaries and allowances. Is it included in clause "b" because it is an allowance? So is a fee, because an order must be drawn for it. So is a commission, because a settlement must be made and recorded, *allowing* credit for it. The allowance to a clerk for preparation of the financial statement is not discretionary. It is obligatory. The court is bound to allow it. The statute says "he shall be allowed a reasonable compensation" for it. Code, c. 39, § 35. If the court should cut his claim for it below the standard of reason, the clerk may sue and recover the value of the service. For this reason, as well as for others stated, this item—the only one conceded to be an allowance under clause "b"—must go out, and the clause becomes a dead letter, made so here in plain violation of the rules of construction. There are no such difficulties and inconsistencies as the majority opinion supposes. The excluding clause in the last paragraph embraces all that is included in clause "b." The majority opinion admits this. Hence the crucial question is, What does clause "b" include? To determine that, we must look at clauses "a" and "b" and the first paragraph of clause "c." We cannot ignore these and go to the final paragraph of the section and make everything turn on a few words found in it. The rules of construction require the court to read the whole section together, give effect to all of its parts, every word of it, and then harmonize them and make the section operate as a consistent whole. Clause "a" gives absolutely the salary. Clause "b" gives absolutely the allowances. The first paragraph of clause "c" gives 85 per centum of all *other* fees, costs, percentages, perquisites, and emoluments. The word "other," qualifying all these items, proves, beyond doubt, that those things are included in clause "a" or "b." If they are not, we must attribute to the Legislature the stupidity of having inserted a useless, meaningless and confusing word ("other"), and also of having inserted a clause (clause "b"), without giving it any office in the world to perform, or anything to act upon; for I have shown allowances must include fees and commissions, or nothing. No court can do this consistently with the rules of construction, as I have shown by authorities already cited. Having thus

shown that clause "b" includes such fees, costs, percentages, perquisites, commissions, and emoluments as are allowed to the officers by the county court by authority of law, we turn to the excluding clause in the last paragraph, which says, "excluding therefrom the salaries of such officers paid out of the county treasury, and allowances made by authority of law as aforesaid." The allowances so excluded are all the allowances covered by clause "b."

I have demonstrated the impossibility of discretionary allowances to officers. That proves they could not have been contemplated as falling under clause "b"; but, if there could be such allowances, no word found in the clause limits it to mere discretionary or even extraordinary allowances, if there could be such. On the contrary, the clause says the officers shall receive such allowance or allowances as the county court may make by authority of law. Where is the warrant of the court in the terms of the clause or the spirit of the act for addition or interpolation of the word "discretionary"? Allowances under special statutes, as suggested in the majority opinion, exist only in imagination. Nobody has pointed out any, or can do so. They are myths, pure and simple.

The opinion seems to assert that commissions cannot go into clause "b," because not allowed by a special order drawn on the county treasury, thus impliedly admitting that allowances to county officers by the county court by special order may go in, and yet it concedes to that clause but a single item so allowed, upon the false assumption that its allowance is discretionary. Now, clause "b" says nothing about the form of the allowance. It excepts allowances, and, if an allowance is made by credit in an officer's settlement, it is as much an allowance as if made by a special order. Indeed, there is an order of allowance in the entry of the settlement upon the court's records and approval thereof. No rule of interpretation justifies or permits interpolation of the word "special" before "allowance or allowances" or the words "by special order" after these terms.

This construction, susceptible of the equivalent of mathematical demonstration, is sustained by other considerations pertaining to the status of the officer in question, the conditions in view of which the legislation was enacted, and its objects and purposes. The collection of taxes is not strictly within the legal theory and scope of a sheriff's office. In handling levies, he acts as collector and treasurer. Section 32 of chapter 39 says: "The treasury of each county shall be kept by the sheriff thereof, who shall be ex officio treasurer of such county and of each district therein." His compensation as such consists wholly and solely of commissions on levies and other receipts into the treasury. He is the collector, as well as the

treasurer, and this compensation to him is charged with enormous expense in the employment of deputies to aid in the collection and disbursement of the levies. It is not a net receipt. His salary, fees, and commissions as sheriff constitute but a small portion of his income. The highest salary allowed to a sheriff is only \$500, and many of them receive only \$200. The highest salaries allowed for clerks will average in the several counties of the state, three, four, or five times the salaries allowed to sheriffs. They are not required to abate any portion of these salaries. The sheriff's commissions on county and district levies are to him what the salaries of the clerks are to them. He is virtually denied any salary, because he gets these commissions, and his expenses for assistance are much heavier than those of clerks. The Legislature allows him commissions in lieu of a salary. All these facts are known to the Legislature. To allow these clerks their several salaries without abatement and, at the same time, require the sheriff to turn into the treasury 15 per centum of his commissions on these levies works an unjust and unreasonable discrimination against the latter, which the Legislature cannot be deemed to have intended, and this applies another settled rule of construction. "Of two permissible constructions of a statute, one working manifest injustice and the other equity and fairness, the latter is adopted, upon the presumption that the Legislature did not intend the results flowing from the former." *Hasson v. Chester*, 67 W. Va. 278, 67 S. E. 731; *Old Dominion, etc., Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222; *Dickey v. Smith*, 42 W. Va. 806, 26 S. E. 373. Besides, the Legislature knew the sheriff's commissions had been largely cut down and reduced by the revision and alteration of the tax system. In almost every county in the state, large levies on public service corporations, other than railroad companies, were formerly collected by the sheriff, and were subject to his ordinary commissions. At the time of the passage of this act, all of those levies were collectible by the auditor, and the sheriff's commission on them reduced from 7½ and 5 per cent. to 1½ per cent. The Legislature thus appears to have reduced the income of the sheriff's office to a point deemed reasonable, without the imposition of this 15 per centum abatement.

The income of the sheriff's office in a few of the larger counties, such as Ohio, Wood, Cabell, and Kanawha, may be larger than is necessary, and this may be equally true of the offices of the clerk of the circuit court and clerk of the county court. But that constitutes no reason for a construction or interpretation of this statute that will make it operate harshly and unjustly upon the officers of the smaller counties in which the offices do not pay sums commensurate with the services performed and the liabilities

incurred. The Legislature, passing this act without sufficient information as to the compensation of these officers to enable it to see what would be just and right, put itself on the side of safety and justice. When the act was originally drafted and introduced, it provided for specific salaries for all these officers, and required them to pay into the treasury all of the receipts from all sources in excess of the prescribed salaries. Seeing the possibility of injustice in an attempt to fix compensation without full knowledge of material facts, this plan was altered by amendment, and section 9 put into its present form. This entirely changed the nature and purpose of the act as a whole. Its main object then was to effect a slight reduction for the time being, and obtain, for the purposes of future legislation, information which the Legislature did not have. Formerly no officer was required to disclose in any manner the amount of fees received by him. The first eight sections of this act are so drawn as to require all these officers to give accurate accounts of all fees, commissions, perquisites, and emoluments received by them, or to which they are entitled, and they are inhibited from performing any gratuitous services. These provisions were intended to make public, as a matter of record, the income of these offices which had been previously secret and unknown, except to the officers themselves. Salaries and allowances by the county courts were not of that class. The records had always disclosed them, including the sheriff's commissions, and the Legislature had altered them from time to time, so as to conform to its notion as to what was commensurate with the service and responsibility. His settlements have always been made matter of record, open to the inspection of the public, just as the salaries of county officers have been. Now that these officers, under the act here involved, are required to make full disclosure of their incomes, the Legislature at any of its future sessions may deal intelligently, wisely, and justly with the subject of compensation to county officers. It could not do so when this act was passed, and for that reason desisted from the attempt. These general considerations fully sustain the interpretation I have hurriedly outlined here.

(70 W. Va. 312)

**CLARK et al. v. HARPERS FERRY
TIMBER CO. et al.**

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)

(Syllabus by the Court.)

**1. VENDOR AND PURCHASER (§§ 279, 285*)—
REMEDIES OF VENDOR—ENFORCEMENT OF
LIEN—PARTIES**

The purchaser of a defined part of the timber on a tract of land subject to a ven-

dor's lien is a necessary party to a suit to enforce the lien, and, in formulating the decree of sale, the court should observe the equitable rule, requiring sale of land so situated in parcels or portions, corresponding with the interests of the parties, in the inverse order of the alienations, commencing with the original vendee, if he retains any of the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 780, 803; Dec. Dig. §§ 279, 285.*]

**2. VENDOR AND PURCHASER (§ 285*)—RE-
MEDIES OF VENDOR—ENFORCEMENT OF LIEN—
TERMS OF SALE.**

In prescribing terms of sale of a large body of land to satisfy a vendor's lien of nearly \$233,000, the trial court does not abuse its discretion by requiring only \$30,000 of the purchase money to be paid in cash and the balance in three equal installments in one, two, and three years, respectively, from the date of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 804, 805; Dec. Dig. § 285.*]

**3. VENDOR AND PURCHASER (§ 279*)—RE-
MEDIES OF VENDOR—ENFORCEMENT OF LIEN—
PARTIES.**

In a suit to enforce a vendor's lien, a purchaser of the land on which the lien is at a tax sale is not a necessary party.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 780; Dec. Dig. § 279.*]

(Additional Syllabus by Editorial Staff.)

**4. APPEAL AND ERROR (§ 238*)—OBJECTIONS
IN LOWER COURT—ERROR IN DECREE.**

Where a decree is entered against one of the defendants upon the bill taken for confessed, an appeal therefrom without application first made to the circuit court to correct any error therein will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1395; Dec. Dig. § 238.*]

Poffenbarger, J., dissenting in part.

Appeal from Circuit Court, Pocahontas County.

Bill in equity by Harry E. Clark and others against the Harpers Ferry Timber Company and others. From a decree for plaintiffs, defendants appeal. Appeal by defendant the Harpers Ferry Timber Company dismissed, and decree reversing cause remanded on appeal by W. O. Bond and another.

Mollohan, McClintic & Mathews, L. M. McClintic, and Price, Osenton & Horan, for appellants Bond, Talbott & Hoover, for appellees.

Samuel T. Spears, for appellant Harpers Ferry Timber Co. Talbott & Hoover, for appellees Clark and others. Mollohan, McClintic & Mathews, for appellees Wm. O. Bond and others.

POFFENBARGER, J. The relation of the appellants, W. O. Bond and N. U. Bond, to the land and debt involved in this suit will appear from the facts stated in Bond v. Taylor, 68 W. Va. 317, 69 S. E. 1000. The Pocahontas Tanning Company assigned the unpaid purchase-money notes mentioned in the statement of that case to Harry E. Clark

and John W. McCullough, partners, under the firm name of Clark & McCullough, and they brought this suit while that of Bond v. Taylor was pending to enforce the vendor's lien reserved to secure the payment of the notes, making their assignor, the Pocahontas Tanning Company, the Harpers Ferry Timber Company, W. C. Bond, N. U. Bond, W. S. Taylor, and the Durbin Lumber Company, a corporation, defendants. The Bonds appeared and answered the bill, claiming to be owners in common with Taylor of certain portions of the timber on the lands, as purchasers thereof from the Harpers Ferry Timber Company, and insisting that, in case a sale should be decreed to satisfy the lien of the plaintiffs, the land and timber not included in their purchase, should be first sold, and, if the proceeds thereof should be insufficient to pay the debt, then only so much of the timber they had purchased as should be necessary to cover any deficiency should be sold. The bill was taken for confessed as to the Pocahontas Tanning Company, W. S. Taylor, the Harpers Ferry Timber Company, and the Durbin Lumber Company, and the court pronounced a decree ascertaining that there was due the plaintiffs \$232,770.86, including interest, and ordering the land, including the timber, sold, by special commissioners appointed for the purpose, in default of payment thereof within 30 days, on terms which are complained of, \$30,000 in cash and the balance in three equal installments payable in one, two, and three years. As this decree disregards the alleged equitable right of the Bonds to have the land only first sold, they have appealed. Though the Harpers Ferry Timber Company made no appearance, it has also appealed.

[4] A motion made here to dismiss the appeal of the Harpers Ferry Timber Company will be sustained. As to it, the decree is one upon the bill taken for confessed. Hence, if it is erroneous in any way, an application should have been first made to the circuit court to correct the error. That is a condition precedent to the right to appeal from such a decree.

[1] The equitable claim of the Bonds, already stated, should have been sustained and provided for in the decree. They bought certain portions of the timber from the Harpers Ferry Timber Company, the vendee of the Pocahontas Tanning Company. At the time of their purchase both land and timber were subject to the vendor's lien for the enforcement of which this suit was instituted, but their contract of purchase did not provide for the payment of that debt in addition to the other consideration they agreed to pay. On that point the contract is clear and unequivocal. They agreed to take from the land and pay for enough timber each month to enable the Harpers Ferry Timber Company to meet its obligations to the Poca-

hontas Tanning Company on the purchase-money notes here involved, and also to provide and pay such sum each month, in the event of their failure to take off enough timber to equal it at the price agreed upon, \$2.50 per thousand feet. The agreement recites that \$4,000 had been paid, not to the Pocahontas Tanning Company, but to the Harpers Ferry Timber Company, and also that future payments should be made to the Harpers Ferry Timber Company. Hence, the Bonds and Taylor, the latter representing the firm in said tract, as it appears from the decision in Bond v. Taylor, already referred to, became purchasers of the timber, and did not assume the payment of the debt due from the Harpers Ferry Timber Company to the Pocahontas Tanning Company. They are in the same situation, therefore, as purchasers of a portion of mortgaged premises from the mortgagor, without assumption of the mortgage debt. In such case, the foreclosure decree should order a sale of the property in the inverse order of the alienations of the mortgagor, first subjecting to sale such portions of the property as he still owns. *Gracey v. Myers*, 15 W. Va. 194; *Jones v. Myrick's Ex'rs*, 49 Va. 179; *Hinkle's Ex'r v. Allstadt*, 4 Grat. 234; *Wilcox v. Musche*, 39 Mich. 101, 104; *Huxley v. Rice*, 40 Mich. 78-77; *Jones, Mortg.* § 1576; 9 Enc. Pl. & Pr. 411. This rule is equally applicable in the enforcement of vendor's liens. *Litchfield v. Preston*, 98 Va. 530; *Whitten v. Saunders*, 75 Va. 563; *Boyce v. Stanton*, 15 Lea (Tenn.) 346; *Alabama v. Stanton*, 5 Lea (Tenn.) 423; 29 Cyc. 792. The decree would be erroneous for another reason. As there are separate interests in the land considered as a whole, soil and timber, the sale should have been ordered by parcels so as to keep the proceeds of the several interests separate and render it possible to determine and conserve the rights of the parties respecting them. *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. 949; *Bank v. Wilson*, 25 W. Va. 242. This conclusion is not inconsistent with the principle of *Hart v. Larkin*, 66 W. Va. 227, 66 S. E. 331, 135 Am. St. Rep. 1027. It does not allow a creditor's debt to be postponed by subsequent acts of the debtor. Both land and timber are liable for the debt, and the creditor is entitled to a decree of sale now, but the method of sale must respect equitable rights of all persons interested in the property.

If any equitable right in the plaintiffs to sell the timber along with the land, treating both as one, or in the Harpers Ferry Company to have the timber sold first, could have been founded upon the expectation of the latter to pay the original purchase money out of the proceeds of the timber, such right was destroyed by the conduct of the Harpers Ferry Company in preventing the cutting of the timber by its collusion with

Taylor in the effort to preclude the Bonds from any share in the timber. The decree in the cause of Bond v. Taylor, reciting the facts in that cause, was exhibited in this with the Bond answer, from which the failure of Taylor and the Bonds to comply with their contract with the Harpers Ferry Company, which would have enabled the latter to pay the Pocahontas Tanning Company, clearly appeared to have been caused in part by the Harpers Ferry Company.

In disposing of these questions, we have said enough to demonstrate the right of the Bonds to be heard in this cause. Though their purchase was subsequent to the vendor's lien, they were nevertheless interested in the subject-matter of the suit.

[2] A cross-assignment of error is based upon the terms of sale, prescribed by the decree, which requires only \$30,000 of the purchase money, less than the interest on the debt, to be paid in cash, and the balance, over \$200,000, in three equal installments, payable respectively, in one, two, and three years from the date of the sale. These terms are somewhat liberal to the purchaser, but the cash required to be paid is a considerable sum, and the deferred installments are not unreasonably postponed. The creditors will receive all their money with interest in a reasonable time, if the property sells for enough to cover the debt. Unable to see any abuse of the court's acknowledged discretion in the prescription of these terms, we overrule this assignment.

[3] Shortly before the institution of the suit, B. M. Hoover purchased all the land as delinquent for nonpayment of taxes. Showing this fact, the answer of the Bonds claimed he was a necessary party to the suit. In the final decree, his appearance is recited, but he filed no answer, and the bill was not amended by the addition of any allegation as to him. Upon this state of facts, the Bonds assign error in proceeding to a decree without such allegation. I think there was error for this reason, but my associates are of a different opinion, for the reason that Hoover's right was definite and certain, and all the other interested parties could protect their rights by redeeming.

For the reason stated, the decree will be reversed and the cause remanded to the circuit court of Pocahontas county, with direction to enter a decree, requiring a sale first of the land, excluding the timber thereon sold to Taylor and the Bonds, and, if the proceeds thereof shall be insufficient to pay the purchase money due the plaintiffs and their costs, then so much of the timber sold as aforesaid as shall be necessary to satisfy the balance of the purchase money lien and costs, and for further proceedings. Costs in this court will be decreed to W. C. Bond and N. U. Bond, the parties substantially prevailing here.

(70 W. Va. 232)

DEVENY et al. v. COOK et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)

(Syllabus by the Court.)

1. COSTS (§ 279*)—ERROR IN TAXATION—MOTION TO RETAX.

An execution on a judgment for costs will not be quashed because the taxation is erroneous. The error must be corrected by motion to retax the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1068; Dec. Dig. § 279.*]

2. COSTS (§ 264*)—EXECUTION FOR COSTS—AMENDMENT.

The circuit court has no authority to amend an execution therein issued on a judgment for costs rendered by the Supreme Court of Appeals, if the proposed amendment involves a change in the taxation of the costs as certified from the appellate court.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 264.*]

3. COSTS (§ 216*)—TAXATION—JURISDICTION.

The jurisdiction to retax costs belongs to the court in which they are recovered and originally taxed. Proceedings to retax must as a general rule be heard before the court of which the clerk who taxed the costs is an officer.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 823; Dec. Dig. § 216.*]

4. COSTS (§ 264*)—COSTS ON APPEAL—TAXATION.

When for any reason there remains an undecided question regarding costs after decision on appeal, the court by which the judgment in relation to those costs was rendered is the court to determine it.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 264.*]

Error to Circuit Court, Marion County.

Action by Thomas A. Deveny and others against James F. Cook and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. S. Meredith, Geo. M. Alexander, and Chas. Powell, for plaintiffs in error. Harry Shaw, for defendants in error.

ROBINSON, J. The circuit court overruled a motion to quash an execution and the plaintiffs in the motion have prosecuted this writ of error to reverse the order made in the premises.

The execution issued on a judgment of the Supreme Court of Appeals, which judgment is in the following words: " * * * and that the appellees * * * do pay to the appellants their costs about the prosecution of their appeal and supersedeas in this Court in this behalf expended." The mandate which certified this judgment to the circuit court was accompanied by a taxation of the costs incurred and recovered by the appellants, according to the usual practice in that regard. The execution on this judgment for costs properly issued in the circuit court, pursuant to the following statutory provision: "The court from which any

case may have come to the supreme court of appeals, shall enter the decision of the appellate court as its own, and execution thereon may issue accordingly." Code 1906, c. 135, § 29. The execution called for the exact amount of the costs taxed in the Supreme Court of Appeals. It followed the mandate of the appellate court and the taxation which accompanied that mandate. That taxation had been made by the clerk of the Supreme Court of Appeals under the authority of this provision: "The clerk of the court wherein a party recovers costs shall tax the same." Code 1906, c. 138, § 12.

One item of the costs so taxed was the expense of the bond required to perfect the appeal and supersedeas. The bond was furnished the appellants by a surety company. The law allows the inclusion of the reasonable expense of a suit bond in the costs recovered by the party from whom such bond is required. Code 1906, c. 87, § 17a1. The parties against whom the execution issued, the appellees in the former proceeding, conceived that the sum taxed against them for the expense of the appeal bond was not warranted by the statute last cited, nor by the judgment on the appeal. As a remedy to prevent the collection of this item, they chose the motion to quash the execution which is now before us.

[1] The case does not call for a construction of the statute allowing as costs the expense of a suit bond. We need not say when and in what amount this expense may be included as costs. Let us assume that the complaining parties are right in their contention that the item in this case is unwarranted. A motion to quash totally the execution could not prevail merely because an improper or unwarranted item was included in the costs. There was unquestionably a valid judgment for costs. That judgment would support an execution for the proper amount. Some amount was proper. An execution on a valid judgment for costs cannot be quashed merely because of clerical irregularities in the amount. The proper course is to move for a correction in this particular. An erroneous taxation of costs furnishes no ground for quashing the writ. The error may be corrected on a motion to retax the costs. Freeman on Executions, § 78; Herman on Executions, § 404; 11 Cyc. 161, 162; 17 Cyc. 1155. There are many cases in point. "The refusal of courts to quash writs because of some irregularity therein and the directing amendments instead is based upon the ground that the irregularity has been of no injury to the moving party and that it is unjust to punish the plaintiff, and to deprive him of some right, because of an error of an officer in issuing the writ, to which the plaintiff did not contribute." Freeman on Executions, *supra*.

[2] Plaintiffs in the motion submit that the circuit court at the least should have amended the writ so as to exclude the item

as to which objection is made. If the taxation had pertained to a judgment of the circuit court, such amendment could have been made by that court. On the motion to quash, the circuit court could have done what would have merely amounted to a re-taxation of costs recovered in that court. But did not the circuit court properly dismiss the motion to quash without amending the writ since the execution was in direct accord with the taxation made in the appellate court? Clearly so, we hold: The circuit court had no authority to do that which would retax the costs recovered in the Supreme Court of Appeals. It could only follow the mandate and taxation that came down to it. No statute gives it any other power. Surely an inferior court is warranted in honoring as correct and legal a taxation of costs made in a superior court wherein those costs are recovered.

[3] The jurisdiction to retax costs belongs to the court in which they are recovered and originally taxed. "Proceedings to retax must as a general rule be heard before the court of which the clerk who taxed the costs is an officer." 11 Cyc. 160. These complaining parties have a clear remedy by which to eliminate the item of expense for the bond, if it is not legal. They may apply to the Supreme Court of Appeals for a re-taxation of the costs. Armed with a re-taxation made by the appellate court and certified to the circuit court, they will be able readily to have the writ amended. No other course would be regular. The item for the expense of the bond, if taxable anywhere, is taxable in the Supreme Court of Appeals, for that item of costs was incurred in a suit or proceeding pending in that court. It was incurred there on an appeal and supersedeas. The bond pertains to the proceedings above. The expense of the bond was incurred by reason of the appellate proceedings. It must be taxed as costs thereof, for it can only be recovered as appellate costs. The fact that the bond is given and filed in the office of the clerk of the court below does not change the relation that this expense bears to the appellate proceedings. If we must permit the re-taxation of such an item in another court, then we must permit the re-taxation of all other items of appellate costs there. The costs due the clerk of the court of last resort, the expense of orders of publication made in that court at the capital, the expense of printing records, and many other appellate charges, may be called into question in distant parts of the state before tribunals which do not have on file the original proofs warranting those charges. Orderly and satisfactory procedure demands that the taxation of the costs of a suit be called into question in the court in which those costs were incurred.

[4] Other courts have dealt with the question which this case presents. An inferior

appellate court in Missouri held: "A motion to retax costs will not be entertained where the costs have been taxed in accordance with the mandate of the supreme court." *Ames v. Scudder*, 20 Mo. App. 64. The Supreme Court of Louisiana denied that there was jurisdiction in the inferior court in relation to the amount of costs recovered above. *State ex rel. Johnson v. Judges*, 107 La. 69, 31 South. 645. One of the points held in that case may be fittingly quoted here: "The judgment is intended to embrace within its terms all questions regarding costs. If, for any reason, there remains an undecided question regarding the costs, after the decision has been rendered, and a question of interpretation or construction arises, the court by which the judgment was rendered, is the court of competent jurisdiction." The same rule is elsewhere expressed as follows: "If for any reason there remains an undecided question regarding costs after decision on appeal, the court by which the judgment is rendered is the court to determine it." 11 Cyc. 161.

The order overruling the motion to quash the execution is not erroneous. It will be affirmed.

WILLIAMS, J. (concurring). I concur in the decision for the reason that no motion to retax the costs had been made, and overruled. Assuming, for the sake of argument only, that the premium on the appeal bond was an improper taxation of costs by the clerk of this court, I do not believe there is any power in this court to correct such erroneous taxation after the mandate has been certified to the court below. Jurisdiction over the case has then passed from this court. If the clerk's taxation of costs, made pursuant to a judgment of this court carrying costs, becomes a part of the judgment itself, it cannot be corrected here or in any other court after it has become final. *Beecher v. Foster*, 66 W. Va. 453, 66 S. E. 643; *Johnson v. Gould*, 62 W. Va. 599, 59 S. E. 611; and *Henry v. Davis*, 13 W. Va. 230. On the other hand, if the taxation is not a part of the judgment itself, it is the ministerial act of the clerk and may be corrected on motion, after due notice, in the court from which the execution issued. This court has no power to enforce its judgments, on appeals, by execution. Its judgments and decrees become, in effect, judgments and decrees of the lower court, and are enforced by execution thereon as if there had been no appeal. Code 1906, c. 135, § 29. The majority opinion would establish a rule requiring the execution debtor to apply, in the first place, to this court for a retaxation of the costs, and then return to the lower court to have the execution corrected accordingly. To my mind this appears to be an unnecessarily circuitous performance,

and in cases where the judgments of this court had become final, which is generally the case even before the taxation of costs has been made by the clerk of this court, would amount to a denial of relief. Our statute, in respect to the effect to be given to the judgments and decrees of this court, on appeals, is peculiar. For this reason the text cited from Cyc. is inapplicable here. By reference to the decisions which the author cites in support of the text, I find that those of them that present conditions which are at all analogous to the case we are deciding, are from states wherein the appellate courts are vested with the power by statutes to enforce their own judgments and decrees. In the Louisiana case, cited by Judge **ROBINSON**, that court, in its opinion, says: "It is Code law that primarily the inferior, and by appeal the appellate, court shall determine the manner of the execution of the judgments which they have rendered, when the proper manner of executing them is to be determined." The subject of costs is purely statutory, and there are no common-law precedents for the procedure in relation thereto. We should establish a rule in conformity with our own statute and in aid of justice. It is consistent with both justice and reason that the lower court should be allowed to entertain a motion to correct a taxation of costs made by the clerk of this court, as preliminary to passing upon the validity of an execution issued by the lower court, when the taxation of costs was not specifically directed by the order of this court.

(70 W. Va. 306)

DEMAIN v. HUSTON et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 327*)—ACTION FOR DISSOLUTION—PLEADING—REPLY.

An answer to a bill for dissolution of a copartnership, claiming a larger share in the firm than the bill admits, not merely a large value of an admitted share, is in substance and effect a cross-bill, to which a special reply may properly be filed.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 774; Dec. Dig. § 327.*]

2. PARTNERSHIP (§ 76*)—SHARE IN PROFITS—PRESUMPTIONS.

Persons entering into a copartnership relation without an agreement as to their respective interests in the firm are presumptively equal partners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 124; Dec. Dig. § 76.*]

3. PARTNERSHIP (§ 53*)—EXISTENCE—SUFFICIENCY OF EVIDENCE.

Omission of the name of one of the members of a firm from affidavits made and deeds executed and accepted by other members thereof, purporting to name all the members, do not as evidence prevail over constant and uniform recognition in other respects of the member-

ship of the omitted person, on an issue as to whether he is a member and the extent of his interest.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 76; Dec. Dig. § 53.*]

Robinson, J., dissenting.

Appeal from Circuit Court, Monongalia County.

Bill in equity by Robert Henry Demain against Chauncey W. Huston and others. From a decree for complainant, defendants appeal. Affirmed in part, and reversed in part and remanded.

Donley & Hatfield and Wm. S. John, for appellants. Moreland, Moreland & Guy and Cox & Baker, for appellees.

POFFENBARGER, J. In this suit to determine the rights of the members of a copartnership, settle the accounts and dissolve it, brought by Robert Henry Demain, what interests or shares he and the other members have is the important question. Claiming a one half interest and conceding the other half to Chauncey W. Huston, he brought the suit against him alone. After the entry by agreement of an order of reference, Huston filed an answer, asserting membership of his father, Samuel P. Huston, in the firm and ownership of a one-third interest therein on the part of his father and another third on the part of himself, and conceding the remaining third to the plaintiff. A general and special replication was filed to this answer. At or about the same time Demain filed an amended bill to which Samuel P. Huston was made a party, and in which he still claimed a one-half interest, conceding that originally the firm had consisted of himself and Samuel P. Huston, and that subsequently Chauncey W. Huston had been admitted into it, but denying any abatement of his own half interest on the admission of Chauncey W. Huston. The matter contained in this amended bill is substantially the same as that set forth in the special replication. To this bill, the two defendants filed a joint and separate answer. This was also replied to generally and specially. In these pleadings the entire history of the transactions of the parties is set forth, and the issue already stated raised, upon which a considerable amount of evidence was taken and filed, and the court entered a decree, declaring Demain entitled to a one-half interest and the two defendants to a one-fourth interest each. From it the latter have appealed.

[1] The overruling of motions to strike out the special replications to the answers is assigned as error upon the theory that the answers are not in effect cross-bills, praying affirmative relief. As they assert a larger interest in the firm on the part of the defendants than the bills admit, we are of the opinion that they are, in effect, cross-bills

in so far as they claim such larger interests and aver facts in support of the claim. We are not unmindful of the general rule that, in the settlement of partnership accounts, the rights of the parties may be adjusted and settled on the allegations of the bill, but ordinarily there is no controversy as to the interests of the parties. Here the bill does not admit certain averments of fact upon which the defendants found their claims. On the contrary, it denies their claim to two-thirds of the assets, after the payment of debts, and the allegations upon which that claim rests. The answers demand something the bill does not admit. It stands upon the averments of the answer, and not upon the allegations of the bill. Hence, we think the case is not within the general rule and the special replications were necessary.

Review of the decree complained of necessitates consideration of the following material facts: About the year 1879 a copartnership was formed by Samuel P. Huston and Robert H. Demain for the purpose of doing business as carpenters and builders, and continued until about March 1, 1888. The business of the firm was neither heavy nor extensive. It consisted largely of work charged and paid for by the day and the cost of materials furnished by them, and the income and profits were, for the most part, divided equally between the members as collections were made. There was, however, an accumulation of some firm property. They had a shop and some small pieces of real estate. According to the testimony of the two defendants, Chauncey W. Huston, the son of Samuel P. Huston, was taken into the firm on the 1st day of March, 1888. Demain is not positive as to the date. He says it was about 1888-90 or 91, or within a year or two of 1890. As to the terms on which he was taken in there is controversy; he and his father testifying positively to an express agreement that the three members of the firm were to have equal interests, and Demain denying such an agreement, and saying he admitted the son at the request of the father, without making any agreement with either of them as to what interest he should have. His theory seems to be that Samuel P. Huston took his son into the firm upon some agreement between them of which he had no knowledge. An expression used by Samuel P. Huston in his testimony is relied upon as an admission of an agreement in accord with the theory of the decree, but, reading it in connection with its context, we do not so interpret it. In other places he swears positively to an agreement to a copartnership with equal third interests. The new firm has never been dissolved, but it has done very little business, if any, since about the year 1903. On the admission of the new member, they did a larger business, taking contracts for buildings and struc-

tures of various kinds, and the firm prospered. Chauncey W. Huston had sole charge of the books, contracts, collections, and bank accounts, and seems to have made all important estimates, purchased materials, and superintended the business generally. Some of the earnings of the firm were invested in real estate which rapidly grew in value, and yielded considerable profits. Demain had the outside management of the structural work, such as getting materials upon the grounds and superintending the employees in their work. Samuel P. Huston worked in their carpenter shop and in the mills from which they procured finished lumber and materials. He had practically nothing to do with the general management of the business, and his name was dropped out of its documentary and contractual business transactions with third parties. Mechanic's liens were taken in which the affidavits to the accounts, made by Chauncey W. Huston, stated the firm consisted of himself and Robert Henry Demain. On one occasion he made an affidavit for a continuance in an action against the firm in which he stated it consisted of himself and Demain. Some deeds for real estate were made to him and Demain as constituting the firm, and others were executed by himself and Demain as the only members of the firm. The record shows one deed executed by all three, describing themselves as partners. Demain and Chauncey W. Huston seem to have been severally engaged in real estate speculations on their individual accounts as well as in the firm name, and to have drawn considerable sums of money from the firm for that and other purposes. Samuel P. Huston, less active and energetic, seems to have required and drawn much smaller amounts, only about \$300 a year, according to the testimony of the son. The record does not disclose in detail nor approximately how much any of them drew from the firm. The books, though demanded by Demain, have not been produced, and the record shows no application for any order from the court to compel him to produce them.

[3] The circuit court rightly found, upon uncontradicted facts disclosed by the evidence, that the firm consisted of three members. Samuel P. Huston was an original member, and did not wholly cease from active participation in the business. He was an equal owner with Demain in such property as the firm had at the time of the admission of his son. He afterwards contributed labor with the knowledge and consent of the other members of the firm, and drew money from it. Recognition of his membership was wholly undisputed and uniform during the whole period of the actual business career of the firm. That his name was dropped out of its transactions with third persons is neither conclusive against him, nor very significant. *Setzer v. Beale*, 19 W. Va. 274. Though an actual contract

or agreement of copartnership among the members of the firm is essential to the existence of the relation, it need not be in any particular form. It may be verbal as well as written and inferred from conduct when not expressed in terms. *Setzer v. Beale*, cited. The omission of Samuel P. Huston's name by his copartners from affidavits, deeds, and other documents is not sufficient to overcome the force and effect of the acts and conduct of the parties in relation to their business. *Setzer v. Beale*, cited.

[2] After the admission of Chauncey W. Huston into the firm, it consisted of three members, and, in the absence of an agreement to the contrary, they were presumptively equal partners. *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S. E. 124; *Clark v. Emery*, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503; *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018. In our opinion the evidence does not overthrow this presumption. There was either no agreement as to the relative interests of the partners or there was an agreement for equal interests, if we are governed by the testimony of the parties as to what took place at the inception of the copartnership relation, and each of these theories conforms to the presumption. Most of the other evidence relied upon by the appellee tends to prove the firm consisted of only two members, a theory it does not suffice to establish. Moreover, this is not consistent, for we find one deed in which all three of the parties united, describing themselves as partners, constituting the firm of Huston & Demain. The proceeds of sale of one piece of firm real estate were equally divided between Chauncey W. Huston and Demain, but this transaction is not shown to have been part of a settlement of the firm accounts or distribution of profits. It is perfectly consistent with the theory of drafts by these members upon the firm assets, and there is evidence tending to show Demain needed at the time just about the amount he so received. All agree that there never has been a settlement or formal distribution of profits among them. The principal facts and circumstances are in agreement with the legal presumption. Chauncey W. Huston seems to have been the most important and valuable man in the firm. He alone had the capacity to keep the books and make estimates for large contracts. Demain had charge of the outside work as he had formerly had it. Samuel P. Huston continued in charge of the shop and millwork. The duties and services of the two old members of the firm were in the new firm about what they had been in the old, when no bookkeeping or estimating of any consequence was necessary. Young Huston came in and performed duties for the new firm essential to its augmented business and larger undertakings, which had not previously been done,

and which neither of the original members had the capacity to do. It is hardly conceivable that this man of far greater business capacity than Demain should give the firm 15 years of his services with the expectation of realizing only half as much as Demain, or that his father gave that period of service for his "board and clothes," and these to be a charge upon his son's interest and reduce it below Demain's.

The order of reference entered by consent on the original bill, in advance of the filing of the answer thereto, was not an irrevocable adjudication of the rights of the parties, if any at all. It does not expressly declare or even recite their respective interests, and any implication arising from the reference is overcome by express reservation of leave to answer and make full defense. Again, the decree was rendered in the absence of a necessary party.

Though we always hold in highest esteem the opinion of the learned judge who rendered the decision, we are unable to adopt his conclusion, and must reverse the decree, in so far as it determines the interests of the parties, and here adjudge, order, and decree that Robert Henry Demain, Samuel P. Huston, and Chauncey W. Huston constitute the firm of Huston & Demain, and have equal interests therein, one-third each. In all other respects the decree will be affirmed, and the cause remanded.

ROBINSON, J., dissents.

(70 W. Va. 280)

BASSFORD v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Appeals of West Virginia. Feb. 6, 1912.)

(Syllabus by the Court.)

RAILROADS (§ 330*)—INJURY AT CROSSING — CONTRIBUTORY NEGLIGENCE.

It is negligence for a pedestrian at a crossing to step in front of an approaching train when the train is in full view and so near that no prudent man would undertake to cross, notwithstanding those in charge of the train may be negligent in running at an excessive speed or in failing to give signals. No recovery can be had for injury received under such circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.*]

Error to Circuit Court, Brooke County.

Action by Crawford Bassford, administrator, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. O. Hertzler and J. C. Palmer, for plaintiff in error. J. B. Sommerville, for defendant in error.

ROBINSON, J. Plaintiff's decedent was killed by a train of the defendant company

at a railroad crossing on one of the streets in Wellsburg. The action is for the recovery of damages on the ground of alleged negligence in running the train so as to cause the loss of life. At the trial, the court sustained defendant's motion to exclude the evidence offered by plaintiff, as being insufficient to maintain the issue on his part, and directed a verdict for defendant. Plaintiff insists that the evidence introduced by him warranted the submission of the case to the jury. He seeks a reversal and a new trial.

There is no error. The case is ruled by principles enunciated in *Riedel v. Traction Co.*, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123. The evidence was properly excluded. It proved that plaintiff's decedent came to his death by his own contributory negligence. Two minds cannot reach different conclusions on the facts proved in this particular. The act of the unfortunate young man in stepping on the track at one side of the crossing when the engine was already at the other side of the crossing was unquestionably contributory negligence. He could have seen the train if he had looked before stepping on the track. There was nothing to obstruct his full view of the train as he approached the track. His faculties of sense were good. Others, from positions no better than his, saw the train approaching. Its bright headlight was clearly discernible. The evidence is conclusive that he either failed to look or assumed a deadly risk in attempting to cross the track in front of the train. There is no conflict of evidence in this regard. Decedent negligently attempted to cross the track when the train in plain view was so near him that no prudent man would have taken the risk. If the jury had found a verdict for plaintiff, it would have been the duty of the court to set aside the same.

That those in charge of the train may have been negligent in running the train at an excessive rate of speed, or in failing to give signals, does not alter the case. No one is excusable for stepping in front of a train, though it is negligently run, when it is only a few feet away and he can plainly see it. He assumes the risk when he does. It is his duty to look and to exercise the prudence which the situation demands. Before crossing a railroad track a person should look both ways and listen for an approaching train. This duty he must perform whenever its performance is reasonably certain to avail. Generally, diversion of attention does not excuse the performance of the duty; nor does misconduct on the part of the railway company excuse that performance. *Patterson on Railway Accident Law*, § 179; *Beach on Contributory Negligence*, §§ 180, 181.

Let the judgment be affirmed.

(70 W. Va. 288)

MILLS et al. v. McLANAHAN et al.(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)*(Syllabus by the Court.)***1. SPECIFIC PERFORMANCE (§ 121*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.**

A case in which the evidence is sufficient to establish the loss, and the contents of a title bond, entitling plaintiffs to specific execution thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

2. VENDOR AND PURCHASER (§ 22*)—REQUISITES AND VALIDITY OF CONTRACT—DEFINITENESS.

The practical location of land sold by title bond, by survey and plat thereof, directed by the vendor or his authorized agent, and possession by the vendee in accordance with such survey and plat, will, as a general rule, be sufficient to give the requisite definiteness to a contract, though it may be otherwise defective.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

3. SPECIFIC PERFORMANCE (§ 121*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

A case in which the evidence, showing payment of all the purchase money, is held sufficient to establish that fact, and to entitle plaintiffs to specific execution of a contract for the sale and purchase of the land called for by the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

4. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS — NOTICE — POSSESSION OF PREMISES.

The defense of innocent purchaser is not available as a defense against one in actual possession holding under a prior equitable title, from the same vendor. The law imputes to such subsequent purchaser knowledge of all the rights which an inquiry of the purchaser in possession or those holding under him might disclose.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

5. SPECIFIC PERFORMANCE (§ 105*)—PROCEEDINGS—LACHES.

The defense of laches is not good in a suit for specific performance, against one who has held possession of the land called for, under his contract of purchase, though many years may have elapsed between the date of the contract, and possession under it, and the date of the institution of the suit.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

*(Additional Syllabus by Editorial Staff.)***6. EXECUTORS AND ADMINISTRATORS (§ 450*)—ACTIONS—EVIDENCE—ADMISSIBILITY.**

In a suit for specific performance of a contract by an administrator to sell land, a plat and survey ordered by the administrator in 1874 is not rendered inadmissible by proof that his successor had been appointed by the circuit court in 1867; the circuit court having had no probate jurisdiction at that date, and it being shown that the administrator who entered into the contract of sale acted as the agent of his successor in ordering the plat and survey,

and the successor being bound by the act of his predecessor in making the contract.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

Appeal from Circuit Court, Mercer County.

Suit by J. B. Mills and others against Johnston McLanahan and another. From a decree for plaintiffs, defendants appeal. Affirmed.

C. W. Smith, for appellants. Hale & Pendleton and Sanders & Crockett, for appellees.

MILLER, J. In the decree appealed from, the court below decreed that plaintiffs and other heirs at law of Robert Mills, deceased, were entitled to specific execution of the contract of sale of the one thousand acres of land proven to have been made in 1866, by John B. Dunlap, administrator de bonis non with the will annexed of Robert McCulloch, deceased, to said Robert Mills, and particularly described in the decree, by metes and bounds, according to a plat and survey thereof, made by Stinson, surveyor, in 1874, filed in the cause. And being of opinion that the defense of innocent purchasers set up by said defendants, Johnston McLanahan, as administrator de bonis non with the will annexed, of said Robert McCulloch, deceased, and in his own right, and by Ephemia P., Marcia P., and Emma P. Moore, in their own right and as trustees, and by Robert M. Henderson, trustee, was not sustained, and that they held the legal title to said land for the benefit of the heirs at law of said Robert Mills, and that the purchase money for said land had been fully paid, and that said heirs at law were entitled to have said land conveyed to them, the court further decreed that the said defendants as individuals and fiduciaries aforesaid, do within thirty days from the date of the decree, by apt and proper deed with covenants of special warranty of title, convey the said one thousand acres to said children and heirs at law of Robert Mills, deceased, to be held by them in such interests and proportions as the law prescribes, and deposit the same in the clerk's office of the court, and upon default thereof that the commissioner thereby appointed convey the same to them as therein directed.

Many points are raised and elaborated in the briefs and arguments of counsel; but after careful consideration thereof, and a review of the pleadings and proofs we conclude that but four questions are fairly presented, and that a proper response to these will substantially dispose of all the errors assigned and relied on by appellants.

[1] The first is, was there in fact such a contract as is alleged, describing the land sold, sufficiently accurate for identification, and as entitles plaintiffs to specific execu-

tion thereof? Though denied in the answer no serious question of the authority of Dunlap, administrator, to make the contract, is presented. The will of Robert McCulloch proven in the cause fully authorized his executor to sell and convey a tract of 35,500 acres of which the land in controversy is a part. Defendants themselves purchased from Dunlap's successor, and the title of both parties goes back to a common source.

The immediate parties to the contract are and were at the date of the suit both deceased; but the existence of a contract between them is proven by reference to it in the original receipt given by Dunlap to Mills, December 5, 1866, for four hundred dollars, reciting it as the first "payment upon a tract of land sold said Mills out of the McCulloch tract of 35,500 acres lying in the County of Mercer," and further reciting that "said tract sold is to contain one thousand acres and to be run in accordance with a contract in writing held by said Mills, executed some time in the year 1866." Besides this receipt, its existence and contents are proven with more or less accuracy, by four or five living witnesses, who saw the contract and either read it or hear it read, three of them wholly disinterested, including French, the attorney in whose hands it was placed for suit some time between 1876 and 1897, time not more definitely fixed, and by whom it was lost, Foley, for many years a nearby neighbor, and Stinson, the surveyor, employed by Dunlap in 1874 to survey out and plat the thousand acres called for in the contract. While these witnesses do not exactly agree in all the details they substantially agree as to the terms of the contract, and prove the same with such substantial and sufficient certainty as to call for its specific execution. The oral testimony as to the description of the land called for in the contract is sufficiently definite; besides the survey of the land by Stinson, surveyor, in 1874, by the direction of Dunlap, which is definite and accurate, fully identified the land surveyed on the ground, and if competent, fully identifies the land intended to be sold, and nothing more is required. This plat and survey was procured with a view to making a deed to the heirs of Mills. And Stinson proves the acknowledgment by Dunlap, at the time he employed him to make the survey, that all the purchase money had been paid by Mills.

[2] Are the plat and survey made by Stinson, objected to, legal and competent evidence? Appellants contend they are not. The evidence of Stinson is that he delivered this plat and survey to Douglass, Dunlap's attorney; and they were by some one turned over to Mrs. Mills, or the heirs of Robert Mills, and were produced by them in evidence. They claim to have held possession under and according to contract, and this plat and survey, continuously ever since. High authority is found holding that "a

practical location of the premises intended pursuant to the agreement is, in many cases, sufficient to give the requisite definiteness to a contract otherwise defective," and that "it will, as a rule, be held sufficient if the property intended to be conveyed can be identified by evidence properly admissible." 26 Am. & Eng. Enc. Law (2d Ed.) 36, citing *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565, and *Lundgreen v. Stratton*, 73 Wis. 659, 41 N. W. 1012. In *Norman v. Bennett*, 32 W. Va. 614, 9 S. E. 914, the land sold was, by direction of an agent, run off and platted by a surveyor, and this court observes: "It must be presumed, that this land was run off to said James J. Norman by Marshall about the time the agreement was made, and Norman took possession of the land then pointed out and designated by Bennett through his agent, Marshall, and after said tract of land was so laid off and accepted by James J. Norman, the survey became a part of the contract, and Norman could not claim beyond its limits."

[3] But are the plat and survey otherwise legal and competent evidence? An objection to them is that at the time Dunlap, administrator, in 1874, is proven to have ordered the survey, his powers and authority had been revoked, and his successor appointed by the Circuit Court in 1867. Three answers are replied to this proposition: First, that Dunlap's appointment was by the Recorder of the County, and that as the law then was, the Circuit Court had no probate jurisdiction; and no authority to revoke or annul letters of administration; second, that if the authority of Dunlap was legally revoked and a successor legally appointed, he continued as the agent of his successors, and claimed to have authority in the premises, and is proven by defendants by competent evidence to have been in fact the agent of McClellan, administrator, his successor, in 1874, the same year he employed Stinson to make the survey and plat of the Mills land, and that he so acted and was recognized as his agent. Strengthening the claim of agency the record shows that Dunlap became and was surety on the fiduciary bond of McClellan, his successor, appointed in 1867; third, that the successor of Dunlap, administrator, was bound by the acts of the latter while exercising his fiduciary office, and was bound to carry out and fulfill his contracts of sale, and that having through Dunlap as agent run out and platted the land he and his successors are bound for fulfillment of the contract of sale.

Much is said and many authorities cited in support of these propositions, but as we think the agency of Dunlap and his authority to have ordered and directed the survey and plat of Stinson fully established, no other reason for holding the survey and plat legal and competent evidence need be given, and we will not go into the other questions

presented. *Norman v. Bennett*, supra, we regard authority for the admissibility and competency of the survey and plat of Stinson. So we are of opinion that the contract, and its contents, have been sufficiently established and the land sold so definitely located as to entitle plaintiffs to specific execution so far as these facts have to do with the question.

[3] The next question is, has it been clearly proven that the purchase money was all paid? We think it has. The court below so found, and we can not say its finding is wrong. There are slight discrepancies in the evidence of the witnesses as to the amount of the purchase money, but none as to the fact of payment. The bill alleges, one thousand dollars as the amount of the purchase money, and that four hundred dollars thereof, evidenced by the receipt of Dunlap, administrator, had been paid; but plaintiffs were not fully advised whether the residue had been paid or not, but if not they stood ready to pay the balance, and proffered the same into court. An amended bill alleged discovery since suit brought that the entire sum had been paid, and charged the fact to be as discovered. French, the attorney who lost the contract or title bond, swears that the consideration recited in the contract was one thousand dollars, and that receipt of six hundred dollars thereof was acknowledged therein. This statement, however, is not entirely in harmony with the language of the receipt of December 5, 1866, which, as already indicated, describes the four hundred dollars paid, as the first payment; however, we have the positive evidence of Stinson, the surveyor, that Dunlap, administrator or agent, as he may be regarded, admitted to him in 1874, at the time the survey was made that the purchase money had all been paid. We regard this admission as administrator or agent, under all the facts and circumstances, legal and competent evidence. It is not likely that Mills would have paid four hundred dollars, and not paid the balance. At least defendants offer no evidence in rebuttal of the evidence of plaintiffs and we think the fact must be regarded as fully established. Moreover, the law is, that after twenty years, there is a presumption of payment. *Roush v. Griffith*, 65 W. Va. 752, 65 S. E. 168; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953; *Calwell v. Prindle*, 19 W. Va. 604, 640.

[4] The third question is, were Moore and McLanahan innocent purchasers without notice of plaintiffs rights? It is conceded that none of the papers under which plaintiffs claim were ever recorded so as to give constructive notice to subsequent purchasers. Plaintiffs rely solely on actual notice imputed to McLanahan, administrator, etc., of McCulloch, as the successor of Dunlap, and upon the fact of actual possession begun by their father Robert Mills, and by his tenants, and after his decease in 1870-72, continued

by his heirs and tenants down to the date of this suit. McLanahan deeded to Moore, July 24, 1884, according to the recitals in the deed, "the whole of the unsold land," describing it by metes and bounds, as "being the rest and residue of the tract of land belonging to the estate of Robert McCulloch, deceased." Notwithstanding these recitals in the deed, it is conceded, that the boundary described is inclusive of the thousand acres claimed by the plaintiffs, and if the defendants are innocent purchasers without notice, as they claim, they would be entitled to the land, as covered by the deed to Moore under which they claim. McLanahan, who conveyed to Moore as administrator, acquired a one half undivided interest in the tract conveyed, by deed from Moore of March 13, 1897, and it is claimed by plaintiffs that conceding Moore to have been an innocent purchaser, McLanahan, as purchaser from him, would not be protected as an innocent purchaser, with notice of their rights imputed to him, as administrator, selling and conveying the land to Moore, in 1884. But if both Moore and McLanahan were charged with notice of the plaintiffs rights by their actual possession and occupancy of the land, as is claimed, we need not trouble ourselves about the relative rights of Moore and McLanahan, due to the notice imputed to McLanahan, as administrator, successor to Dunlap.

The crucial question then is, did Robert Mills, his heirs and tenants under him, in 1884, have and hold such possession, under the contract from Dunlap, as to put the purchasers on notice of their equitable rights? The court below by its decree found that they did. After a careful review of the evidence, without taking time to recite it in detail, our conclusion is, that actual possession and occupancy of the land, first by Robert Mills and by his tenants, continued during his life, and after his decease by his son Hugh G. Mills, Jesse Monk and others. The evidence clearly establishes the fact, that there were some six several improvements upon the tract as surveyed by Stinson, designated in the record, as "Snead Place," "Clark Place," "Halstead Place," "Little John Snead Place," "Dock White Place," and "Hubbel Place." These were all occupied continuously, either actually or by cultivation and improvements, by Mills or his sons or other tenants, down to the time of the institution of this suit. One of the contentions of the appellants is, that as the evidence shows, Robert Mills, prior to his purchase of the land, in 1866, had bought out some squatter rights, and had previously occupied the land by himself or his sons, that had previously been in possession of these squatters, he cannot be said to have taken possession under his contract with Dunlap, or to have held possession by virtue thereof. We see no merit in this position. Though Mills may have purchased squatter rights, after he bought the land from Dunlap, ad-

ministrator of McCulloch, thereby recognizing the superior rights of his vendor, he must in law be regarded as having taken and as holding possession under him. According to the evidence, most, if not all of these different places or improvements were much improved by the erection of buildings, planting of orchards, clearing and cultivation, by Mills and his heirs and tenants. They were certainly sufficient to put purchasers on notice of the rights of the occupants.

McLanahan professes to have gone over the land on several occasions before his sale to Moore, in 1884. Moore does not profess to have been upon the land, indeed his deposition does not seem to have been taken in the cause. The deed to him shows him to have been a resident of Pennsylvania. If either Moore or McLanahan had gone upon the land and made inquiry of Hugh G. Mills, Jesse Monk, or of any of the other occupants of the land, such inquiries would undoubtedly have led to a full disclosure of the rights under which this land was occupied, by Mills, his heirs and tenants. The law not only imposes the duty upon a purchaser to make such investigation, but imputes to him notice of all facts which such inquiry would have disclosed, and of all the rights of those in possession, depriving him of the defense of an innocent purchaser. *Frame v. Frame*, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323; *Ellison v. Torpin*, 44 W. Va. 414, 436, 440, 442, 30 S. E. 183; *Weekly v. Hardesty*, 48 W. Va. 39, 44, 35 S. E. 880; *Marshall v. Hall*, 51 W. Va. 569, 577, 578, 580, 42 S. E. 641; *Nutter v. Brown*, 51 W. Va. 603, 42 S. E. 661, and other cases, digested in 13 Cyc. Dig. Va. & W. Va. Reports, 598.

[5] The fourth and last question is, are plaintiffs barred by laches, or lapse of time. Our decisions say no. They hold that the defense of laches will not avail a defendant in a suit for specific performance of a contract, where the vendee, his heirs or assigns, are in possession, acquired under the contract, though many years may have elapsed between the date of the contract and the time of the suit for specific performance. The following authorities affirm the proposition, as well as illustrate its application: *Marling v. Marling*, 9 W. Va. 79, 99, 27 Am. Rep. 535; *Abbott v. L'Homedieu*, 10 W. Va. 678, 711, 712; *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Norman v. Bennett*, supra; *Weekly v. Hardesty*, supra; *Nutter v. Brown*, supra; *Ratliff v. Sommers*, 55 W. Va. 30, 44, 46 S. E. 712, 1 Ann. Cas. 970; 2 *Minor's Inst.* (4th Ed.) 892, 893; 18 Am. & Eng. Ency. Law, 125; 2 *Lomax Dig.* 103; *Fry on Specific Performance*, 530, 531; 23 Am. & Eng. Ency. Law, 498, 516, 523; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728.

Perceiving no error in the decree we must affirm it, with costs to the appellees incurred in this court.

(70 W. Va. 296)

ARNETT et al. v. FAIRMONT TRUST CO.
et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912.)

(Syllabus by the Court.)

1. CHARITIES (§ 22*)—BEQUESTS—INDEFINITENESS.

Bequests by a testatrix, one of \$40,000, to trustees named, "to be placed and used to the very best of said parties knowledge in helping the poor those who are deserving, in lifting young men up and helping the work along in putting down intoxicants drinks and saving souls. Let this money be used in the way God may direct for His cause;" the other of "\$10,000 to be placed in the Baptist Church to be used for Lord's work in the way he may direct," are void for uncertainty.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 51-56; Dec. Dig. § 22.*]

2. WILLS (§ 512*)—CONSTRUCTION—RESIDUARY DEVISE.

The residuary clause of the will of the testatrix, containing said void bequests, is: "If any money left after distribution let it be returned to the estate of C. W. Arnett." The money bequeathed by the testatrix had all been derived by her through the executor of the will of her husband, C. W. Arnett, by her act of renunciation. Under the proof, said residuary clause is valid, and by proper construction means: If any money is left, after distribution, let it be returned to the executor of the will of C. W. Arnett, deceased, and go and be distributed as a part of his estate and as directed by his will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1074, 1075; Dec. Dig. § 512.*]

Robinson and Williams, JJ., dissenting.

Appeal from Circuit Court, Marion County.

Bill by Glenn J. Arnett and others against the Fairmont Trust Company and others. Decree for plaintiffs, and defendants appeal. Affirmed in part, and reversed in part.

George M. Alexander and Charles Powell, for appellants. W. S. Meredith, for appellees Arnett. William S. Haymond, for appellees Ogden and others.

MILLER, J. On July 8, 1907, Mrs. C. W. Arnett, by an instrument, wholly in her own handwriting, undertook to make a testamentary disposition of her property, as follows:

"Should I not live I place in the hands of my two brothers, Dr.'s W. C. Jamison and J. A. Jamison and Rev. W. J. Eddy the sum of \$40,000 dollars (or if one or more of said parties should not be living that the Trust Company select two Christian men in place of absent one) to be placed and used to the very best of said parties knowledge in helping the poor those who are deserving, in lifting young men up and helping the work along in putting down intoxicants drinks

and saving souls. Let this money be used in the way God may direct for His cause.

"To my sister Lou John I give \$3,000 my brother Pierce L. Jamison \$1,000 my sister Ellen Fear \$2,000 my brother David Lee Jamison \$1,000 \$1,000 to Mrs. Rie Arnett. Let her use all that may be needed to make her daughter Ora comfortable.

"Continued July 8th, 1907.

"\$3,000 I put into the hands of my brother, Doctor W. C. Jamison or should he not be living let the Trust Company select a true competent man. the money to be used for my son Glenn J. Arnett if at any time he may be in need of help but in no way or at any time to be instrumental the use of said money in causing him to do wrong. But should he prove worthy, and live right let the money be used in helping him in business or in any way right.

"\$50.00/00 fifty dollars I place for an office desk my son Glenn J. Arnett.

"\$125.00/00 for the best Type writer.

"\$1,000 to be used in buying a home for Miss Dora Bell Arnett and to make her comfortable.

"\$10,000 to be placed in the Baptist Church to be used for Lord's work in the way he may direct.

"If any money left after distribution let it be return to the estate of C. W. Arnett."

The plaintiff, Glenn J. Arnett, son of the testatrix, and for whom provision is made in the will, charges in his bill that the purported bequests, of \$40,000 in the first clause, and of \$10,000 to the Baptist Church, in the next to the last clause, as well as the last or residuary clause, providing, that "If any money left after distribution let it be return to the estate of C. W. Arnett," are each wholly void for uncertainty. He professes his willingness, however, that the Baptist Church, to whom \$10,000 is given, should be paid, not the full amount, but a ratable proportion of the net amount of the estate, alleging that the estate is not sufficient to pay all bequests in full.

It is charged, among other things, that as to said \$40,000, and \$10,000 bequests, the testatrix died intestate, and that plaintiff as her sole heir at law is entitled to the whole amount thereof.

The Fairmont Trust Company, administrator with the will annexed of the estate of said testatrix, and as executor of the estate of C. W. Arnett, deceased, with others, is made a defendant. An injunction is prayed for restraining the payment of said legacy of \$40,000; and there is also a prayer for an accounting; for a decree for the money found due plaintiff on settlement, and for general relief.

We think the bill is good on demurrer, and that the demurrer was properly overruled.

The Fairmont Trust Company in its an-

swer, as administrator with the will annexed of said testatrix, admits that the two bequests of \$40,000 and \$10,000 respectively, and the last or residuary clause, are all very indefinite, and that it is unable to administer the estate without a construction of the will, and the advice of the court. In its answer and cross bill, as executor of the will of said Calvin W. Arnett, deceased, said company admits and charges the invalidity of the bequests, \$40,000 and \$10,000, and prays that they be so declared. But it denies that the last or residuary clause is invalid; on the contrary it charges the same to be legal and valid, and competent to carry the whole of the estate of said testatrix, not legally disposed of by her will, back into the estate of said testator, from which it was derived by her, by her act in renouncing his will, and it prays for that relief.

On this appeal, by Marguerite Wilcox (late Arnett) and by the Fairmont Trust Company, in both its fiduciary capacities, two questions are presented, first, whether the court below erred in its final decree, in adjudging on bill and cross bills, the bequests of \$40,000 and of \$10,000 respectively, to be void; second, whether the court erred in decreeing also said last or residuary clause to be also void for uncertainty.

[1] Clearly the two bequests of \$40,000 and \$10,000 are void for uncertainty. This is practically conceded. The main contention is as to the last or so called residuary clause. Is it also void, or is it competent to carry the money covered by the invalid bequests back into the estate of C. W. Arnett? Section 13, chapter 77, Code 1906, relating to wills provides: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will; and if there be no residuary devise therein, such real estate or interest shall go to the heirs-at-law of the testator, as if he had died intestate."

The clause in question is in form clearly a residuary clause, but if it be also void for uncertainty, as it is claimed it is, and as the court below decreed, there is no error in the decree; otherwise there is, and for which it must be reversed. The language is: "If any money left after distribution let it be return to the estate of C. W. Arnett."

It is evident from the language used, that to sustain the clause as a valid disposition of property, we must be able, under recognized rules of construction, to interpret the words "estate of C. W. Arnett," as definitely referring to the executor of the will of C. W. Arnett, deceased, and also to interpolate after them these words, or their equivalent, "to be taken, held and administered as a part of his estate and according to the terms and provisions of his will." If the intention

of the testator be clear, well recognized rules of construction permit courts to supply and interpolate words, and even to fix the sense of ambiguous words. It is well settled, that in the disposition of property by will, the subject and object of a devise or bequest must be definite and certain. 4 Minor, Inst. 96; Pack v. Shanklin, 43 W. Va. 304, 27 S. E. 389. In the application of these rules, however, the decisions are not all in harmony. In this case do the words of the residuary clause indicate with reasonable certainty a person capable of taking the bequest? The rules require us to gather the meaning and intent from the whole will. Can we say with any certainty that by the words "estate of C. W. Arnett," the testatrix meant executor of the will of said decedent, and that the property should go and be administered in the same way in which his property is directed to go? We observe in the residuary clause, the words "return to" immediately preceding the words quoted, plainly implying that the money bequeathed had at some time been a part of that estate, else it could not be returned to it. May we not say with reasonable certainty that as the evidence shows her husband left a will, and the will is produced in evidence, and as it is shown she obtained the money disposed of in her will, from the executor of her husband's will, by renouncing the provision thereof in her favor, that by directing the residue of her estate thus acquired to be returned to his estate she meant to say to his executor, and through the same channel it had come to her, and to go as by his will it was originally intended to go. We think we may safely infer this to have been her intent, but are the words employed susceptible of that interpretation? We know by reference to a copy of her answer filed in another suit, brought by said company as executor, to construe the will of her husband, and vouched with the answer and cross bill of said company in this suit, that, except as to the amount of the annual allowance provided for her therein, she was fully satisfied with his will, and expressed her desire, if a larger annual allowance was provided for her, that the residue of his estate should go as directed by his will.

Let us refer to some authorities bearing on the question. In an old English book, Hawkins on Wills, cited by the Court of Errors and Appeals of New Jersey, in Halsey v. Paterson, 37 N. J. Eq. 445, 448, it is laid down as a rule that a bequest of personal estate to the "representatives," or "legal," or "personal" or "legal personal representatives" of any one, means prima facie executors or administrators. By the will of the testatrix in that case, after certain specific bequests, by the fourth clause, she gave all the rest and residue of whatever kind and nature, which she owned or was possessed of, prior to the death of her husband, to four persons, to be equally divided

among them. She next gave all the property and estate which might have been devised or bequeathed to her by the will of her late husband, "to his legal representatives." It was held that by the gift to her husband's "legal representatives" she had intended a gift to his executors. In another case, of Long v. Watkinson, 17 Beaven, 471, the testator by his will, directed his executors to pay the residue and remainder of his estate and effects to his sister, with this proviso: "But, in case of my said sister's death, my instructions are then to pay over all the residue and remainder of my estate and effects to the executors or executrixes which my said sister, Mrs. Mary Fowler, may appoint." His sister died a few days before the testator, leaving Mary Long her sole executrix, and Isabella Watkinson, her sole residuary legatee. After citing some prior decisions the Master of the Rolls held, that the true interpretation of his will was, that his residuary estate was to go to the executrix of his sister, though she died before him, to be administered by her as a part of her estate. In 2 Redfield on Wills (2d Ed.) 409, the author, after citing some cases, observes: "But after some dissent, it seems now finally settled, both by decisions of the English courts, and finally by statute, that unless a contrary intention appear by the context, whatever is bequeathed to the executors or administrators vests in them, as a part of the personal estate of the testator or intestate." And in the following section this author says: "And it seems that bequests to the executors, &c. of any person, will make the estate a portion of the estate of such person in the fullest sense, so that it will be subject to the disposition of the will of such person, notwithstanding such person may die before the testator."

In Webb v. Den, 17 How. 576, 15 L. Ed. 35, the terms of a deed were under construction. It contained no words of give, grant, bargain and sell, and so forth, but only "a release and quit claim forever, unto the legatees and devisees of Anthony Bledsoe, deceased." The will of Bledsoe was in evidence. The objection to the deed was, that it had no effective words of grant in fee, and neither stated a consideration nor sufficiently described the grantees. The court held, that the deed necessarily referred to the will, to ascertain the persons who were such "legatees and devisees," and thus far incorporated it, and that it contained therefore a sufficient description of the grantees.

We understand counsel for the appellees to practically concede that if in place of the words used, by the testator, she had said "let it be returned to the executor of the estate of C. W. Arnett," the effect of the bequest of the residuum of her estate, would have been to put it back into the estate of her husband, to be distributed as a part of his estate. His position furthermore is that as the will of the testator, though in

evidence, is nowhere referred to in the will of the testatrix, the former cannot be looked to to render certain the bequest of the testatrix, or to determine to whom the residuum of her estate is to go, or how to be distributed. Besides the general rules which counsel invoke, as to the certainty and definiteness of the subjects and objects required in a devise or bequest, he relies upon *Clinton v. Hope Insurance Co.*, 45 N. Y. 455, 461, and *Simmons v. Spratt*, 20 Fla. 495, 505. The Florida case was an ejectment suit. The deed involved was that of the executors of one I. D. Hart. The executors by it, "sets apart, distributes and conveys unto the estate of Daniel W. Hart," a certain lot. The court in that case observes: "The question is, does a deed of conveyance by the executors of I. D. Hart, who, under his will and an order of the court, are authorized to distribute I. D. Hart's estate, conveying and setting apart this lot to the estate of Daniel W. Hart, vest such title in the devisee of Daniel W. Hart who alone under the terms of his will could acquire it as would enable such devisee to maintain ejectment?" The Florida court thought in that case that the description of the grantee, "the estate of Daniel W. Hart" in the deed, was too vague and uncertain to constitute a good grant at law, and observed: "Here there is no grantee by name or otherwise, and no reference to the will of D. W. Hart is made." No authorities are cited by the court for this conclusion; but it is admitted that there are some cases, which make such a deed effective to pass title to the administrator, where he takes the title of the intestate, but the court did not think that a parallel case. It is then observed: "The greatest extent to which the courts have gone in the matter of ascertaining the grantees in an uncertain deed is to permit extraneous evidence to be given to ascertain to whom such description is meant to apply when such evidence can explain the plain uncertainty, but at the same time accomplish a manifest intention." By way of illustration the court cites *Webb v. Den*, supra, where the deed was to the "legatees and devisees of the late Anthony Bledsoe." This language, says the court, necessarily restricted the grantees to such persons as took under the will. The court places its decision mainly upon the ground, that the deed was without the most remote reference to the will of Daniel W. Hart, or anything by which it could be contended that his niece, Mrs. Dearing, was the grantee intended.

The case of *Clinton v. Hope Insurance Co.*, supra, was an action upon a fire insurance policy, insuring the "estate of Daniel Ross." The property insured was destroyed by fire pending negotiations for the sale and conveyance of it by the parties who owned it when the policy was issued, but after the vendee had gone into possession. After the fire a new contract was

entered into between the same parties, the vendee purchasing the real estate and claims for insurance, and taking a deed. It was held, that the vendee by the first contract acquired no title to the property, and that by his second contract the claims to cover the amount insured were not extinguished; that the destruction of the property which fixed the liability of insurance, at the same time discharged the vendee from his obligation to purchase; and therefore, that the insurers could not be subrogated to that obligation to the extent of their liability for insurance. In the body of the opinion the court says: "The person or persons to be insured are not named in the policy, nor is this essential to the validity of the contract of insurance."

"If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to, to ascertain the meaning of the contract; and when thus ascertained, it will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it who were in the mind of the parties when the contract was made. (1 Phil. on Ins. 163; *Colpoys v. Colpoys*, Jacob., 451; *Burrows v. Turner*, 24 Wend. [N. Y.] 277 [35 Am. Dec. 622]; *Davis v. Boardman*, 12 Mass. 80; *Newson's Adm'rs v. Douglass*, 7 H. & John. [Md.] 417 [16 Am. Dec. 317].)"

We do not say, or mean to be understood as saying that the rule applicable in an action upon a policy of insurance, laid down in the New York case, is applicable to the full extent in cases involving the construction of wills; but if a policy of insurance in favor of the "estate" of one named is not void for uncertainty, and may be rendered certain by extrinsic evidence, why on like principle, may not extrinsic evidence be employed to render certain who was in the mind of the testator when employing similar language to describe the object or objects of her bounty? Of course there is a distinction to be recognized between the words of a will and of a contract inter partes. If, however, the object of a testator's bounty can by extrinsic evidence, and without doing violence to the language of the will, be definitely ascertained, what reason can be assigned against its admission? The New York case was cited by counsel for appellees, for the proposition that "the estate of R.," in the policy, did not have a definite legal significance, "meaning R.'s administrator."

Though the language of the will here is not as clear as might be desired, in manifesting the intentions of the testatrix, yet we think it bears evidence on its face of a clear intent and purpose, on the part of the testatrix, that the plaintiff, her son, for

whom the father in his will, had made an elaborate "spendthrift" provision, well known to and understood by her when she made her will, should take nothing under her will, except as specifically provided. In making the small provision for him, and in attempting to dispose of the bulk of her estate, so derived, to religious and charitable uses, she evidently intended that he should look for his main support to the will of his father, and the estate devised to him therein, and subject to the terms and conditions thereof, wisely made. Therefore, the main provisions of her will having failed because of uncertainty, justice demands, that we should give such construction to the residuary clause thereof as will clearly effectuate the intent and purpose of the testatrix, if we can find legal justification for so doing. It is just and right, her bequests having failed for uncertainty, that the money covered by the void bequests, should by the residuary clause of her will, go back into the estate of her husband to be disposed of as his will had directed.

[2] We are of opinion, therefore, taking the will of the testatrix by its four corners, that the words of the residuary clause, "let it be return to the estate of C. W. Arnett," means to the executors of the will of said C. W. Arnett, deceased, to go and be distributed as, by the terms of his will, his estate is directed to be distributed to his legatees. We think the principles of the authorities cited justify this conclusion.

Our opinion, therefore, is to reverse so much of the decree appealed from as adjudges said residuary clause invalid; and gives decree in favor of P. B. Ogden and others, trustees of the Baptist Church, for \$10,000, as provided therein. In other particulars the decree will be affirmed.

ROBINSON, J., dissents.

WILLIAMS, J. I dissent for the reason that I believe the residuary clause is void for uncertainty. Testatrix bequeathed the residue of her estate to the "estate" of her husband, who was then dead. An *estate* is not a person, either natural or artificial; nor can the word be properly construed, in my opinion, to mean a person. It means the quality of interest in property, or property rights. It is a thing as much incapable of taking and holding property, either by deed or will, as it is of taking by inheritance, or of disposing of property. What right has the court to say that testatrix meant her husband's executors, by the use of the word "estate," and that they were to take, not absolutely, but in their official or representative capacity? None, whatever, as I see it. Testatrix made no reference to her husband's will, and yet the majority opinion

holds that she disposed of her property in the manner in which her husband had disposed of his! But suppose he had not made a will, and the bequest had been made, as it is now, to his estate, would the word "estate" then have meant his administrator, or would it have meant his distributees? Would it have been liable for the husband's debts? Unquestionably it would have been liable for testatrix's own debts, but would it have become liable for the debts of both estates? The fact that testatrix acquired the property by renunciation of her husband's will can not aid in the interpretation of her will. The property was then her own, and no longer subject to her husband's will. It was as if he had never owned it. If she had bequeathed it to her husband's executors, to be administered by them according to the terms of her husband's will, it would have been a valid will, such as this court, by its majority opinion, has made for her. But, she not having referred to her husband's will herself, what right has the court to do so, in order to supply something vitally important to give effect to her own will? There is no latent ambiguity, to give the right to resort to extrinsic evidence to determine the meaning of her words. The will must be determined from the words she used. It cannot be inferred from extrinsic circumstances. It is not possible to interpret her will without reading her husband's will in connection with it, and his will is no part of her will. I think the unconscious desire of the majority of the court to do what they have conceived to be absolute justice in this particular case, by preventing an improvident and reckless son from squandering the property which his father's frugality and business sagacity had enabled him to accumulate, has led them farther into the realm of speculation than the well established rules of law governing the interpretation of wills will warrant. They have adopted the will of the husband as the will of his wife, a thing which she did not do herself.

(70 W. Va. 356)

HARRIS et al. v. MICHAEL et al.

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1912.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 78*)—OIL LEASE
—CONSTRUCTION.

When a lessee for oil and gas producing purposes segregates the lease by assigning to another all rights thereunder as to a distinct parcel of the land, a discovery of oil on the part assigned will give the lessee a vested right to produce oil on the part retained, though he has taken no possession of that part.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

2. MINES AND MINERALS (§ 77*) — VESTED RIGHTS OF LESSEE—WAIVER.

Where a lessee acquires a vested right to produce oil from land, but never takes actual possession of the premises, it may be shown that he has abandoned the right by proving his intention to do so from any facts and circumstances evidencing a voluntary waiver of the same.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. § 77.*]

3. MINES AND MINERALS (§ 77*)—OIL LEASE—ABANDONMENT BY LESSEE.

A failure for ten years, on the part of a lessee holding a vested right to produce oil from land, to enter on the premises and undertake a fulfillment of the implied covenants of the lease which obligate him to operate the property, during all of which time an adjoining well is producing oil and presumably draining the neglected premises, sufficiently evinces an intention of the lessee to abandon his right.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. § 77.*]

4. EQUITY (§ 219*)—LACHES—DEMURRER.

A lessee, having a vested right to produce oil from land, who takes no possession and does nothing on the premises for ten years, and then, while a subsequent lessee is operating the property, remains silent as to his rights for seven years more, is so clearly barred by laches from asserting his neglected rights that his bill in equity showing the delay and silence will be dismissed on demurrer.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 496-499; Dec. Dig. § 219.*]

Appeal from Circuit Court, Marlon County.

Bill by Carey C. Harris and others against Pinkney Michael and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. M. Hess, for appellants. U. N. Arnett, Jr., for appellee Michael. Neely & Lively and L. D. Beall, for appellee Freeland Oil Co.

ROBINSON, J. In 1889, Pinkney Michael leased to Harris and Steel a tract of 146 acres for oil and gas producing purposes. The lessees agreed to drill a well on the premises within twelve months or thereafter to pay five hundred dollars a year until a well should be drilled. The lessor was to receive one-eighth of all the oil produced and saved from the premises and two hundred dollars for each gas well. If a well was not drilled, a failure to pay the five hundred dollars for any year rendered the lease void. No term was fixed for the continuation of the privileges granted if oil was produced within the time provided for drilling. In this respect the lease is different from those usually employed.

No well was drilled within the twelve months; but the payment was made, so that the right to drill continued through the second year. Within the second year, in 1891, the lessees assigned their rights in the lease, as to 55 acres of the tract only, to Frank Burt, for no other consideration than Burt's promise to drill a well thereon within the limit of that year. They retained no interest whatever in that part. The 55 acre tract

transferred to Burt was laid off and described by metes and bounds. Burt, or those to whom he assigned, put down a well on the 55 acres and produced oil. The well continued to be a producing one. In 1898, through various transfers or assignments, that well and the rights pertaining to it under the assignment to Burt came to the ownership of the original lessor, Pinkney Michael. Thus that portion of the original lease was merged into his greater estate, the ownership of the land itself.

The residue of the 146 acres was never developed by Harris and Steel, the lessees, or by anyone for them. They had wholly parted with their leasehold rights in the 55 acres of the original lease, as we have shown. The same had gone back to the lessor. They made no use of their leasehold rights in the residue of the 146 acre tract. So, in 1901, ten years after the drilling of the well, and more than three years after the rights on the 55 acres passed back to Michael, he ignored the former lease, as to which the holders thereof had for so long remained inactive, and again leased the residue of the tract, all but the 55 acres, to one McBride. Operations under the McBride lease were begun and continued. Oil was produced. The McBride lease was assigned to others. Five wells were drilled under this later lease on the residue of the tract. Still for seven years more, the original lessees remained inactive as to use or claim of their rights under the original lease. They silently permitted the five wells to be drilled during the seven years by McBride and those claiming under him. Then, in 1908, seventeen years after the drilling of the Burt well, during all of which time Harris and Steel indicated no purpose to make the property beneficial to themselves or to the lessor, though for a great period of the time others were using it for profit, they filed their bill in equity claiming to be entitled to the oil, by virtue of their original lease, in that portion of the tract outside of the 55 acres, and demanded an accounting from those who had taken oil therefrom. They plead no excuse for the delay in the assertion of their alleged rights. The defendant demurred to the bill. The circuit court sustained the demurrer and dismissed the bill. Plaintiffs have appealed.

The statement of the case which we have made is a fair presentation of the material facts as they appear upon a reading of the bill. The direct allegations together with the reasonable inferences therefrom arising make the case as we have stated it. Are plaintiffs entitled to be heard in a court of equity?

[1] The drilling of the Burt well was a compliance with the lease as to the whole tract. Harris and Steel, by the contract with Burt, caused that well to be drilled. As to them it pertained to the lease on the

whole, though as to Burt it pertained only to the 55 acres. The drilling of this well and the producing of oil therefrom gave to Harris and Steel a vested right to produce oil and gas under their lease. As to all but the 55 acres which they had assigned away, that right remained to them under the lease on the whole. After the production of oil under the lease on the whole, they had a vested right to produce on the residue. We must inquire whether or not they lost that right.

It is assuredly true that where a lessee enters upon the leased premises and discovers oil or gas his right to produce the oil or gas becomes a vested right. It is equally true that he may divest himself of this right by intentional abandonment and relinquishment of the premises. Archer on Oil & Gas, 547. When there is such abandonment and relinquishment, the lessor may declare the lease forfeited by leasing to another. Guffy v. Hugill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. And, if the lessee has not actually entered on the land the relinquishment of his right to do so, or his abandonment, becomes purely a question of his intention; in which case, his intention to abandon may be established by proof of such facts and circumstances as evince a voluntary waiver of his rights. Smith v. Root, 66 W. Va. 633, 66 S. E. 1005, 30 L. R. A. (N. S.) 176.

Harris and Steel never entered into possession of the premises to which their rights in the residue of the lease pertained. The possession of Burt, even if considered in their behalf, was of course limited to the 55 acres. If, as is said, he took possession for them, his possession extended no further than over the 55 acres which they sold him. They put him into possession of that part alone, so that he might drill a well and cause them to have vested rights as to the residue. But as to that residue his possession for them could not go, and they entered not upon it themselves. Besides, they had absolutely no concern in the part sold Burt when the sale to him had fulfilled their purpose in getting a well drilled. After the drilling of this well it cannot be said that he was in any manner acting on the premises for them. All their concern in the 55 acre part ceased as soon as Burt's agency in drilling the well was performed. As to Burt that well related to the 55 acres; as to Harris and Steel it related to the residue, but only to the extent of causing rights therein to vest in them. Both were interested in the drilling of the well, but neither was interested in the parcel of the other. Burt's remote relation to the original lease as an undivided one ceased absolutely when he finished the well. He was never in possession of the residue as to which Harris and Steel now claim rights. He was simply in possession of his own parcel, on which the drilling of a well gave them rights in the

other parcel. But as to that other parcel they never saw fit to take possession.

[2] Since the lessees never entered into actual possession of the premises to which their vested oil rights pertained, the question whether they relinquished their right to do so, whether they abandoned that right, must be determined alone by their intention in this particular. Their intention to abandon the lease may be established, as we have seen, by the proof of any facts or circumstances evidencing a voluntary waiver of their rights.

[3] Surely, a failure for ten years to enter and at the least to make a start to develop the parcel which plaintiffs segregated to themselves from the whole, evidences intention on their part to abandon their rights under the lease as to it. If men ever intended to make use of such oil rights, it is reasonable to conclude that they would do so before the lapse of so long a period. If they really meant to make use of such rights, would they neglect those rights for ten years and all that time allow the oil to be drained from their lease by an adjoining producing well? They were getting nothing by the production of that well. If they ever meant to claim under the lease as to the residue, why let Burt and others drain it so long? Why stand by and see the lessor himself take the oil by the Burt well which became merged in his estate in the land? Surely their long and palpable neglect of the part of the lease which they retained, in the light of the circumstances surrounding that neglect, is evidence that they waived their rights. They divided into two parts the original lease so they could profit from one part of the land, in case Burt by a well on the other part proved the territory to be good. But for some reason they did nothing for ten years. Must we not conclude that they deemed the property unprofitable and cast it aside? Why allow Burt, and even the lessor himself, to take their oil by this well if they deemed it worth taking themselves? Moreover they were bound by implied covenants to produce and make a return for the lessor, if the property could be profitably worked. Would men ordinarily incur liability for failure to develop a profitable property? Indeed the facts and circumstances sufficiently establish that the lessor had right to conclude, at the time he gave the second lease, that the original lessees had deemed their rights not worth while and had waived them.

In cases of the character of this one, a failure to continue explorations for so long a period should raise a presumption of abandonment as matter of law. The very nature of the contract would seem to raise a presumption of abandonment when there is unreasonable delay in doing under the lease what the parties originally contemplated should be done under it. "There is no case which goes so far as to announce that after mere discovery of oil, the lessee, upon the

assumption of vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease and simply hold it for speculative purposes, or to await his own pleasure as to the time of development." Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566. Where one under duty to explore or to continue explorations for oil neglects to do so for a period plainly inconsistent with an intention to fulfill the duty or contract, his neglect should be taken to mean a waiver of his rights in the premises. In the case last cited, it was held: "The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others." And by an eminent authority it is said: "When there is an obligation expressed or implied to operate under the lease, the failure to do so either within the prescribed time, if there be a time prescribed, or within a reasonable time, will, if unexcused, amount to an abandonment." Barringer and Adams on Mines and Mining, 170.

[4] But, aside from the question of abandonment, there is another feature of the case fatal to plaintiffs. They clearly show themselves guilty of laches in the assertion of their rights. They have remained silent so long and have allowed such rights of others to attach that it would now be inequitable to hear them. For seven years after the giving of the second lease to McBride they have passively allowed operations for oil to be prosecuted thereunder. The property has passed from McBride to others. Five wells have been put down under the McBride lease. Plaintiffs have stood silently by and made no objection to the use and occupancy of the property—the great investment of money in it—by subsequent lessees. By their long silence, they have misguided others into expending money on the property. They show no justifiable excuse for their silence. It is not enough to say simply as they do that they were "seldom in the community." They are chargeable with knowing what was going on in relation to this property. If they were seldom in the community, then they were there at times. They had the opportunity of observing what was being done by others. They have plainly acquiesced in the operation of the property under the McBride lease. They cannot decline to assert their rights for seven years and then be heard to assert them. "Where one has means of knowing or ascertaining his rights, where he is put on inquiry, where ordinary prudence should impel him to inquire, he must do so or else time runs against him in the

assertion of those rights. One who would repel the imputation of laches by showing ignorance of his rights must be without fault in remaining in ignorance of those rights. Indolent ignorance and indifference will no more avail to prevent the bar of laches than will voluntary ignorance. Equity aids only the vigilant." Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558.

This additional seven years of neglect of the rights now claimed is another strong element proving that the lessor rightly assumed that plaintiffs had abandoned their rights when he gave the second lease. If they had not then abandoned, why did they so long allow others to operate the property?

The bill is pregnant with an intention to abandon the rights now claimed, and with delay in asserting the claim. The demurrer was rightly sustained. The decree will be affirmed.

(70 W. Va. 363)

BUSKIRK et al. v. SANDERS et al.

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 26*)—SUBJECTS OF RELIEF—ACTION AT LAW.

If any affirmative equitable relief is necessary to a full settlement of the controversy a court of equity will interfere, and entertain a suit for such relief, and enjoin the action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24, 28; Dec. Dig. § 26.*]

2. INJUNCTION (§ 16*)—NATURE OF REMEDY—ADEQUATE REMEDY AT LAW.

The mere existence of a legal remedy is not of itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. It must also appear that it is as practical and efficient to secure the ends of justice and its prompt administration as the remedy in equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.*]

3. EQUITY (§ 43*)—JURISDICTION—REMEDY AT LAW.

Though defendant has legal and equitable defenses he has the right as a general rule to go into a forum where he may have the benefit of all his defenses, and thereby be afforded complete protection against the claims of his adversary.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.*]

4. GUARDIAN AND WARD (§ 43*)—CUSTODY OF ESTATE—AUTHORITY TO SELL.

If a guardian, of his own volition and without authority of the court, sever standing trees from his wards' lands, they are thereby converted into personal property; and his duty then, though wrongfully imposed, is not to suffer the timber to remain on the ground to rot and perish, but to sell it and account to his ward for the proceeds, and the purchaser

thereof from the guardian, in good faith, and for a fair price, will acquire good title thereto.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 173, 186-188, 190, 191; Dec. Dig. § 43.*]

5. CONTRIBUTION (§ 5*) — LIABILITY FOR WRONGFUL ACTS.

To deprive one of his right of recourse upon or contribution from one with whom he may have co-operated in the wrongful act of cutting timber from another's lands, such act must have been *malum in se*.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6-9; Dec. Dig. § 5.*]

6. GUARDIAN AND WARD (§ 39*)—CUSTODY AND CARE OF ESTATE—RIGHTS OF THIRD PERSONS.

If timber trees be cut from a ward's land, without fraud and in good faith, and by permission of his guardian, no trespass is committed, and the infant, even after the guardianship has ceased, must look to the guardian for compensation for the timber taken.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 170, 171; Dec. Dig. § 39.*]

7. GUARDIAN AND WARD (§ 148*)—ACCOUNTING BY GUARDIAN—CREDITS—NECESSARIES.

A guardian, without previous order of the court, unless for necessities, is not entitled to credit for disbursements out of the principal of his ward's estate. Such necessities may include necessary repairs on his ward's houses, fences, etc., but not permanent improvement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 497; Dec. Dig. § 148.*]

8. SUBROGATION (§ 10*)—PAYMENT OF MONEY FOR ANOTHER—GUARDIAN AND WARD.

If a guardian out of her own money, or money obtained from another, and for which she is liable, pay purchase money lien or other debts for which the land of her ward is liable, she or her estate, is entitled to be subrogated to the rights of the creditors whose debts have thus been discharged.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 33; Dec. Dig. § 10.*]

9. EQUITY (§ 52*)—RELIEF GRANTED.

With all parties or their legal representatives before it, a court of equity may in a proper case take a short cut in re-adjusting complicated and involved accounts, so as to do equity between the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 172; Dec. Dig. § 52.*]

Appeal from Circuit Court, Wyoming County.

Bill in equity by U. B. Buskirk and another against Herbert W. Sanders and others. From a decree for defendants, plaintiffs appeal. Reversed and rendered.

Jno. M. McGrath, C. E. Pyle, Jas. H. Gilmore, and Campbell, Brown & Davis, for appellants. J. A. Toler, M. F. Matheny, and Sanders & Crockett, for appellees.

MILLER, J. The preliminary injunction awarded plaintiffs, restraining defendants from prosecuting their suit at law against them to recover the value of timber alleged to have been taken from their land, was by the final decree on demurrer and motion of defendants, wholly dissolved and the bill dismissed.

The grounds of demurrer relied on here, are: First, that plaintiffs had already submitted themselves to the jurisdiction of the court in the suit at law; second, adequate remedy at law; third, want of equity, and, fourth, other reasons to be assigned.

The theories of the four special counts of defendants' declaration are as follows: First, that plaintiffs themselves sold the timber trees to defendants, and that the latter cut, and carried them away, and in consideration thereof promised to pay plaintiffs therefor the sum of \$25,000.00: Second, that plaintiffs had before that time, at the special instance and request of defendants, bargained and sold the timber trees to defendants, who had cut and carried them away, and in consideration thereof had promised to pay plaintiffs what they were reasonably worth: Third, that plaintiffs being the owners of a tract of 3,000 acres, on which said timber trees stood, defendants had cut and carried them away, whereby they had become indebted to plaintiffs the value thereof, alleged to be \$25,000.00: Fourth, that plaintiffs had inherited said land from their father, J. O. Sanders, deceased, and that defendants had entered into a contract with their mother, the administratrix of their father's estate, whereby they purchased from her, with notice of her want of authority, said timber trees, and that pursuant thereto they had cut down, removed and sold said trees in the market, but took no title thereto, well knowing the same belonged to plaintiffs, whereby they became indebted to plaintiffs in the sum of \$25,000.00, the value thereof, and which they thereafter in consideration of the premises faithfully promised to pay plaintiffs.

Appellants admit that prior to filing their bill they appeared to said action at law, demurred to the declaration, and took leave to file special pleas.

Besides the prayer for an injunction, there is a prayer that plaintiffs be adjudged not liable to pay a second time for said timber; that it be ascertained, by a commissioner, what disposition was made by Ida Sanders of the money paid her therefor, with all the facts in relation thereto; that it be also adjudged that all expenditures for repairing the dwelling house, fences, barns and other improvements on the land descended to defendants, were for their benefit; that if plaintiffs, who in good faith, and without notice that said timber had been taken from defendants' lands, purchased the same, and paid full market price therefor, should in any event be again held liable therefor, the estate of said Ida Sanders be decreed to refund to them the amount so paid, and that defendants, her wards, and as distributees of her estate, be charged in equity, when ascertained, with the balance on settlement of her guardianship accounts, and with the

amount received by them as distributees of her estate, and with the amount expended by her, out of her own funds, in excess of assets, in paying debts in repairing and improving their lands, and that their liabilities thereby incurred to her estate be offset against the liability, if any, of plaintiffs to them.

Defendants have apparently abandoned the first point of their demurrer, though fully argued, with citations of authorities, in the brief of appellants' counsel, it is not referred to by counsel for appellees or discussed by them in their brief. We will not further notice it therefore.

The material facts well pleaded in the bill and taken for true on demurrer, present the following propositions relied on as a basis for equitable relief:

First, that the timber was not cut or removed by plaintiffs, but by defendants' mother and guardian, having, by virtue of section 7, chapter 82, Code 1906, the care and management of their estate, real and personal, and who after severing said timber sold and delivered the same to plaintiffs, at the place of delivery, and that they in good faith paid her for same, the full market price therefor, and that she and not they, if any one, should be rendered liable to defendants therefor, and for any waste committed; that if this, a legal defense, be not sustained, they, nevertheless, have complete equitable defenses not available at law, which they are entitled to interpose, namely, that should they, for any reason, be rendered liable to defendants for said timber, their mother and guardian would become liable to them for the amount recovered; and as defendants, as alleged, would be liable to her estate on settlement of her guardianship accounts, for moneys paid out for necessary repairs and improvements on their lands, and for their maintenance and education, in a large sum; and also in settlement of her administration accounts, as administratrix of their father's estate, for money paid out beyond assets, to discharge a lien on their lands for purchase money, and to pay borrowed money and other debts for which his estate was liable, alleged to be about \$1,800.00; and as they also as distributees of her estate had received about \$3,700.00, and could be required to refund the same, to pay debts, their claim against appellants, if valid, should in equity be offset by her liability to them.

The first inquiry is, has equity jurisdiction where defendant has a legal and also an equitable defense? Little need be said in affirmance of this proposition. Plaintiffs might fail in their legal remedy, and yet if their several grounds of equitable relief be good, they should prevail. To make these equitable defenses available settlements of the guardianship, and administration accounts of defendants' mother, would be necessary, involving an ascertainment of the

value of any repairs, or improvements, if allowable, on the lands, and the amount expended by her in their maintenance and education, and which could not be done on the trial of the action at law.

[1,2] Though one have a defense at law, yet if it be doubtful, and he also have equitable defenses, and his legal defense would not be as adequate and certain as in a court of equity, he may go into equity, at once, without awaiting the result of the lawsuit, or even being compelled to confess judgment at law. *Gas Co. v. Window Glass Co.*, 63 W. Va. 266, 61 S. E. 329; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836. "If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of defendant's rights, a court of equity will interfere, and entertain a suit for such relief, and enjoin the action at law." 4 Pom. Eq. Jur. § 1363, page 2706; 22 Cyc. 799, 801, and cases cited; *Knott v. Seamands*, 25 W. Va. 99, 105; *Dudley v. Miner's Ex'r*, 93 Va. 408, 25 S. E. 100, 101; *High on Injunctions* (4th Ed.) §§ 30, 66. The mere existence of a legal remedy, says Mr. High, section 30, "is not in itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity."

* * * It must also appear * * * that it is as practical and efficient to secure the ends of justice, and its proper and prompt administration as is the remedy in equity."

[3] Assuming the law to be that the application of these principles to a particular case must depend upon the character of the case as disclosed by the pleadings, we have here facts alleged which on plaintiffs' theory may constitute a complete defense to the action at law; but they also allege facts which on their theory, if their defense at law should fail, would, nevertheless, in equity constitute good defenses, not available on the law side of the court. We understand the authorities to hold that a defendant has the right to the benefit of all his defenses, and that when some are legal, and others equitable, the one at law, which in the exigencies of a trial might fail, can not be said to be as adequate and certain, and as complete a protection to defendants' rights, as all combined, and in a forum where he may have the benefit of all. Wherefore he may then go into equity for a vindication of his right.

[4] The first proposition of appellants that defendants' guardian, if any one, is liable to them for the timber taken, is not conceded, but controverted by appellees. They contend that standing timber being real estate cannot be severed or sold by a guardian, without authority of a court, and though severed in fact, it still remains real estate, and that purchasers from a guardian acquire no title, and are liable to the owners of the land. That standing timber is real estate, and that a guardian can not, generally, law-

fully convert his ward's realty into personality, or personality into realty, or sell and convey it to a purchaser, by deed or otherwise, without previous sanction by the court, are propositions not controverted by appellants' counsel. But such is not the case presented by the bill, and the authorities cited and relied on by appellees' counsel are for the most part inapplicable.

The case here is one where a guardian, in lawful control and management of the infants' lands, has in fact and of her own volition severed the timber, and after so converting it into personality, has sold it in the market. Having done so, the duty, though wrongfully imposed, is not to let it rot and perish on the ground, but to sell it, accounting for the proceeds to her wards. This seems a self evident proposition. No other course would be open to her. The infants could not sell it or pass good title. She could.

That timber severed from land becomes personality is fully sustained by our decisions. *Null v. Elliott*, 52 W. Va. 229, 43 S. E. 173; *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432. That a guardian may in good faith and free from fraud lawfully sell his ward's personal property, particularly when perishable and liable to waste, and give the purchasers good title, is too well settled to admit of controversy. *MacLay v. Equitable Life Assurance Society*, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528; 21 Cyc. 146; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *Woerner Am. Law Guard.* 179; *Hunter v. Lawrence*, 11 Grat. 130, 62 Am. Dec. 640. In 2 *Barton's Ch. Pr.* 753, it is said: "He may sell the whole or any part of his ward's personal property, whether it is perishable or not, and may pass a good title to it unless the sale be fraudulent, and the purchaser collude with the guardian by co-operating in the fraud." The bill negatives all fraud or collusion with the guardian in severance and sale of the timber. After she cut the timber and converted into personality, as counsel for appellees in their brief believe in good faith, whose property was it? Was it not the wards' personal property? And who besides the guardian had lawful authority to sell it and preserve, or lawfully dispose of the proceeds? Certainly no one but the guardian could do so.

[5] But assuming that the foregoing defense, good at law, we may say, should fail for any reason, what about the equitable defenses? Suppose, for example, that it should turn out on the trial, on the theory of the fourth special count in defendants' declaration, that appellants purchased from the administratrix, or the guardian, the standing timber in place, and thereby became parties to a wrongful act, having paid her the purchase price, would not she or her estate, be liable individually to repay or refund the money paid her by appellants? Appel-

lees answer no; on the principle announced in *Asberry's Adm'r v. Asberry*, 33 Grat. 463, that one "who concert or unites with a fiduciary in a misapplication of the trust funds, or in any other act contrary to the duty of the fiduciary, becomes a particeps criminis, and will be held liable accordingly." That case involved the misapplication by the guardian of his ward's funds in payment of his individual debt, and the principle was there clearly applicable. *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616, involved the investment by a guardian of the ward's money in real estate and the reservation by the vendor of lien for the unpaid balance, rendering the property purchased liable to be sold for the payment thereof, which was the purpose of that suit, and involving the loss of the ward's entire estate. The purchase of the real estate was held a breach of trust, and a vendor a participant therein, and liable to refund the money of the infant, quite a different case from the case in hand, and to which the principle was clearly applicable.

The principle, which we think is applicable here, is, that to deprive appellants of recourse, upon the estate of Mrs. Sanders, or contribution by her, she being at least equally liable for the alleged wrongful act, their act in purchasing and severing the timber must have been malum in se. 6 *Pomeroy Eq. Jur.* § 916; *Thweatt v. Jones*, 1 Rand. 328, 10 Am. Dec. 538. We see nothing on the face of the bill, or in the nature of the transaction between appellants and the administratrix or guardian, justifying the theory of fraud or bad faith, to deprive them of the benefits of the equitable defenses interposed, if they are otherwise well founded.

[6] These defenses, moreover, do not stand alone on the general rule applicable to persons jointly responsible for the wrongful act. The alleged wrongful act here consists in an alleged trespass or waste committed on infants' lands. An old Virginia case, *Truss v. Old*, 6 Rand. 556, 18 Am. Dec. 748, cited and differentiated in *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878, says: "Possession is indispensably necessary to support trespass quare clausum fregit. * * * Guardians in socage, and testamentary guardians, (although they have no beneficial interest, yet) have a legal interest, and the possession of the ward's land during the guardianship. If, therefore, a person trespass on the lands of an infant and cut and carry away his trees, without license of the guardian, the ward cannot maintain trespass, but the guardian may, and must account to the ward for the damages recovered. * * * If the trees are cut and carried away by permission of the guardian, no trespass is committed, and the infant even after the guardianship has ceased, cannot maintain trespass for the act. The wrong must be compensated to the ward by the guardian."

In the McDoddrill Case this court held that the doctrine of the Truss Case did not apply to guardians by nature, but only to guardians appointed, who as in this case had given bond, &c. It should apply in full force, we think, where as in this state, the statute gives the guardian control and management of the wards' real estate; and we agree with appellants' counsel that though defendants' action at law is in assumpsit and not, as in Truss v. Old, in trespass, the plaintiffs who may waive the tort and sue in assumpsit must be those who could have maintained trespass. Of course this argument relates more particularly to the legal defense interposed; but it is also applicable to the position of appellees' counsel, based on the theory of *joint tort feorsors*.

If Truss v. Old is good law appellants committed no trespass on the appellees' lands, and are not joint tort feorsors, but are in a position to hold her and her estate liable for any liability to them on the theory that her act was unauthorized and they liable to appellees for the timber taken.

[7] The question remains, are appellants' equitable defenses well founded? If upon the rules and principles already enunciated, appellants who have paid the guardian of the appellees in full for the timber taken, she and her estate would certainly be liable to appellants, if they should for any reason be held liable to the appellees for the timber purchased. Another proposition equally fundamental is, that if the guardian received the purchase money for the timber, as guardian, she would be bound to account for it in settlement with her wards, and would be entitled to credit, in equity at least, for any disbursements legally made. Appellees contend that without previous authority, as provided by section 8, chapter 82, Code 1906, she would be entitled to no credit for disbursements out of the principal of her wards' estate. We think this not a well founded proposition. The statute we think so far as it relates to disbursements by guardians for necessities must be construed to be permissive, on the principles of *Maclay v. Equitable Society*, supra, construing a statute in Mississippi, and as only providing a mode by which the guardian may obtain in advance judicial approval of his act, instead of leaving the question open for dispute at a future day. At common law expenditures made by a guardian in good faith, and for the benefit of the ward, would be confirmed by the court. This rule is recognized in *Myers v. Myers*, 47 W. Va. 488, 35 S. E. 868, and *Campbell v. O'Neill*, 72 S. E. 732, 738. Necessaries within this principle, we think, would include necessary repairs to a dwelling house, in order to make it tenantable, necessary repairs to fences, necessary food and clothing, and a common school education. *Woerner Am. Law Guard.* 202; 2 *Barton's Ch. Pr.* 156. We do not think under the principles of our decisions, a guardian with-

out previous authority would be entitled to credit for disbursements for permanent improvements of the wards' real estate, though in *Jackson v. Jackson*, 1 Grat. 148, decided before our present statute, it would seem he might even have been entitled to credit for such expenditures, if obviously for the wards' benefit. Under our decisions expenditures so made without court authority must fall within the rule of necessities. Clearly, therefore, appellees would not be entitled to charge their guardian with the money received from appellants, without at the same time giving her credit for disbursements out of that fund for such necessities; and appellants would certainly be entitled in equity to offset so much of their money as she has expended in this way, out of their money, against any legal liability to appellees for the timber taken.

[8] A still stronger ground of equitable relief is, that a purchase money lien on defendants' lands and debts for borrowed money and other debts of the estate of J. O. Sanders, were paid off and discharged by the guardian. This land was liable for these debts. If Mrs. Sanders, either as administratrix or guardian, discharged them out of her own money, or out of money paid her by appellants, not being a volunteer but having a duty in relation to such debts, she would be entitled to subrogation to the rights of creditors, and her creditors, she being dead, would now be entitled to have her claims against her husband's estate, and against her wards, treated as assets subject to their debts. 37 Cyc. 444, and notes. If out of the money obtained from appellants, as the bill charges, the guardian paid these debts, and appellees or the estate of their father became liable by subrogation to her estate, it would be most inequitable to hold that the several liabilities should not be adjusted on principles of equity to relieve appellants.

[9] Still another, and perhaps a stronger basis of equitable relief is, that appellees, as distributees of their mother's estate, have received large sums of money. If Mrs. Sanders should be held liable to appellants for the purchase money paid her for the timber, her heirs and distributees, to the extent of personal assets received, would be liable either directly or through her administrator, who is now before the court, to refund the money or property received in distribution, to pay that liability to appellants, and this being so, a court of equity with all parties before it ought to take the short cut by offsetting the appellants' claim against their guardian's estate, against their claim against appellants, for the timber taken from their land. On the subject of compelling legatees and distributees to refund where no bond has been taken, see 5 Cyc. Dig. Va. & W. Va. Rep. 631, 635; 2 *Lomax on Ex'rs*, 175.

For these reasons we are of opinion to reverse the decree below dismissing the bill on demurrer, and to enter here the decree

which we think the court below should have pronounced, overruling the demurrer, and giving appellees a reasonable time within which to answer the bill.

(70 W. Va. 374)

JONES v. RIVERSIDE BRIDGE CO.
(Supreme Court of Appeals of West Virginia.
Feb. 13, 1912.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 55*)—CARE REQUIRED.

A contractor, having servants at work in the erection of a building along with the servants of another contractor, owes to the latter the duty of care for their safety.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-272, 285; Dec. Dig. § 55.*]

2. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR.

If, in such relation, a servant of one of the contractors is injured under circumstances creating a reasonable probability that the injury was caused by the omission of such duty on the part of the other or the negligence of his servants, the maxim *res ipsa loquitur* applies, making the circumstances, without more, evidence of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228; Dec. Dig. § 121.*]

3. NEGLIGENCE (§§ 134, 136*)—QUESTION FOR JURY.

Ordinarily such circumstantial evidence is not conclusive of the question of negligence, and only suffices to carry the issue to the jury and sustain a verdict for the plaintiff, if found.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-272; Dec. Dig. §§ 134, 136.*]

4. TRIAL (§ 203*)—INSTRUCTIONS—DUTY OF COURT.

If it affords bases for inferences favorable to each of the parties, the court, upon request therefor, must give instructions submitting the hypotheses such inferences appreciably tend to sustain.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

(Additional Syllabus by Editorial Staff.)

5. TRIAL (§ 191*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In an action for injuries to a person employed in a building through the fall of a board from an upper floor through the negligence of employes of defendant also employed in the building, instructions stating the duty of defendant to exercise care for the safety of the men known to be working in the basement of the building, and to afford plaintiff reasonable protection from objects caused to fall from the fourth floor by the negligence of the agents, servants and employes of defendant, and the duty of defendant to give plaintiff reasonable warning of objects caused to fall from the fourth floor by its agents, servants and employes, did not assume that the defendant's servants caused the board inflicting the injury on plaintiff to fall.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

6. TRIAL (§ 191*)—INSTRUCTIONS — INVASION OF PROVINCE OF JURY.

In an action for personal injuries, an instruction allowing the jury to consider the health and condition of plaintiff before the injury as compared with his condition in conse-

quence of the injury was not objectionable as assuming facts in controversy, where all the evidence adduced relating to the plaintiff's physical condition at the time of the trial tended to show a continuance of the effect of the injury he had received.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

7. TRIAL (§ 237*)—INSTRUCTIONS — INVASION OF PROVINCE OF JURY.

In an action for personal injuries caused by the negligence of defendant's servants, an instruction requiring the jury and each member thereof to believe the defendant liable beyond a reasonable doubt as requisite to a verdict for plaintiff was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 548-551; Dec. Dig. § 237.*]

8. TRIAL (§ 263*)—INSTRUCTIONS—REQUESTS.

There was no error in refusing defendant's request for an instruction after amendment on the ground that it had not been presented to plaintiff's attorney for inspection after the final alteration thereof.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 263.*]

Robinson and Williams, JJ., dissenting.

Error to Circuit Court, Ohio County.

Action by James M. Jones against the Riverside Bridge Company. Judgment for plaintiff, and defendant, brings error. Reversed, and new trial awarded.

Hubbard & Hubbard, for plaintiff in error. Noyes & Ritz and John S. Ritz, for defendant in error.

POFFENBARGER, J. On this writ of error to a judgment for \$1,016.67, the amount of a verdict rendered, the sufficiency of the evidence to sustain the verdict was raised by a request for a peremptory instruction to find for the defendant. The principle governing the disposition of the assignment of error founded upon the refusal of that instruction will solve most of the other questions presented.

The plaintiff below was injured by the fall of a board while employed in and about the work of constructing a building, several stories high, in the city of Wheeling. The action was not brought against his employer nor the owner of the building, but against a contractor engaged in the installment of the steel work of the building. The servants of the structural iron company, the defendant, were placing a steel beam or girder for the fourth floor of the building, and the plaintiff, employed by the brick work contractor, was in the basement, handling some pieces of terra cotta, when he sustained the injury. Just what he was doing at the instant of the fall of the board does not appear, but he was on duty in the basement. Another servant of his employer was hauling the terra cotta to the front of the building and sliding it into the basement, and he was carrying or wheeling it back from the front. Who let or caused the board to fall is not expressly shown. Nothing in this connection is disclos-

ed except that it came from the fourth floor, and that at that time the servants of the defendant company were working on that floor, or rather where it was intended to be. One witness says: "They were throwing in a beam; getting ready to place one. * * * They were adjusting this platform on the fourth floor. They had boards laid around." Another witness says it came from "upon top somewhere," and that a gang of bridge men were working where it came from. Another witness says it came from about the fourth tier of iron or the ceiling of the third floor, and that the structural iron workers were working on that floor. No witness states specifically that any other persons were on that floor, but one witness said, responding to a question as to whether any persons were working between the fourth floor and the first: "Yes, sir; they was working all over the floors." The defendant company had its hoisting engine in the basement, and for about 12 feet back from the street no flooring of any kind had been put in for any of the stories. Back of the 12-foot space, some fire proofing had been laid on some of the floors, but how much space was so covered is not shown. In this 12-foot space at the front of the building there seems to have been nothing to break or prevent the fall of any object and the board by which the plaintiff was injured seems to have come down through it. This open space or some other was no doubt needed for the work of hoisting materials. Some testimony was adduced to the effect that, under such conditions, the contractor putting in the steel work does not lay any floors below the workmen to prevent tools and materials from falling, even though other persons are working below, and that such articles frequently fall in the course of the work.

[2] The trial court disposed of the case upon the theory that the lack of evidence, showing just how the board happened to fall, is aided by a presumption or inference of negligence, which the jury might draw, under the rule *res ipsa loquitur*, applied in several cases by this court, notably *Bice v. Electrical Co.*, 62 W. Va. 685, 59 S. E. 626, and *Snyder v. Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. The argument against the application of this doctrine is based largely upon the definition of the rule or doctrine stated in the syllabi of the two cases just cited, embodying certain specifications of conditions under which it is applicable, and the assumption that every case falling under the principle must come within those specifications. Accordingly it is said the agency causing the injury must be definitely known, and appear to have been under the management and control of the defendant, and the occurrence such as, in the ordinary course of things, does not happen, if proper care is used by those who have the management. The language of this court thus relied upon does not purport to

be a general definition of the rule. It is rather an application of the rule to the particular facts and circumstances of the cases. The principle is broader. "When the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence in conformity with the maxim, '*res ipsa loquitur*.'" *Seybott v. Railroad Co.*, 95 N. Y. 562, 47 Am. Rep. 75, quoted in *Snyder v. Electrical Co.* "I have ventured to call it demonstrative evidence of negligence; for, although the evidence must always be detailed by the mouths of witnesses, yet, when the facts are thus disclosed, they either demonstrate negligence conclusively or tend to demonstrate it, subject to explanation by the defendant, showing that his conduct was consistent with due care." 1 *Thomp. Neg.* § 15, p. 16. "Where an accident itself, with all its surroundings, speaks in such way and is of such character as to show negligence on the part of the defendant, the doctrine *res ipsa loquitur* applies, and the plaintiff is allowed to recover in the absence of other proof." *Wood v. Railway Co.*, 5 *Pennewill* (Del.) 369, 64 *Atl.* 246. However, we perceive no difficulty in applying the terms of the supposed definition to the facts here disclosed. The board was the agency causing the injury. Ordinarily a board is not a dangerous article, but, under given circumstances, it may be very dangerous. If a board be insufficiently suspended or fixed over a street or walk for some purpose so that it may fall upon a pedestrian passing under it, it is a dangerous agency, and is under the management or control of him who maintains it there in an insecure condition. So a board in the hands of a workman at the top of a four-story building is a dangerous agency to other persons passing under it in the discharge of their duties. Owing to the peculiar circumstances and the very great danger of injury in case it should fall, a very high degree of care is exacted on the part of him who holds it, just as in the case of one who erects or constructs a fixture over a road or passageway, likely to be used by travelers or other persons. The duty imposed under such circumstances is so great that ordinarily it is not omitted and injury does not result. Hence, when injury does result, there is a probability of omission of the care, prudence, and diligence exacted by law. Instances of the application of the doctrine are given in *Snyder v. Electrical Co.*, as follows: "*Mulcairns v. City of Janesville*, 67 *Wis.* 24, 29 *N. W.* 565, wall of a cistern falling; *Dixon v. Plums*, 98 *Cal.* 384, 33 *Pac.* 268 [20 *L. R. A.* 698, 35 *Am. St. Rep.* 180] chisel falling from a scaffold; *Houston v. Brush*, 66 *Vt.* 331, 29 *Atl.* 380, injury from being struck by a wheel from a tackle block, attached to a derrick; note in *Railroad Co. v. Anderson* (Md.) 20 *Am. St. Rep.* 493 (a. c., 72 *Md.* 519, 20 *Atl.* 2, 8 *L. R.*

A. 673); *Thomas v. Telegraph Co.*, 100 Mass. 156, telegraph wire swinging over a street too low, so as to obstruct travel; *Clare v. Bank*, 1 Sweeny (N. Y.) 539, injury from plank falling from one's premises; *Howser v. Railroad Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, cross-tie falling from a moving car; *Ugla v. Railway Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; *Morris v. Strobel & Wilken Co.*, 81 Hun, 1, 30 N. Y. Supp. 571, signboard falling in street." Applications of the doctrine in cases of the class to which the one now under consideration belongs will be found in *Guldseth v. Carlin*, 19 App. Div. 588, 46 N. Y. Supp. 357; *Reilly v. Construction Co.*, 83 Hun, 196, 81 N. Y. Supp. 618; *Thrusell v. Handyside*, L. R. 20 Q. B. D. 359; *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. 484.

As to whether the board working the injury complained of was under the management or control of the defendant's servants, the evidence is not direct and positive, as will appear from the statement already given. It is readily inferable, however, from the facts stated. Defendant's servants were working at the point or place from which the board fell and using boards in connection with their work. No reason is perceived why evidence sufficient to sustain a finding by the jury that the agency working the injury was under the control of the defendant should not suffice to establish the facts as in other cases. It is a question for the jury rather than for the court. We do not understand the rule to require conclusive evidence of control or management of the agency by the defendant. The declaration fully sets forth the facts and circumstances here stated, and specifies the means or agency by which the injury was inflicted, charging it to have been negligently done. This makes it clearly good under our decisions, and the surplusage therein, if any, does not vitiate it. So the demurrer was properly overruled.

[5] Exception was taken to the action of the court in giving three of the plaintiff's instructions under the impression that they assumed certain facts. One of these stated the duty of the defendant to exercise care for the safety of the men known to be working in the basement of the building and afford the plaintiff reasonable protection "from objects caused to fall from the fourth floor by the negligence of the agents, servants, and employes of the defendant." Another stated the duty of the defendant to give the plaintiff reasonable warning "of the objects caused to fall from the fourth floor by its servants, agents, or employes." These instructions did not assume that the defendant's servants caused the board inflicting the injury to fall. They stated the duty of the defendant under the circumstances disclosed by the evidence. Not mentioning the board which caused the injury, they stated the general duty of the defendant to take precaution

against injury from falling objects. We do not think the jury could have considered the language used as importing that the defendant's servants had caused the board to fall.

[6] The other instruction complained of allowed the jury to consider the health and condition of the plaintiff before the injury as compared with his "condition in consequence of said injury" at the time of the trial. All the evidence adduced relating to the plaintiff's physical condition at the time of the trial tended to show a continuance of the effect of the injury he had received. Nothing was adduced in contradiction thereof. He proved it by his own testimony and that of a physician. The assumption in the instruction is the relation of his condition to the injury, not the extent of the impairment of health or physical capacity. As to the latter, nothing was taken from the jury. As the fact assumed is sustained by direct, positive, and uncontradicted evidence, we perceive no error in the assumption thereof.

[3] Six several instructions, propounding inquiries as to whether the defendant had exercised reasonable care for the safety of the plaintiff and whether the latter had assumed the risk of injury in the manner in which it occurred or the injury was accidental, were requested by the defendant and refused by the court. In thus disposing of these requests, the court must have considered the evidence conclusive on the question of liability or as having established a legal presumption of negligence, precluding inquiry as to accidental injury or assumption of risk. This is a misapprehension of the effect of the rule. Under it, the evidence only carries the case to the jury, as sufficing to justify an inference of negligence. *Duhme v. Packet Co.*, 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. The rule is a mere application of the law of circumstantial evidence.

[4] The evidence goes to the jury for such inferences as may arise out of the facts disclosed, and each party is entitled to instructions submitting the hypotheses in his favor for which any basis is found in the evidence. Our own cases as well as the definitions of the rule found elsewhere say no more than that the circumstances constitute evidence tending to prove negligence. Both the *Snyder* and *Bice* Cases say the facts, unexplained, afford "reasonable evidence" that the injury arose from want of due care, not that they are conclusive, inhibiting any other theory. There may be, and no doubt are, cases in which the circumstances are conclusive, allowing only one inference, and so precluding instructions favorable to the defendant, but this evidence is not of that character.

If there is a contractual relation, as between passenger and carrier, the circumstances unexplained are generally conclusive, when sufficient to take the case to the jury, but this case involves no breach of contract. Here a witness says men were working all over the floors. Boards were placed on the beams on all the floors to enable workmen to get around over them. Another says bricks and other objects were falling frequently. The plaintiff himself says he would have been out of danger had he stepped 4 or 5 feet in one direction, instead of running 20 feet in another. Another witness says the defendant was conducting its work in the customary manner, and all agree that warning was given when the board fell. Under all these circumstances, we are unable to say there was no basis in the evidence for an inference of assumption of risk or accidental injury. The request for these instructions did not challenge the sufficiency of the evidence to sustain a verdict for the defendant. It only asked the court to say whether there was any evidence of any kind appreciably tending to sustain the hypotheses embodied in the instructions. *Newhouse v. Railroad Co.*, 62 W. Va. 562, 59 S. E. 1071; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981. No peremptory instruction to find for the plaintiff was asked. Upon these principles, we think the court erred in refusing defendant's instructions Nos. 4, 5, 6, 7, 8, and 9.

[7] Defendant's instruction No. 10, requiring the jury and each member thereof to believe the defendant liable beyond a reasonable doubt, as requisite to a verdict for the plaintiff, was properly overruled. Ordinarily the reasonable doubt rule does not apply to civil cases. *Simmons v. Insurance Co.*, 8 W. Va. 474. There are exceptional cases in which it does apply (*Brockerbrough v. Spindle*, 17 Grat. 21; *Greenhow v. Harris*, 6 Munf. 472, 8 Am. Dec. 751; *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. 512; *Hall v. N. & W. Ry. Co.*, 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 869, 67 Am. St. Rep. 757), but this is not one of that class.

[8] Defendant's instruction No. 11, as originally tendered, objectionable in its requirement of "weighty proof" of plaintiff's inability to escape injury, was amended by the court, so as to eliminate that, and also an additional requirement that each juror must find a preponderance of evidence in favor of the plaintiff, in order to justify a verdict for him. To the giving of the instruction as so amended the defendant objected, and, after further amending it, so as to restore requirement of belief on the part of each juror, again offered it, and the court refused to give it as last amended, because it had not been presented to plaintiff's attorney for inspection after the final alteration thereof. We think there was no error in this. The court may prescribe and enforce reason-

able rules for the regulation of practice at its bar.

For the errors noted, the judgment will be reversed, the verdict set aside, and a new trial awarded. The request for judgment here must be denied, since we reverse for error in the course of the trial, and it does not appear that a good case cannot be made on another trial.

ROBINSON, J., dissents.

WILLIAMS, J. (dissenting). I do not think it was error to refuse defendant's instructions. The falling of the board upon plaintiff is *prima facie* proof of defendant's negligence under the rule *res ipsa loquitur*, and, in the absence of any explanation of the cause of its falling, established plaintiff's right to recover, provided he was not negligent himself, and there is no evidence that he was. If plaintiff had asked for a peremptory instruction directing the jury to find for him, the court should have given it; or if, on the facts proven, the jury had found for defendant, it would have been the duty of the court to set it aside, on motion of plaintiff, because it would have been clearly against evidence. This is not a case involving conflict of evidence, which would give the jury the right to weigh and determine its relative value. The fact that the board fell from defendant's working place upon plaintiff, and injured him, is not denied. The law says that such fact unexplained is *prima facie* proof of negligence, and casts the burden upon defendant to rebut it. No attempt was made to discharge that burden, and, under the rules of evidence, plaintiff's case was as fully established as if negligence had been proven by the most direct testimony. His proof was full and complete, because it was not denied, the presumptive negligence was not explained. How can it be logically said that defendant is prejudiced by the refusal of the court to give its instructions, when there is no evidence on which to predicate them; and, if their refusal works no prejudice, why should this court reverse the judgment? The refusal was harmless error, if error at all. But I say it was not error, because there is not a particle of evidence contradicting the legal presumption of negligence arising from the fact of the falling of the board from defendant's work place without proof of any particular cause. It was incumbent on defendant to show that it was not caused by its negligence. It did not discharge the burden, thus shifted to it; and the rule *res ipsa loquitur* supplies what plaintiff could not, and did not actually prove, and says that the cause of the board's falling was defendant's negligence. If the jury are given no facts to which to apply legal principles, there is no duty on the court to instruct them as to the law. Cases are tried on law and fact, not on law alone, and,

if there are no facts to support a case, there is no need to give the jury the law. The board that struck plaintiff was 2 by 12 inches by 16 feet. Defendant knew that men were working in the basement. They had a right to work there. The surroundings made it incumbent upon it to use greater care than if no one had been working below. When the board started to fall, warning was given to those below, and plaintiff immediately ran to escape danger. It appears that he would not have been hurt if he had run in some other direction, but the board would not have fallen on him where he did take refuge, if it had not struck a girder on the first floor and broke, and a piece of it glanced over to where he was. There is nothing in his conduct, or in the circumstances proven, from which the jury could even infer that he was negligent.

Defendant could make but two defenses: (1) That the board did not fall for want of due care of its servants; and (2) that plaintiff was himself negligent. Defendant was not plaintiff's master. No contractual relation existed between them, hence the law of assumption of risk has no application. One cannot plead assumption of risk in defense of his own negligence. That is against the policy of the law. As I see it, no other verdict could have been found. Because, in view of the facts established by proof; aided by a legal presumption, the rule *res ipsa loquitur*, negligence of defendant, as the proximate cause of plaintiff's injury, is established.

(112 Va. 904)

DAVIS v. DAVIS.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. INDICTMENT AND INFORMATION (§ 15*)—FORMER INDICTMENT.

Where one or more counts in an indictment state offenses not embraced in indictments previously dismissed, though provable by evidence which would have been admissible under the dismissed indictments, the prisoner cannot be discharged on habeas corpus, but must be remanded for trial.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 15.*]

2. INDICTMENT AND INFORMATION (§ 132*)—ELECTION BETWEEN COUNTS.

Where one or more counts in an indictment state offenses not embraced in dismissed indictments, but provable by evidence which would have been admissible under the dismissed indictments, it is proper practice, when the prisoner is brought to trial, to require the attorney for the commonwealth to state upon what counts he relies as setting forth offenses not embraced in the dismissed indictments.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 132.*]

Application by Charles Hall Davis for writ of habeas corpus to Arthur Kyle Davis. Denied.

George S. Bernard, John L. Lee, James Mann, and Charles T. Lassiter, for petitioner. Samuel W. Williams, Atty. Gen., and Richard H. Mann, for respondent.

PER CURIAM. [1, 2] This day came again the parties in obedience to the writ of habeas corpus awarded herein, and the court, having maturely considered the petition of the plaintiff, the return and answer of the said defendant to said writ, and arguments of counsel, is of opinion that, while it may be true, as claimed by the petitioner and conceded in argument by the Attorney General and attorney for the commonwealth for the city of Petersburg, that all of the evidence which will be admissible upon a trial of the indictment found at the June term, 1911, of the corporation court of Petersburg could have been introduced under some one of the indictments which were dismissed, it may also be true that there are offenses charged in that indictment not embraced in the indictments which were dismissed, and the court is further of opinion that if there be one or more counts in the indictment of the June term aforesaid which state offenses not embraced in the dismissed indictments, though provable by evidence which would have been, as above indicated, admissible under those indictments which were dismissed, the prisoner cannot be discharged, but must be remanded for trial; and being further of opinion that it will be proper practice for the corporation court of Petersburg, when the prisoner is set to the bar for trial, to require the attorney for the commonwealth, before going into trial, to state upon what counts he relies as setting forth offenses not embraced in the indictments which have been heretofore dismissed, to the end that the court, with the aid of counsel, may determine upon which counts the accused may now properly be tried, and thus eliminate much that would tend to confuse the material issues and greatly protract the trial, it is therefore considered that the petitioner is not illegally detained in custody, and his petition to be discharged is denied, and the prisoner is remanded to the custody of his surety on his bail bond, to be tried on the charges pending against him in the hustings court of the city of Petersburg.

Petition denied.

(137 Ga. 635)

HAMILTON v. SMITH.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. SPECIAL DEMURRER.

After the petition was amended by attaching thereto a copy of the specifications constituting a part of the building contract, it was not subject to the grounds of special demurrer urged against it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INSTRUCTIONS.

While there may have been some inaccuracies in the instructions excepted to, they were not, when considered in connection with the entire charge, sufficient to require a reversal.

3. SUFFICIENCY OF EVIDENCE.

There was ample evidence to authorize the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by R. P. Smith against N. W. Hamilton. Judgment for plaintiff, and defendant brings error. Affirmed.

Maddox, McCamy & Shumate, for plaintiff in error. C. D. McCutchen and W. E. Mann, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 536)

BROWN et al. v. TOMBERLIN.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

PROCESS (§§ 4, 63*) — JUDGMENT (§ 106*) — PLEADING (§§ 129, 336*)—SERVICE OF PROCESS—DEFAULT JUDGMENT—ADMISSIONS BY PLEADING—DIRECTION OF VERDICT.

Where an equitable petition is filed against several defendants, against whom substantial relief is prayed, they are not called upon to answer the petition, unless they are served with a copy of the petition and process as provided by law.

(a) Nor are they in default unless such service has been perfected; it not appearing that they have waived service and process.

(b) The provision of the Code requiring defendants to admit, deny, or explain why they do not admit or deny, each paragraph of plaintiff's petition, under penalty of having the allegations in plaintiff's petition taken as true, applies to the original petition.

(c) Where defendants fail to answer an amendment, or a cross-petition in equitable proceedings, filed by a codefendant against the other defendants (which cross-petition was not served upon them), the failure so to answer does not authorize the court and jury to treat the allegations in the amendment and cross-petition as admitted.

(d) A judgment by default will not bind a defendant who has not been served with a copy of the petition and process in an action brought against him, unless he has waived service in some manner provided by law.

(e) Mere service of the original petition and process on a defendant, made after the appearance term of the court to which it is returnable, is a nullity, in the absence of an order to perfect service.

(f) The court is not authorized to direct a joint verdict against defendants, based on pleadings being taken as true, when a portion only of the material pleadings were served on some of the defendants, and no valid service of any of them was had on one of the defendants.

[Ed. Note.—For other cases, see Process, Dec. Dig. §§ 4, 63;* Judgment, Dec. Dig. § 106;* Pleading, Dec. Dig. §§ 129, 336.*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Action by O. F. Dean and others against J. H. Tomberlin and others. Judgment for plaintiffs against defendants, and for defendant Tomberlin against defendants W. F. Brown and another, and defendants W. F. Brown and another bring error. Reversed.

W. W. Bennett, for plaintiffs in error. V. E. Padgett and Jas. R. Thomas, for defendant in error.

HILL, J. O. F. Dean and others filed their equitable petition against J. H. Tomberlin, W. F. Brown, and J. T. Brown, to the March term, 1910, of Appling superior court, alleging Tomberlin to be a resident of Pierce county, W. F. Brown to be a resident of Appling county, and J. T. Brown to be a resident of Florida, and praying for an injunction, appointment of a receiver, cancellation of the transfer of certain letters patent, judgment against the defendants, and the sale of the letters patent. A temporary order was granted by the judge, restraining the defendants from selling or in any manner disposing of the letters patent in question. W. F. Brown was served with a copy of the petition and process on the 22d day of November, 1909, and J. T. Brown, who was a resident of Wayne county, Ga. (although alleged to be a citizen of Florida), was served with a copy of petition and process May 2, 1910, by the deputy sheriff of Wayne county, Ga. The plaintiffs amended their petition, after the service of J. T. Brown, by alleging that the latter was not a citizen of Florida, but was a citizen of Wayne county, Ga. At the interlocutory hearing, and at the first term of the superior court when the petition was made returnable, one of the defendants, Tomberlin, filed his answer and cross-bill, admitting that he sold a certain interest in the letters patent to W. F. and J. T. Brown, and alleged that W. F. and J. T. Brown were indebted to him in the sum of \$2,000 for the letters patent, and prayed for a judgment against the two defendants, W. F. and J. T. Brown, neither of whom appeared in person or by counsel, nor did either of them file any defense or other proceeding in the case. At the March term, 1911, the plaintiffs filed certain amendments to their original petition, and, upon application, made W. R. Beach a party plaintiff. Neither the cross-bill and answer of Tomberlin nor the amended petition of the plaintiffs was served upon either W. F. or J. T. Brown. Upon call of the case at the March term, 1911, counsel for the plaintiffs announced that they desired to take a verdict and decree in an uncontested case; and under said statement and by direction of the court he did take a verdict and decree. No evidence was introduced on behalf of the plaintiffs, or on the part of Tomberlin. The court having directed a verdict and render-

ed a decree in favor of the plaintiffs against the defendants, and in favor of Tomberlin against W. F. and J. T. Brown, the two last named excepted.

We think the court erred in directing the verdict of which complaint is made. Undoubtedly, where suit has been properly brought, and the defendants are served with copies of the petition and process, and fail to appear in court or make answer, and are in default, the averments plainly and distinctly made in the plaintiff's petition shall be taken as *prima facie* true, unless the defendant states in his answer that he can neither admit nor deny such averments because of the want of sufficient information. Civil Code 1910, § 5539. The record shows that W. F. Brown, one of the defendants, was served with a copy of the petition and process, but not with the amended petition. J. T. Brown, although alleged to be a citizen of Florida, was served with a copy of the petition and process in Wayne county, Ga., personally by the deputy sheriff of that county, but not with the amended petition. In fact, the service was made before the petition was amended. The amendment was material to the action. The answer of the defendant Tomberlin admitted various allegations in the plaintiffs' petition, but denied others, and his cross-bill alleged a cause of action against his codefendants, W. F. and J. T. Brown, and prayed a verdict and judgment against them in his favor for \$2,000; but the cross-bill was never served on either of the codefendants. This makes an unusual case. In the brief of counsel for defendants in error it is stated that "an acknowledgment of service was duly entered and acknowledged by their attorney, Jos. A. Morris, who represented said defendants at the time," etc.; but, if such be the case, the record fails to disclose it. This case is contrary to the general rule and custom where only the plaintiff has judgment against the defendants. But here one of the defendants, Tomberlin, sets up an entirely new cause of action in the same suit in which he is sued, against his codefendants W. F. and J. T. Brown. Admitting partially his liability in favor of the plaintiffs, he prays judgment against his codefendants for \$2,000. When the case was called in court, counsel for plaintiffs announced that he desired to take a verdict and decree in an uncontested case; and on the statement of counsel the court directed a verdict and signed a decree for the plaintiff against all the defendants for the full relief prayed for, and also in favor of the defendant Tomberlin, on his cross-bill against the defendants W. F. and J. T. Brown, for all the relief prayed for in the cross-bill. Under the facts disclosed by the record, we do not see how this verdict and decree can stand. But one of the defendants against whom the cross-bill was directed has been served with a copy of the original petition and process, and he was not served

with the amended petition. Neither of these defendants was served with the cross-bill, nor does it appear that either of the defendants in the cross-bill has made such appearance in person or by counsel as to amount to a waiver of petition and process. If service was not perfected before the first term of the superior court, then, under the rulings of this court, an order should have been taken at that term to perfect service on those upon whom it had not been perfected. The mere service of the original process on the defendant J. T. Brown, made after the appearance term of the case, had no legal effect whatever. A codefendant is not bound to answer until he is served with a copy of the cross-bill, unless he waives that right by appearance and answer, or in some other way. A valid judgment or decree cannot be rendered against a defendant unless he has been duly served and put on notice of the complaint made against him, or he has waived that right in some manner pointed out by the law. He is entitled to due process of law—to his day in court; and if he has not had this, and a verdict and judgment be rendered against him, then, on a proper motion made, it should be set aside. As these defendants have not had their day in court, and been put on notice of the case made against them, nor waived that right, we must hold that the verdict against them was erroneously directed. *Hudson v. Hudson*, 119 Ga. 637 (3, 4), 46 S. E. 874; *Brown v. Railroad Co.*, 131 Ga. 259, 62 S. E. 186; *Allen v. Mutual Loan, etc., Co.*, 86 Ga. 74, 76, 12 S. E. 265; *Peck v. La Roche*, 86 Ga. 314, 12 S. E. 638; Civil Code 1910, §§ 5563, 5561, 5559.

The plaintiffs have no right to a judgment in this case except by default, and only one defendant was in default, and he was not so as to the amended petition; for he was neither in court, nor had waived his right, nor was served with a copy of the proceedings filed against him. The rule as to taking judgment by default does not apply to a case where an amendment is filed which is material to the judgment rendered and the defendant is not served with a copy of the amendment. See *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. Nor would it apply to the defendant J. T. Brown, who was alleged to be in Florida, and who was served by petition and process before the amendment to the petition was allowed. Nor is a codefendant bound to answer unless he is served. One codefendant cannot file an answer and set up therein a cross-action against codefendants and take judgment by default against them, with no proof whatever, when no service has been perfected upon the codefendants, and there is no waiver by them. J. T. Brown, alleged to be in Florida, and not served with a copy of the amendment or defendant's cross-bill, was not called to come into court under penalty of a judgment by default. Neither of the codefendants, W. F.

and J. T. Brown, was called on to answer the cross-bill of the defendant Tomberlin, and were in no such default as to him as to render them liable to a judgment by default. In 1 Black on Judgments, § 211, it is said: "When we inquire as to the proper disposition to be made of a joint judgment against several defendants, which is void as to one of them, when it is brought before a court of review by writ of error or appeal, we find the authorities more nearly harmonious. In general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety." In *Harralson v. McArthur*, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689, it was held: "A joint verdict and judgment against several defendants, some of whom were never served, and had not waived service by appearance, should be set aside on motion made at the same term." And in *Tedlie v. Dill*, 3 Ga. 104, 105, it was said: "A judgment, as being an entire thing, cannot be reversed in part and stand good as to the other part, or be reversed as to one party and remain good against the rest. Hob. 90; Carth. 235. If judgment is entered against joint defendants, when one of them is dead, the judgment shall be reversed for error as to all of them; for in such case, if the plaintiff proceed, it is at his peril. He ought to make a special entry of the death of the party, namely, to suggest it on the record, with 'nihil ulterius versus eum fiat,' and then take judgment only against the others. Id. 149." The question at last resolves itself to this (in view of the tangled web of the petition, amended petition, answer and cross-bill, of service on some and not on other parties to the case, of failure to perfect service, etc.): Can the court untangle the web, and separate the legal from the illegal, and uphold the verdict and decree as to some, and set it aside as to the other defendants? The whole case is so confused and interwoven, the legal with the illegal, that the only course open, in order for all parties to have their day in court and their rights, whatever they are, adjudicated, is to reverse the judgment of the court below and order a new trial.

Judgment reversed. All the Justices concur.

(10 Ga. App. 550)

REDFEARN v. THOMPSON. (No. 3,241.)
(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 101*)—ACTIONS—EVIDENCE—PRESUMPTIONS.

In an action for slander, where the language alleged to have been used imputes to the plaintiff guilt of an indictable offense, he establishes a *prima facie* case upon proof that the slanderous language, substantially as alleged in the petition, was used by the defend-

ant; and, without more, the plaintiff is presumed to be innocent of the crime charged. This is true, whether the defendant pleads justification or not. Therefore it is proper, where the alleged slanderous words charged a crime, to instruct the jury that "the plaintiff is presumed to be innocent of the charges imputed to her by the alleged slanderous words of the defendant, set out in the plaintiff's petition, and, until or unless it is overcome by satisfactory proof, this presumption of innocence in the plaintiff's favor remains with her through every stage of the trial."

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 273-280; Dec. Dig. § 101.*]

2. LIBEL AND SLANDER (§§ 56, 61*)—ACTIONS—EFFECT OF EVIDENCE.

Evidence that the plaintiff's general character or reputation was bad at the time the defendant used the alleged slanderous words, or before that time, presents no defense to an action for slander, based upon words charging a specific crime. The fact that the character of the plaintiff in an action for slander is bad may serve to mitigate the damages, but cannot prevent recovery.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 153-156; Dec. Dig. §§ 56, 61.*]

3. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

The court having properly instructed the jury that evidence of the bad character of the plaintiff, who sought to recover damages for an alleged slander, might be considered by the jury in assessing the damages, it was not error, in the absence of an appropriate timely request, to omit any further instruction upon the subject. The language thus used in referring to the evidence upon the subject of the plaintiff's character was favorable to the defendant, and the jury could not have been misled thereby into increasing such damages as might be awarded; and if fuller instructions were desired they should have been requested.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

4. APPEAL AND ERROR (§ 968*)—REVIEW—QUESTIONS OF FACT—COMPETENCY OF JURORS.

The finding of the court, when sitting in lieu of the common-law triors, as to the competency of jurors, is not subject to review. A challenge for principal cause being considered as a matter of law, a judgment of the trial court thereon may be reviewed; but, in case of a challenge to the favor, the decision of the judge as trior, being essentially the determination of a question of fact, is final and conclusive. Therefore the judge's finding as to the jurors who were attacked for prejudice and bias cannot be made a ground of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 968.*]

5. TRIAL (§ 344*)—VERDICT—IMPEACHMENT BY JURORS.

An affidavit, given by a juror after the verdict was rendered, to the effect that he did not voluntarily assent to the verdict, cannot be received. A juror will not be heard to impeach the verdict after its record.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 813; Dec. Dig. § 344.*]

6. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Mrs. F. B. Thompson against R. L. Redfearn. Judgment for plaintiff, and defendant brings error. Affirmed.

Fondren Mitchell and Branch & Snow, for plaintiff in error. Roscoe Luke and Theo. Titus, for defendant in error.

RUSSELL, J. Mrs. Thompson brought suit for an alleged slander. The jury returned a verdict in her favor for \$500. Exception is taken to the judgment overruling the defendant's motion for a new trial. Inasmuch as it cannot be said that the verdict is without evidence to support it, we shall not discuss the general grounds of the motion for new trial; for, unless the verdict was induced by some of the errors assigned in the other grounds of the motion, there would be no theory upon which this court could order another trial.

The slanderous words alleged in the plaintiff's petition imputed to her guilt of the offense of adultery, and adultery and fornication. In the twelfth paragraph of the petition the defendant was alleged to have used certain slanderous words, which imputed to the petitioner, not only the crime of adultery, but also the crime of murder. By an amendment to his original answer the defendant pleaded justification, in so far as he was alleged to have charged the plaintiff with adultery. We purposely omit any reference to the loathsome details of the very voluminous testimony in the case. The defendant introduced a mass of testimony in support of his defense that the statements made by him were true; and, on the other hand, there was testimony which would have authorized the jury to believe that the statements made in regard to the plaintiff were wholly false. Testimony tending to impeach some of the witnesses was introduced. The court also permitted testimony to the effect that the general character of the plaintiff for chastity was bad, and in rebuttal testimony from other witnesses that the plaintiff's character was good. If, in spite of the evidence against her, the jury saw fit to award the plaintiff a verdict, the amount of the verdict, \$500, cannot be said to be immoderate. And as the evidence in behalf of the plaintiff (which the result shows was believed by the jury) would have justified even a much larger finding in her favor, there was no error in refusing a new trial, unless some of the errors alleged in the motion for new trial prejudiced the defendant's case and contributed to induce the verdict reached.

[1] 1. The court charged the jury as follows: "At the outset of this trial, gentlemen of the jury, the plaintiff, Mrs. Thompson, is presumed to be innocent of the charges imputed to her by the alleged slanderous words of the defendant, set out in the plaintiff's petition; and until or unless it is overcome

by satisfactory proof, this presumption of innocence in the plaintiff's favor remains with her through every stage of the trial." Error is assigned upon this instruction, upon the ground that it gave to the plaintiff the benefit of a presumption applicable to criminal cases alone; there being no presumption of innocence in civil cases. We do not think that the exception is meritorious, and certainly the charge is not subject to the complaint made against it, as requiring the defendant to establish his plea of justification to the satisfaction of the jury beyond a reasonable doubt, as would be true in a criminal case. In fact, when the judge told the jury in this charge that the plaintiff—who was alleged to have been slandered by being charged with the commission of a criminal offense—was presumed to be innocent of the charge, it was tantamount to saying that if she proved the use of the alleged slanderous words, or if the defendant admitted them, it cast upon him the burden of proving the truth of his statements. The statement of the judge dealt with the burden of proof in the case, and not with the degree of mental conviction necessary to enable either the one party or the other to successfully carry that burden. This is plain when he says that the presumption is to be "overcome by satisfactory proof." He did not tell the jury that the defendant had to establish the guilt of the plaintiff by proof satisfying their minds to the exclusion of a reasonable doubt. The case being a civil cause, the jury would naturally infer that by "satisfactory proof" was meant the preponderance of the evidence; but the judge not only instructed the jury very fully as to the meaning and effect of the phrase "preponderance of evidence," but also defined the term "satisfactory proof" as being that degree of reasonable and moral certainty produced by a preponderance of the evidence.

On principle it would seem, where one is slanderously charged with a crime, and he who makes the charge pleads justification, that the same burden of proof in establishing the truth of the alleged slander should be placed upon the defendant who pleads justification as would devolve upon the state were the plaintiff on trial for the crime itself; that is to say, that the defendant in an action of slander or libel, who has pleaded justification, should be required to prove the crime which he has imputed to the plaintiff by evidence which satisfies the jury of the plaintiff's guilt of the crime charged beyond any reasonable doubt. This rule (which is sustained in 2 Starkle on Slander, 98, 2 Greenleaf on Evidence, § 426, and 2 Addison on Torts, 386) was for some time considered the rule in this state, as will be seen from the decisions in Ransome v. Christian, 56 Ga. 352, and Williams v. Gunnels, 66 Ga. 521; but in Atlanta Journal v. Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St.

Rep. 104, these rulings were reviewed, criticised, and disapproved, with the statement that the question was not directly presented in either of them. Inasmuch, however, as the decision in the case of *Atlanta Journal v. Mayson*, supra, was rendered by only two justices, and the decision in *Williams v. Gunnels*, supra, was rendered by a full bench, if the question were now squarely before us, it might well be said to be doubtful which precedent is controlling. However, as we pointed out above, the charge of the judge is not in conflict with the ruling in the *Mayson Case*, supra, because, with his explanation of the term "satisfactory proof" as contained in the latter portion of his charge it was very plain to the jury that the defendant was only required to establish his plea of justification by a preponderance of the evidence; the court not having charged the jury that the defendant was required to adduce a degree of proof which would satisfy the minds of the jury, beyond a reasonable doubt, of the plaintiff's guilt of the charge made against her by the defendant.

Neither did the court err in charging the jury that the plaintiff was presumed to be innocent of the crime imputed to her by the defendant. The instruction on this point was in reference to who carried the burden of proof, and not to the degree of proof necessary to enable one to carry it successfully. Every person is presumed to have a good character until the contrary is shown, and to be innocent of crime until there is evidence of some kind to establish its existence. The presumption to which the judge referred exists, regardless of the degree of proof which in any particular case may be necessary to rebut it. "There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens v. State*, 20 Tex. App. 269; and in the case of *Cluck v. State*, 40 Ind. 263, the Supreme Court of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in *Sackett on Instructions to Juries*, p. 651." *Bennett v. State*, 86 Ga. 404, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465. In *Goggans v. Monroe*, 31 Ga. 301, the judgment of the lower court was reversed because it was held to have been error that the court refused to charge a request to the effect that the plaintiff was entitled to the legal presumption, in the absence of evidence proving to the contrary, that his character was good. In an action for slander, where the language alleged to have been used imputes to the plaintiff guilt of an indictable offense, he establishes a *prima facie* case upon proof that the slanderous language, substantially as alleged in the petition, was used by the defendant; and, without more, the plaintiff is presumed to be innocent of the crime charged. This is true, whether

the defendant pleads justification or not. Therefore it is proper, where the alleged slanderous words impute a crime, to charge the jury that the plaintiff is presumed to be innocent of the charges imputed by the alleged slanderous words of the defendant, set out in the plaintiff's petition, and that until or unless it is overcome by satisfactory proof this presumption of innocence in the plaintiff's favor remains through every stage of the trial.

[2] 2, 3. Exception is taken to the following instruction in the judge's charge: "If you find the plaintiff to be entitled to recover, and if you believe from the evidence that the plaintiff's general character or reputation, at and before the speaking by defendant of the slanderous words in question, was bad, you would have the right to take that fact into account in assessing the plaintiff's damages." Two assignments of error are predicated upon this instruction. Both of them are without merit. In the first it is insisted that if the jury should have believed, from the evidence, that the plaintiff's general character or reputation was bad, and if they should have believed that the defendant did not use the words charging the crime of murder, the plaintiff could not recover at all. In the second it is urged that the charge gave the jury no intimation as to how they could take the fact of the plaintiff's bad character into account, either by way of diminution or increase in the amount of damages. Evidence that the plaintiff's general character or reputation was bad at the time the defendant used the alleged slanderous words, or before that time, presents no defense in an action of slander predicated upon words charging a specific crime. The fact that the character of the plaintiff in an action for slander is bad may serve to mitigate the damages, but cannot prevent recovery.

[3] The court having properly instructed the jury that evidence of the bad character of the plaintiff, who sought to recover damages for an alleged slander, might be considered by the jury in assessing the plaintiff's damages, it was not error, in the absence of an appropriate timely request, to omit any further instruction upon the subject. The language used in reference to the evidence upon the subject of the plaintiff's character was favorable to the defendant, and the jury could not have been misled thereby into increasing such damages as might be awarded, and if fuller instructions were desired they should have been requested.

[4] 4. Numerous affidavits were presented attacking B. C. Johnson, the foreman of the jury, and S. M. Chastain, a member of the jury, upon the ground that they were incompetent through prejudice and bias, and disqualified to serve as jurors, because they had formed and expressed a fixed opinion in favor of the plaintiff before they were

impaneled to try the case. A countershowing was made in behalf of these jurors, and the court held them to be competent by overruling these grounds of the motion for new trial. Among the affidavits in support of the jurors are those of a number of witnesses testifying to the good character of each of the jurors. It is insisted that the judge should not have considered the affidavits presented in support of the good character and standing of the jurors, but should have repelled the evidence upon the subject of the character of the jurors who were attacked. The judge was sitting as a trier, and we see no reason why he could not take into consideration the evidence as to the integrity and general good character of the jurors in connection with the other testimony before him. Granting that testimony to the effect that the jurors were men of high character and good standing would, in some instances, be irrelevant, there was, in the present instance, direct conflict between the witnesses as to material statements which were related as having been made by each juror. The jurors were each witnesses, and it is likely that the effect was to impeach these witnesses by proving contradictory statements, and in any case proof of good character may tend to sustain a witness whose impeachment is sought by proof of contradictory statements.

But this is unimportant, for the finding of the judge upon the subject of a juror's prejudice or bias, or the absence of disqualifying prejudice or bias, is not subject to review. Those decisions of the Supreme Court holding to the contrary were rendered prior to the passage of the act of 1856, which substituted the trial judge for the triers known to the common law. The cases of *Wade v. State*, 12 Ga. 25, and *Anderson v. State*, 14 Ga. 709, which are cited by counsel for plaintiff in error, are rulings made prior to the act of 1856. In the case of *Bishop v. State*, 9 Ga. 129, 130, in which Judge Lumpkin well said: "It is the pride of the Constitution of this country that all cases should be tried by jurors from whose breasts are excluded all bias and prejudice. To break down any of these safeguards, so wisely erected, and to suffer jurors to decide upon the life and liberty of the citizen whose minds are poisoned by passion or prejudice, would be to stab the upright administration of justice in its most vital parts." And the decisions reversing the judgment of the court below refusing a motion for new trial in such cases were of a still earlier date. The question is fully discussed in the opinion in *Turner v. State*, 114 Ga. 421, 40 S. E. 308. The distinction between a challenge for principal cause and challenges to the favor is

there pointed out, and it is held that as to a principal challenge it must be principally a question of law, submitted to the court as a court, and that in such a challenge the decision of the court is subject to review. However, as to a challenge to the favor, it was held in that case (citing numerous authorities) that "under our system, where the court is substituted for the triers to decide challenges to the favor (*Reid v. State*, 20 Ga. 688), the court's decision as to such a challenge is on a footing with that of the triers, and is final and conclusive. *Thomp. & Mer. Jur.* §§ 238, 249, et seq.; *Thomp. Trials*, § 100; 12 Enc. Pl. & Pr. 470. 'The decision of the judge, as trier, can no more be made a ground of error before this court than the verdict of triers could have been.' *Galloway v. State*, 25 Ga. 596." Consequently the judge's findings as to the jurors who were attacked for prejudice and bias in this case cannot be made a ground of error.

[§] 5. One of the jurors who tried the instant case made an affidavit that the verdict returned was not his verdict; that it did not speak his opinion of the law or of the evidence, and he did not concur in it; that he became ill during the deliberation of the jury, and needed a doctor, and so informed the other members of the jury, and insisted that he be given the services of a doctor, but that some of the members of the jury, including the foreman, told him that before he could get the services of a doctor he must allow them to return a verdict for the plaintiff; and that, while the juror had been in favor of a verdict for the defendant, he agreed that the verdict should be returned into court only in order to get a doctor and be relieved of his illness, but the verdict did not speak the truth of the case, according to his opinion, and was not his verdict. The judge declined to consider the juror's affidavit impeaching the verdict; and he could not have done otherwise, under the repeated rulings in this state. A juror cannot be heard to impeach the verdict returned into court, after its record. The principle succinctly stated in *Bishop v. State*, 9 Ga. 121 (4), that "the affidavit of a juror will not be received to impeach his verdict," has been reiterated too often to permit of space for citations.

[§] 6. It appears that the trial was free from error, and the evidence, as we have heretofore said, being sufficient to authorize a finding for the plaintiff, there was no error in refusing a new trial.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 583)

JOS. ROSENHEIM SHOE CO. v. HORNE
et al.HORNE et al. v. JOS. ROSENHEIM SHOE
CO.

(Nos. 3,249, 3,250.)

(Court of Appeals of Georgia. Jan. 15, 1912.
Rehearing Denied Feb. 27, 1912.)*(Syllabus by the Court.)***1. EXCEPTIONS, BILL OF (§ 20*)—DISMISSAL—**
—GROUNDS.

The motion to dismiss the bill of exceptions, on the ground that it does not disclose with sufficient certainty who are the parties to it, is not well taken.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 20.*]

2. ABATEMENT AND REVIVAL (§ 8*)—GROUNDS—
—PENDENCY OF FORMER SUIT.

The liability which, under Civil Code 1910, § 2220, attaches to the organizers of a corporation for beginning to do business before the minimum capital stock is subscribed for, attaches in favor of creditors, and not in favor of the corporation itself. It is a liability which a trustee in bankruptcy of the corporation cannot legally enforce; hence the pendency of a suit by a trustee in bankruptcy on this alleged cause of action does not afford ground of abatement as to a suit filed by a creditor in his own behalf.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 3972; Dec. Dig. § 8.*]

PARTNERSHIP (§ 42*)—ORGANIZATION—LIA-
BILITY OF PROMOTERS.

Prior to the formal and complete organization of a corporation, the organizers of it may make provisional contracts in behalf of the corporation, which may become binding on the corporation after it begins business; but in the meantime, and until the corporation is legally organized, the promoters are liable as partners. The law does not require that the minimum capital stock, as stated in the charter, shall be fully subscribed for until formal organization, and till the corporation, as such, begins to do business. Hence one dealing with the persons who have obtained a charter for a corporation, but who have not formally completed organization thereunder, may, though he has knowledge, at the time he contracts, that the capital stock has not been subscribed for, hold the organizers liable as partners, when they afterwards go forward and commence business as a corporation without requiring the capital stock to be subscribed; it not appearing that he knew that the persons with whom he dealt did not intend to obey the law in this respect.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 57; Dec. Dig. § 42.*]

4. PARTNERSHIP (§ 42*)—ORGANIZATION—LIA-
BILITY OF PROMOTERS—"MINIMUM CAPITAL
STOCK."

Where the application for charter and the charter of the corporation name only one sum as the proposed capital of the corporation, that sum is the "minimum capital stock," which Civil Code 1910, § 2220, requires to be subscribed for in order to relieve the organizers of the corporation from individual liability to creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 57; Dec. Dig. § 42.*]

Error from City Court of Eastman; C. W. Griffin, Judge.

Action by S. E. Horne and others against the Jos. Rosenheim Shoe Company. To a judgment for plaintiffs, defendant brings error, and plaintiffs file a cross-bill of exceptions. Judgment on main bill of exceptions reversed, and on cross-bill affirmed.

The plaintiffs sold goods to the manager of a corporation in process of organization. The capital stock of the corporation was stated in the application for charter and in the charter itself as \$20,000. The full capital stock was never subscribed or paid in; indeed, only 10 per cent.—that is, \$2,000—was ever subscribed or paid in. Before the plaintiffs' bill was fully paid for, the corporation became bankrupt. The trustee in bankruptcy and the plaintiff each separately sued the promoters of the corporation to enforce that liability declared by Civil Code 1910, § 2220, as follows: "Persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock with interest." The suit by the trustee in bankruptcy is involved in the present case only to the extent that its pendency was set up by the defendants as a plea in abatement to the present action.

The facts of the transaction are practically undisputed. The principal reason asserted by the defendants as to why the plaintiffs should not hold them liable is that they knew, at the time they extended the credit, that the full capital stock had not been subscribed. The proof as to this element of the case comes from the plaintiffs' credit man. He testified, in substance, that when he passed on the order for the goods he had before him reports from the commercial agencies stating that the corporation was in process of organization, and that only \$2,000 had been subscribed for and paid in at that time. He further stated in his testimony that he did not understand or believe that only this sum was to be subscribed for and paid in; nor did the commercial reports so state. His understanding was that the organization was not complete, that it would be completed by the full capital stock being subscribed, and that it would be paid in as needed. The court granted nonsuit on the ground that this knowledge as to the capital stock not being subscribed for prevented the plaintiffs from recovering.

To this judgment, as well as to a number of other rulings, the plaintiff brings error. The defendants have filed a cross-bill of exceptions.

Hardeman, Jones, Callaway & Johnston, R. S. Wimberly, and Jno. R. L. Smith, for plaintiff in error. W. M. Clements, W. L. & Warren Grice, and Akerman & Akerman, for defendants in error.

POWELL, J. (after stating the facts as above). [1] 1. The defendants in error have moved to dismiss the bill of exceptions because it does not definitely disclose who are parties to it. It recites that it is filed in a case of Joseph Rosenheim Shoe Company against certain persons and a corporation, naming them, and that to the final judgment the plaintiff excepts and tenders the bill of exceptions. These recitals are consistent with the record. The motion to dismiss is overruled. *Joiner v. Singletary*, 106 Ga. 257, 32 S. E. 90.

[2] 2. As to whether the present suit was subject to abatement because of the pendency of the prior suit instituted by the trustee in bankruptcy of the corporation on the same alleged cause of action: The right of action declared by Civil Code 1910, § 2220, is given to the creditors, and not to the corporation, or to any one standing as its representative or successor in title. In *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452, this court allowed the receiver appointed in an equitable action against the corporation to maintain a similar action with the consent and under the direction of the court of his appointment. That decision was based on the theory that the receiver, under all the circumstances of the case, not only was clothed with such right to sue as formerly resided in the corporation, but also represented the creditors and was authorized to sue in their behalf. It was on this second fact, the fact that he had been vested with the right of action normally residing in the creditors, and not the fact that he was also the representative of the corporation, that this court recognized the receiver's right to bring suit to enforce the liability against the promoters of the corporation.

A trustee in bankruptcy, upon his appointment and qualification, succeeds (except in so far as it is otherwise specially provided) to the title to all property of the bankrupt, and becomes authorized to sue and recover in most cases where, but for the intervention of the bankruptcy proceedings, the bankrupt could have sued. Still such title and such authority to sue as the trustee in bankruptcy possesses is only that conferred by the act of Congress. He is, in a sense, a representative of the creditors and of the bankrupt, but is a special and not a general representative. The extent and limits of his title as to property and as to causes of action are prescribed in section 70 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). Neither this nor any other portion of the act transfers to him causes of action accruing personally to the creditors. It is true that by the amendment of June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), the trustee is vested with the same rights as if he were a judgment creditor; but this, as plainly appears from the context, is intended

to apply only to cases in which the trustee is suing to recover assets belonging, in law or in equity, to the bankrupt estate, or is defending against the claims of others seeking to take property from his possession. For unpaid stock subscriptions the corporation would, but for the bankruptcy, have a cause of action. *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76. And to enforce that liability the trustee in bankruptcy may sue. *Commercial Bank v. Warthen*, 119 Ga. 990, 47 S. E. 536. If, instead of paying the subscriptions in cash, or in property at fair valuation, the stockholders go through the form of satisfying their obligations on their contracts of subscription by paying in property fraudulently overvalued, the law looks upon the subscriptions as still unpaid, and the trustee of the bankrupt corporation may sue to compel the delinquent stockholders to make good that of which the corporation has been deprived through the fraud. *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

But the liability of the stockholders in each of the cases just mentioned is essentially different from the liability imposed by law upon the persons who undertake to organize a corporation and proceed to do business before the minimum capital stock is subscribed. When persons in this state apply for a charter for a corporation, and state what the capital stock of the corporation is to be, the expression "capital stock" means something. It means that the new creature of the law is to start out on its business career with assets of the amount stated. It means that those organizing the corporation, while desiring to exempt themselves from general individual liability for the liabilities that the corporation may incur, will see that it starts off in life endowed with this amount of money (or the equivalent of money) which is hazarded upon the enterprise. Those who are to deal with the corporation are publicly informed that this impersonal trader starts off with this much capital pledged to its success. Ten per cent. of the amount of the capital stock designated in the charter must be actually paid in before the corporation begins business. Civil Code 1910, § 2823 (3). The other 90 per cent. need not be paid in, provided the corporation holds unpaid stock subscriptions, bona fide taken, for that amount. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

But the subscribers for the stock may be compelled to pay it in, and are individually liable for it, whenever the interests of the corporation or of its creditors so require. Civil Code 1910, § 2823 (3). Thus the amount paid in, or the amount paid in plus the individual liability of bona fide subscribers for the corporate stock, must always amount to as much as the capital which, according to representations made in the application for the charter, is to be employed; else the persons who, in violation of this promise and

duty, organize the company and proceed to transact business in its name, do not relieve themselves of personal liability for the debts of the organization. In such cases the liability attaches to the promoters of the enterprise, not in their capacity as stockholders of the corporation, nor by reason of any contract between them and the corporation, but because they have violated the law and have broken a duty to persons dealing with the corporation as if it had been legally organized. The cause of action on this account does not arise in favor of the corporation, but arises in favor of those who have dealt with the organizers; that is, usually in favor of persons who have extended credit to the corporation on faith of the organizers' promise and duty to see that it was endowed with the amount of capital stated in the charter. This cause of action does not pass to the trustee in the event the corporation is declared bankrupt. The plea in abatement setting up the pendency of the suit by the trustee in bankruptcy was properly stricken on demurrer.

[3] 3. The next question is whether the trial judge correctly held that the plaintiffs could not recover because their credit man knew at the time the goods were sold that only about 10 per cent. of the stated capital had been subscribed for and paid in. From the testimony of this credit man as a witness, it is not altogether plain that he knew that only this amount had been subscribed, but it is plain that he knew that only this amount had been paid in. His testimony does show, however, that organization was not complete at this time, and that he did not know that the remainder was not to be subscribed or paid in. Now "one extending credit to a corporation cannot complain of acts of mismanagement on the part of officers and agents of the corporation prior to the time when the credit was extended." *Commercial Bank v. Warthen*, 119 Ga. 990, 47 S. E. 536. How far does this principle apply here? This transaction took place before the corporation formally began business, but was ratified by the corporation afterwards; for it took the goods and made payments on the account. The law does not require any part of the capital stock to be paid in before the corporation begins business; but prior to formal organization, while the necessary stock subscriptions are being obtained and other preliminaries are being attended to, many things of a provisional nature must often be done, and the law contemplates that they may be done. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

As to debts incurred by the organizers of the corporation while the affair is in this provisional state, they are liable as partners until the corporation is duly organized and its corporate responsibility is substituted for

their prior individual responsibility. In this case the responsibility was never shifted. There was no fraud and no wrong in the situation as it stood when these goods were sold. The time had not arrived when it became requisite that the full amount of the capital stock should be subscribed. These creditors had the right to act upon the assumption that these organizers would complete the organization as they had declared in the application for charter it would be completed, holding them individually liable in the meantime. What the credit man of the plaintiffs knew in this case charged the plaintiffs with knowledge that the corporation was not then legally organized, but not with notice that it would not be. The judge erred in granting nonsuit.

[4] 4. As to the point raised by the defendants that the liability against persons undertaking to organize the corporation is, by Civil Code 1910, § 2220, to make good "the minimum capital stock," and that the charter in the present case set no minimum, and that, therefore, no liability exists: Sometimes an application for charter recites that the capital to be employed shall not be less than so many dollars and not more than so many, or that it shall be so many dollars with a privilege of increase, and in such cases the lowest amount named is the minimum referred to in the Code section; but in other cases, as in the one at bar, only one amount is named, and that, as it seems perfectly clear to us, is both minimum and maximum.

The other points made in the record are controlled by the views already set forth, and we need not enlarge upon them.

Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

(10 Ga. App. 564)

ACME BREWING CO. v. WM. RAHR SONS CO. (No. 3,333.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

SALES (§ 121*)—RESCISSION OF CONTRACT—ESTOPPEL.

The contract was entire. There was no offer or attempt to return any of the malt which was shipped, but, on the contrary, a deduction for deficiency in quality was accepted by the purchaser, and the malt put to his own use. Consequently the purchaser estopped himself from rescinding the contract. The facts in the present case, as stated by the pleadings, are practically and substantially identical with those in *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50, and the decision of the Supreme Court in that case is fully controlling, so that there was no error in striking the defendant's answer, nor in thereafter entering judgment for the plaintiff.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 296-301; Dec. Dig. § 121.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Acme Brewing Company against the Wm. Rahr Sons Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ellis & Jordan, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, for defendant in error.

RUSSELL, J. According to the allegations of the petition, the defendant entered into a contract by which it agreed to purchase 10,000 bushels of malt from the plaintiff, at \$1.05 per bushel "f. o. b. Macon," which was to be ordered out by the defendant until all of it should be taken before October 1st, and each shipment was to be paid for by the defendant within 30 days from the date of the shipment. The defendant ordered out, and the plaintiff shipped, at various times, in four shipments, about 8,000 bushels of the malt, and the defendant paid for it. The petition alleged that the plaintiff was willing and offered to deliver to the defendant the balance—about 2,000 bushels—not theretofore ordered out, and requested the defendant to accept it and pay the agreed price therefor; but it was alleged that the defendant would not accept the balance of the malt, and that thereupon the plaintiff, after giving notice to the defendant, sold it at its market price on the defendant's account. This suit was brought to recover the difference between the amount received from the sale of the undelivered portion of the malt contracted for and the contract price at which it had been sold to the defendant. Various letters and telegrams constituting the contract were set out in the petition and attached thereto. The defendant in its answer admitted the correspondence constituting the contract, and that it had agreed to accept the malt as alleged by the plaintiff, and had refused, when requested, to order out the last shipment, or to accept or pay for it. The answer put the plaintiff upon proof of some of the allegations as to the sale of the malt on the defendant's account; but as the matters dealt with in these portions of the petition are largely matters of calculation, and as no point is made upon this in the brief, the only real question turns upon whether the defendant's plea sets up any valid reason why the defendant should be relieved from the obligation of the contract admitted by it. The affirmative defense which the brewing company sought to interpose set up that out of an order of 10,000 bushels of malt, to be delivered between May and October, 7,979 bushels had been ordered out in several shipments, for which the defendant paid the plaintiff the contract price. Each of the shipments contained malt inferior in kind and quality to that contemplated by the contract, due to the presence of unreasonable quantities of trash and screenings in every shipment. Upon notification of this fact the plaintiff made al-

lowances to the defendant on each of the several shipments, to cover the trash and screenings, which are fully set forth in an exhibit attached to the answer. The defendant notified the plaintiff several times prior to the time when the last shipment should have been ordered out that it refused to order forward any further shipments for the reason that the plaintiff had failed to comply with its contract, in that the several shipments already made by it failed to contain first-class screened malt, free from trash and screenings. The defendant pleaded that by reason of the several breaches of the contract by the plaintiff the contract was abrogated. On demurrer the court struck the answer, and thereafter entered judgment against the defendant. Exception is taken to both of these rulings.

It will be seen, from the above statement, that there was no rejection of any of the malt actually shipped, nor any complaint of the quality of the malt, though the defendant claims deductions for a certain number of pounds of trash and screenings on each shipment, which were allowed by the plaintiff. As the finding for the plaintiff, after the striking of the defendant's answer, was inevitable, and the exception to the action of the court in "rendering final judgment on pleadings from which the material defense of defendant, now and here plaintiff in error, had been stricken on demurrer," is only necessary in order to comply with the ruling in *Lyndon v. Georgia Railway & Electric Co.*, 129 Ga. 353, 58 S. E. 1047, the only question presented to this court is the one presented by the exception to the ruling upon the demurrer. In view of the admission of the defendant that the contract was made, and that four shipments were made under it, for which it paid the purchase price, the only main question was whether under the facts stated the defendant had rescinded or could rescind the contract. The facts in the present case are practically and substantially identical with those in *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50, and the decision of the Supreme Court in that case properly controlled the judgment of the trial judge. Practically the only difference between the two cases is that the case cited concerned a shipment of corn, and not of malt, and the period within which the shipments were to be made was different from that in the case at bar. "Where there was a contract of sale of corn, and a portion was delivered, paid for, and used by the purchaser, he cannot rescind the contract upon the ground that the quantity received and accepted by him was inferior in quality to that stipulated in the contract." *Henderson Elevator Co. v. North Georgia Milling Co.*, supra. See, also, *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

The learned counsel for the plaintiff in error, in support of his contention that the delivery of inferior malt was a breach of the contract, and that the Acme Brewing Company was entitled to treat the breach as a discharge from further performance of the terms of the contract upon every particular, cites the case of *Harden v. Lang*, 110 Ga. 304, 36 S. E. 100. It will readily be observed, however, that in the *Harden* Case the principle is distinctly announced that when a breach is occasioned, and the purchaser desires to rescind the contract, he must not only notify the opposite party, but he must return the articles he has received, and Judge Little in delivering the opinion says: "When, after such breach, he not only retains the articles received, but puts them to his own use, and notifies the seller he has purchased elsewhere the part of the machinery contracted for, but not delivered, this is equivalent to an election to abide by the terms of the contract, and he thereafter holds under those terms the articles received." This principle is adverted to in the *Henderson Elevator Company Case*, supra. In that case the defendant had used the corn. The defendant in the present case used the malt. It could not return it. It did not offer to do so, and, as was said by Judge Bleckley in *Summerall v. Graham*, 62 Ga. 729, "Restitution before absolution is as sound in law as in theology." The plaintiff in error also relied upon the decisions of this court in *Gude & Walker v. Bailey Co.*, 4 Ga. App. 230, 61 S. E. 135, and *Cincinnati Glass Co. v. Stephens*, 3 Ga. App. 766-768, 60 S. E. 360. Neither of these cases is in point. The facts in each case clearly distinguish them from the case at bar, and in each case the ruling turns largely upon the fact that the facts were such as to authorize the inference that there was a novation.

There was no error in sustaining the demurrer and striking the defendant's plea. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 573)

FLINT RIVER & N. E. R. CO. v. MAPLES
et al. (No. 3,418.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. PLEADING (§§ 18, 192*) — RAILROADS (§ 478*)—ALLEGATIONS IN GENERAL—ACTIONS FOR FIRES.

Reasonable certainty as to essential statements is sufficient to enable pleadings to withstand a special demurrer. Complete particularity of statement is not required, where a reasonable inference, from the statements made, readily suggests the facts.

(a) In an action brought against a railroad company for damages due to negligently setting out fire, the manner in which the fire was set out must be alleged; but from the very nature

of the case it is not always within the power of the plaintiff to state the particular agent, servant, or employé who actually started the fire, and the omission on the part of the plaintiff to specify the particular employé to whose negligence the injury was traceable will not subject the petition to special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 409; Dec. Dig. §§ 18, 192;* Railroads, Cent. Dig. §§ 1690, 1698-1705; Dec. Dig. § 478.*]

2. APPEAL AND ERROR (§ 204*)—EVIDENCE (§ 157*)—TRIAL (§ 55*)—OBJECTIONS IN LOWER COURT—BEST EVIDENCE—EXCLUSION OF IMPROPER EVIDENCE.

While the best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary, or of another who has examined the record in the proper court of ordinary, that no letters of administration upon the estate are shown by those records, still where a witness testifies to the effect that no administration has ever been granted upon the estate of a named person, and no objection is interposed at the time the testimony is offered, it will be assumed that the witness has made the requisite examination of the records, and testifies from knowledge derived therefrom; for, "unless it affirmatively appears that evidence is hearsay, it is not to be excluded as such, where it is of a nature which admits of its resting on the personal knowledge of the witness."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 204;* Evidence, Dec. Dig. § 157;* Trial, Dec. Dig. § 55.*]

3. DESCENT AND DISTRIBUTION (§ 75*) — RIGHTS OF HEIRS—REAL PROPERTY.

When there is no administration, nor any necessity for administration, realty descends to the heirs at law. The evidence in the present case was sufficient to show that the intestate died before the time of the fire which was alleged to be the cause of the injury and damage.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 243-251; Dec. Dig. § 75.*]

4. SUFFICIENCY OF EVIDENCE—ADMISSIBILITY—CHARGE OF COURT.

The verdict was authorized by the evidence. There was no error in the ruling upon the testimony complained of, nor in the charge of the court to which exception is taken.

(Additional Syllabus by Editorial Staff.)

5. DEATH (§ 4*)—SUFFICIENCY OF EVIDENCE.

In an action by heirs of land against a railroad for negligently setting out fire, uncontroverted testimony that the ancestor of plaintiffs went into possession of the land about 12 years before the trial, and that she had been in possession between 12 and 13 years up to the time of her death, was sufficient to show that she died before the time of the fire, 16 months before the trial.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 4.*]

6. APPEAL AND ERROR (§ 1135*)—AFFIRMANCE—ERROR NOT SHOWN.

In an action by heirs of land against a railroad company for negligently setting out a fire, a judgment for plaintiffs will not be reversed on the ground that it included the value of rails, which, being personalty, were not inherited by plaintiffs, where it does not affirmatively appear that the verdict included the value of the rails, the other items of damage alleged being greater in amount than the verdict, and no objection was made to the evidence as to the rails, and no motion was made to strike from the petition the items claiming

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

damages for their destruction, and there was testimony sustaining the theory that the rails were cut after the death of the ancestor of plaintiffs, and were therefore the property of plaintiffs in their own right.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1135.*]

7. TRIAL (§ 296*)—INSTRUCTIONS—ERRORS—CURE BY OTHER INSTRUCTIONS.

In an action against a railroad company for negligently setting out fire, an instruction that the next question for the jury to decide was whether the railroad company exercised due diligence in piling cross-ties on the side of the track is not ground for reversal, as assuming that the railroad company piled the cross-ties on the side of the track, where the court subsequently stated that his attention had been called to the fact that he said that the cross-ties were piled in the manner alleged, that that is the allegation they make, but that the jury must look to the evidence to see whether the railroad company has exercised ordinary diligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

8. RAILROADS (§ 481*)—OPERATION—FIRES—ADMISSIBILITY OF EVIDENCE.

In an action against a railroad company for a fire caused by the burning of certain cross-ties by the section foreman, it was not error to admit testimony that the engine had been there 15 or 20 minutes, and that the witness never saw a train set woods on fire.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 481.*]

Error from City Court of Camilla; M. O. Bennet, Judge pro hac.

Action by I. Maples and another against the Flint River & Northeastern Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. J. Hill and Shipp & Kline, for plaintiff in error. E. M. Davis, for defendants in error.

RUSSELL, J. Maples and others brought suit against the railroad company for damages, alleging that the defendant had set out fire, as the result of which the plaintiffs had been damaged in the sum of \$490, which was specified as follows: 200 timber trees burned, \$220; 760 yards of rail fence, \$70; 25 or 30 acres of canebrake, \$200; and 2,000 rails burned, \$20. The defendant demurred generally and specially to the petition. The court overruled the demurrer, and exceptions pendente lite were filed. On the trial a verdict for \$429 was returned in favor of the plaintiffs. The case is brought to this court upon assignments of error on the exceptions pendente lite, and also upon the refusal of a motion for new trial. From evidence in behalf of the plaintiffs the jury were authorized to infer that the fire was caused by the burning of certain cross-ties by the section foreman, perhaps in pursuance of instructions from his superiors. The right of the plaintiffs to maintain the action, and the amount of the recovery, were fully sustained by the testimony.

[1] 1. The court was so clearly right in overruling the general demurrer as to preclude any necessity for discussion upon that subject. The petitioners alleged that they were the sole heirs of Mrs. Margarette J. Maples deceased, late of said (Mitchell) county, and as such were the owners and in possession of two described tracts of land, located in the county and adjoining the defendant's railroad; that the defendant permitted combustible material, such as wire grass and undergrowth, which had become seared and dry, to remain upon the right of way of the said railroad, contiguous to and adjoining the petitioners' land, and through its servants had piled old cross-ties along the right of way, and set fire to these piles of cross-ties at a time when a high wind was blowing in the direction of the petitioners' land and property, which spread to their land, and, in spite of every effort upon their part to check the flames, destroyed the property to which we have above referred. The amendment alleging possession, which was offered in response to the demurrer, cured the only material defect in the petition. The title to the land was only incidentally involved, for the city court of Camilla had no jurisdiction to determine the title to the land. "The bare possession of land authorizes the possessor to recover damages from any person who wrongfully, in any manner, interferes with such possession." Civil Code 1910, § 4472; Southern Ry. Co. v. Thompson, 129 Ga. 367 (9), 58 S. E. 1044; Downing v. Anderson, 126 Ga. 373, 55 S. E. 184.

From the brief of the plaintiff in error it appears that the ground of the special demurrer really insisted upon in this court is the one in which it is contended that the plaintiffs did not put the defendant on notice as to how the fire originated, whether from the defendant voluntarily putting out fire or whether the fire caught from defendant's locomotive; and it is insisted that the effect of overruling the demurrer to this particular part of the petition was, perhaps, to permit the plaintiffs to prove that the fire was put out by the defendant in either of these ways, or to prove that the defendant by any other means fired the plaintiffs' woods and canebrake. Complete particularity of statement is not required where, from the statements made, the facts sought to be alleged may easily be deduced. As was said by Judge Powell in Atlantic Coast Line R. Co. v. Davis, 5 Ga. App. 214 (1), 62 S. E. 1022, "reasonable certainty is all that is required to render pleadings exempt from attack by special demurrer." The plaintiff in error, no doubt, formed the impression that the allegation of the declaration was susceptible of two interpretations, from the introduction of certain testimony in regard to the passage of other trains of the defendant, to which we will refer later in this

opinion. The petition distinctly alleges in its seventh paragraph, that "On said date hereinafore mentioned the defendant, through its agents, servants, and employes, negligently set fire to said piles of cross-ties at a time when a high wind was blowing in the direction of petitioners' land and fence, * * * which said fire spread * * * to the lands of petitioners," etc. This sufficiently charges the manner in which the fire was set out by the defendant, and compelled the plaintiffs to prove that the fire originated in the manner specified.

Another ground of the demurrer raises the objection that the petition did not set out the names of the agents or employes of the company who set out the fire. Such a requirement as this would be so unreasonable as to debar most plaintiffs, damaged by fire set out by a railroad company, from any right of action at all; because, whether the fire originated from the employment of defective instrumentalities in the boiler, or from the act of section hands, the plaintiffs, in either event, might not be able to ascertain the name of the particular servant of the company whose negligence caused the damage. In an action brought against a railway company for damages due to negligently setting out fire, the manner in which the fire was set out must be alleged; but, from the very nature of the case, it is not always within the power of the plaintiff to state the particular agent, servant, or employe of the railroad company who actually started the fire, and the omission on the part of the plaintiff to specify the particular employe to whose negligence the injury was traceable will not subject the petition to special demurrer.

[2] 2. In the motion for a new trial it is insisted that there was no competent evidence going to show that there was not an administrator appointed on the estate of Mrs. Margarette J. Maples, for the reason that no one testified to having examined the records of the court of ordinary to ascertain whether there was an administrator on the estate or not. Counsel for the plaintiff in error cites the ruling in *Compton v. Fender*, 132 Ga. 483, 64 S. E. 475. In the present case it appears, from the petition and the proof, that the plaintiffs were all the heirs at law of Mrs. Maples. Her husband testified that there was no administration. No objection was offered to the testimony at the time. It was not sought to show, by means of a cross-examination, that the testimony was hearsay. No objection having been offered to the testimony at the time, it must be assumed that any objection to the testimony dependent upon the fact that it was not the best method of proof was waived. While it is true, as ruled in the *Compton Case*, supra, that the best method of proof that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary, or of some other person who

examined the record, and who will testify that no such letters of administration were ever granted, as shown by the record, still it was ruled in *Atlanta Glass Co. v. Nolzet*, 88 Ga. 43, 13 S. E. 833: "Unless it affirmatively appears that evidence is hearsay, it is not to be excluded as such, where it is of a nature which admits of its resting on the personal knowledge of the witness." There was no objection offered to the testimony of the witness in the present case, and, upon the reasoning in the *Nolzet Case*, supra, it must be assumed that the witness who stated that there was no administration had made an examination of the records in the court of ordinary of Mitchell county, and that his testimony was based upon knowledge derived by him from this examination.

[3, 5] 3. In the motion for a new trial it is insisted that there was no testimony to show whether Mrs. Margarette J. Maples died before or after the alleged fire. This exception is wholly without merit, because the undisputed testimony shows that Mrs. Maples had been dead about 4 or 5 years before the fire. Jurors can make calculations, as well as other people, and any juror of ordinary intelligence could as easily ascertain approximately when Mrs. Maples died, from the testimony in this case, as if a witness had stated that she died in some year named by him. The evidence of I. Maples was not controverted by any testimony in the case. He testified that she went into possession of the land "about 17 years ago," and she had been in possession, under the deeds exhibited by him, between 12 and 13 years up to the time of her death. If Mrs. Maples went into possession 17 years prior to the time the witness was testifying, and was in possession 13 years before she died, it is easy to see that she had been dead for 4 years at the time the witness was testifying in February, 1911, and therefore must have been dead approximately 2 years in October, 1909, the time of the fire. If the witness' wife had only been in possession 12 years at the time of her death, then the fire was approximately 3 years subsequent to her death. By any reasonable deduction from the testimony upon the subject of the wife's possession the conclusion is certain that Mrs. Maples died before the fire occurred; and it being sufficiently proved, as we have heretofore shown, that there was no administration upon her estate, her realty descended to her heirs at law.

[4] 4. In the remaining grounds of the motion for new trial the insistence is presented (a) that the heirs at law could not recover for the 2,000 rails alleged to have been damaged, because it is personal property; (b) that the judge erred in assuming, in his charge to the jury, that the railroad company did in fact pile cross-ties on the side of the track; and (c) that the court erred in permitting, over objection, the following testimony: "The engine had been

there 15 or 20 minutes. I never saw a train set woods on fire." None of these assignments of error appear meritorious.

[6] (a) As to the rails: It does not affirmatively appear that the plaintiffs recovered the full value of the rails, or that the rails were included in the verdict in favor of the plaintiffs. The allegations as to the amount of each item of damage were sustained by proof, yet the verdict was only for \$429.22, instead of for \$490, the total amount alleged. If the jury merely found for the plaintiffs the value of the 200 trees and the canebrake, amounting to \$400, and then included in their verdict 7 per cent. interest as a part of the damages, the amount would have been a little larger than the verdict. Such a finding would have excluded both the \$20 worth of rails and the fencing around the pasture, as to the destruction and value of which there was no dispute. But no objection seems to have been offered to the evidence upon the subject of the rails. The judge in his charge did not refer to the rails, and no motion was made to strike from the plaintiffs' petition the items claiming damages upon that score. Furthermore, even if the verdict included the rails, the testimony in behalf of the plaintiffs is perfectly sustained upon the theory that the rails were cut subsequently to the death of Mrs. Maples, and therefore were the property of the plaintiffs in their own right, for the destruction of which they could recover.

[7] (b) The seventh ground of the motion for new trial assigns error upon the following language of the charge of the court: "The next question you will have to decide is whether or not the railroad company exercised due diligence in piling cross-ties on the side of the track." It was testified for the plaintiffs that there were cross-ties piled along the right of way at the time of the fire. It was not denied by the witness for the defendant that there had at some time and at various times been cross-ties piled along the right of way. He did say that they had been burned on a certain portion of the right of way before the fire. It might appear that this statement of the court, while it was obviously harmless, would afford ground for new trial if it was not apparent that the court immediately corrected the error and made it plain that there was no intention upon his part to express any opinion whatever as to the evidence, or even to intimate that cross-ties had been left piled upon the right of way. From what followed it is

plain that the language employed was a mere lapsus linguae. The court had stated only one additional issue, and had uttered only a few words, when, his attention having been directed to the slip of the tongue, he charged the jury as follows: "My attention has been called to the fact by Mr. Davis that I said that the cross-ties were piled in the manner alleged. That is the allegation that they make. You look to the evidence to see in reference to that, gentlemen of the jury, whether or not the railroad company has exercised ordinary diligence."

[8] (c) Error is assigned because the court permitted a witness to testify that: "The engine had been there 15 or 20 minutes. I never saw a train set woods on fire." The objection made to this evidence was that the petition did not allege that the fire originated from an engine, and therefore the defendant had no notice at all that it would be claimed that the fire originated from an engine. If the objection had been made that this testimony was irrelevant, because the petition charged that the fire was set out by the burning of piles of cross-ties, the evidence would still have been admissible because it is apparent from the context of the witness' testimony that his statement in regard to the engine was elicited merely to fix the time when he saw the fire, and from his statement that he never saw a train set woods on fire we are unable to draw the conclusion that his testimony tended to show an effort on the part of the plaintiffs to establish the fact that the fire, in the present case, was caused by sparks or fire from the engine. So far as the proof is concerned, the only difficulty which presents itself is in determining whether the testimony is sufficient to have authorized the inference that the fire and consequent damage were caused by the setting of fire to piles of cross-ties by agents or servants of the defendant railroad company. After a careful review of the evidence (and especially in view of the testimony in behalf of the plaintiffs as to the statement of the section foreman that he was going to burn piles or cross-ties, which these witnesses say were on the right of way), we are of the opinion that the jury were authorized to find that the fire was set out by an employé of the defendant in the manner alleged in the petition.

Judgment affirmed.

POTTLE, J., not presiding.

(70 W. Va. 317)

GROSS v. GROSS.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1912. Rehearing Denied
March 12, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 574*)—RECORD—CERTIFICATE OF EVIDENCE.**

A vacation order of a judge certifies the presentation to him of bills of exception and a transcript of all the evidence, and certifies that for identification the bills were numbered as bills of exception by a number to each, and that the certificate of evidence was marked "Certificate of Evidence," and certifies that the bills were signed, and that the certificate of evidence was also signed by the judge, and the order says that bills and certificates were ordered to be made a part of the record. The bills refer to the "Certificate of Evidence" as part of them. The "Certificate of Evidence" is part of the record, and brings the evidence before this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2567-2571, 3641-3644; Dec. Dig. § 574.*]

2. HUSBAND AND WIFE (§ 325*)—ACTION BY WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.

A wife, though the husband be living, has the right of action in her sole name for wrongful alienation of her husband's affection, causing his separation from her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

3. HUSBAND AND WIFE (§§ 325, 333*)—ALIENATION OF HUSBAND'S AFFECTION—LIABILITY OF FATHER.

A father is liable to his son's wife for alienating the affection of the son from his wife, and causing him to separate from her, if the father is moved by malice towards the wife and without good faith and honest purpose and good motive for the welfare of his son. If his action is without malice, and springs only from what he honestly believes to be necessary for the welfare of his son, he is not liable; and the presumption is that he acts without malice and with such good motive until the contrary appears, and the burden is on the wife to show malice and absence of such good motive.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1119, 1124; Dec. Dig. §§ 325, 333.*]

Error to Circuit Court, Randolph County.

Action by Frances Dent Gross against Cecil Gross. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Maxwell, D. H. Hill Arnold, and W. E. R. Byrne, for plaintiff in error. Fred O. Blue, Arthur D. Dayton, and W. E. Baker, for defendant in error.

BRANNON, P. Frances Dent Gross brought an action of trespass on the case in the circuit court of Randolph county against her father-in-law, Cecil Gross, charging him with having alienated the affection of her husband, Ivan Victor Gross, and inducing him to separate from her, and she recovered a verdict and judgment for \$12,500, and Cecil Gross comes to this court for relief.

[1] It is contended that no bill of excep-

tions brings the evidence before us so that we can review the case. The order of the judge says that the defendant presented 15 bills of exception and also a transcript of all the evidence, and for their identification numbers the bills, and states that the transcript is marked "Certificate of Evidence," and orders that bills and said "Certificate of Evidence" be made part of the record. This certificate of evidence, so marked, is found in the record, and bills of exception, about which as parts of the record no question can be made, refer to it as "Certificate of Evidence." Thus this evidence has a distinct earmark of identification in the order of the judge and in bills of exception, so that there can be no difficulty in finding it. The point is technical and unsubstantial, too much so to shut a suitor out of court. *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604; *Kay v. Railroad*, 47 W. Va. 467, 35 S. E. 973.

[2] Does the declaration show good cause of action? As one ground of demurrer, it is said that, the declaration showing the plaintiff to be a married woman, she cannot sue in her own name. Here we meet with a question somewhat difficult, more so than at first it appeared to me. The authorities differ somewhat. By the common law the suit for a tort to the wife could not be sued by her alone by preponderance of authority. This was on account of unity of husband and wife placing her under disability; but we have a statute saying that "a married woman may sue or be sued in any court of law or chancery." Is such a demand as this arising from tort, a mere claim for unliquidated damages, a property right, so as to be considered a separate estate of the wife? If so, there is no difficulty in saying that she may sue to enforce it under that statute giving her full capacity to sue. I think, with some hesitation, that it is a property right as held in *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40. It has been held otherwise. *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 532. It is true that it does not seem comprehended by sections 1, 2, and 3 of chapter 66 of Code 1906. It is not property acquired "by inheritance or by gift, grant, devise or bequest." It is a right to demand money. It must be in favor of some one. This tort was to the wife's injury. She is the meritorious cause of action. By the common law action for tort injurious to the wife must be by husband and wife. The right was in the wife, but, owing to disability, she could not sue alone. First Minor's Inst. 387. It is suggested that section 13 of chapter 66 specifies three cases where the married woman may be sued alone, one being where the action concerns her separate property, and it is said that this section 13 limits the right of action under 15, and must be read

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with it; but those two sections have different functions, one giving the right of action to the wife to sue in her own name, the other gives right to sue the wife without joining her husband—two different purposes. I do not see how section 13 has anything to do with a suit by the wife, since it touches only suits against a married woman, and does not give action in her favor. We think that section 15 should be given a liberal construction to enable a married woman to sue, and that section 3 should be liberally construed to make such a demand separate property. The old rules of the common law laid down centuries gone, making the wife the inferior, practically a slave, have become wholly distasteful to enlightened public sentiment, and from statute and refusal of many courts to follow them have "gone glimmering through the dream of things that were, the school boy's tale, the wonder of an hour." The rule saying that for a tort against the wife she could not sue during wedlock, but could do so after its close, arose from the old rule stated by Blackstone thus: "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. 142. The old rule made the two persons a unit, and sunk the individuality of the woman in the individuality of the man. Her property rights were sunk largely. Therefore she could not alone sue to enforce her right. But in our day, when we look at not merely the letter, but the purpose, of acts giving the wife separate estate, and right to sue, and modern decisions, we conclude that old rules have perished, that a wife is not the legal inferior, but the equal, of the husband. Reflect that in sustaining the wife's capacity to sue we only say that her incapacity to sue for a tort affecting her was only a disability to sue during wedlock, and that is removed by a broad statute giving her absolute right to sue. We do not go far. We do not legislate. The Legislature has plainly legislated this result by fair construction of the letter and spirit of its acts. There are older cases denying the right of married woman to sue for alienation of the affection of her husband. *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79, and *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499. But in later days since the separate estate acts protecting the property of the wife many cases assert this right of action in the wife. *Cooley on Torts*, 475, says that 20 states concede this right of action to the wife in her own name. For the proposition that such action lies, I cite *Tiffany on Domestic Relations*, 78; note in 94 Am. Dec. 593; note 20 Am. St. Rep. 88; *Williams v. Williams*, 20 Colo. 57, 37 Pac. 614; 15 Amer. & Eng. Ency. L. 864; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Jaynes v. Jaynes*, 39 Hun

(N. Y.) 40; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646, and note. I refer particularly to the well-considered case of *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 553, 6 L. R. A. 553. It holds that whilst, before the late statute of New York providing that "in an action or special proceeding a married woman appears, prosecutes, or defends alone or joined with other parties, as if she were single," the action had to be in the name of the husband and wife, yet that statute would entitle the wife to an action in her own name for the alienation of the affection of her husband. Our statute is to the same effect as the New York statute. As said above, if this demand is separate property, there can be no question that the wife can sue alone; but, even if we cannot regard it as separate property, then I would say that section 15 giving her right to sue, even if this demand be not property, it is an actionable right springing from a wrong to her, and she has a right to sue. That section alone vests in her power to sue, and thus abolishes former laws disabling her to sue alone because of the unity of husband and wife. This was so held in *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 93, and *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and cases in note. Some cases hold that without an enabling statute the wife may sue alone. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; *Williams v. Williams*, 20 Colo. 57, 37 Pac. 614. There is reason why we should not expect the husband to unite in a suit against his father. And generally why should not a wife sue alone for such a wrong? Should the old unjust rule of the common law still prevail, allowing a husband to sue and pocket the proceeds? It is undoubted that a husband may sue for the seduction of his wife, and there is no reason why the wife should not have equal right to sue for seduction of her husband. The ground of action is the loss of consortium.

[3] A second ground presented to sustain the demurrer is that the declaration should state that Cecil Gross is father of Ivan Gross, and allege that the defendant's act was not actuated by parental solicitude for the welfare of the son, and that it is not enough to charge malice, as in the case of a stranger, but the declaration must also negative good motive on the part of the father. We do not see that these points are tenable. It is enough to charge malice. This contention is rested on the law universally stated, that a parent is not liable for causing his child to separate from husband or wife, if the counsel given the child is such as he fairly and honestly considered to be called for by the life or health or welfare of his child. This is a favor shown to a parent, the law realizing the impulse of a father for an unfortunate child. To justify recovery, the plaintiff carries the burden of showing mal-

ice and of overcoming the presumption that he acted under the influence of natural affection, and for what he believed to be for the real good of the child. He may lawfully do so, if he honestly believes that the continuance of the marriage relation will injure health or mind or destroy peace of mind, even though it turn out that he acted on mistaken premises or false information, and that the result of his intervention has been unfortunate. The rule is more liberal to the parent than to a stranger. *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322, 9 Ann. Cas. 958. "In every suit of this kind the prime inquiry is, From what motive did the father act? Was it malicious, or was it inspired by proper parental regard for the welfare and happiness of the child?" *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623. The act must be shown to be malicious, "as all legal presumptions, in such cases, are that the parent will act only for the best interests of the child." *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574. In an early leading case on this subject (*Hutcheson v. Peck*, 5 Johns. [N. Y.] 196), the great Chancellor Kent said: "If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But the relationship gives rise to a new and peculiar interest. * * * A father's house is always open to his children, and, whether they be married or unmarried, it is still to them a refuge from want, and a consolation in distress. Natural affection establishes and consecrates this asylum, and, according to Lord Coke, it is nature's provision to assist, maintain, and console the child. I should require, therefore, more proof to sustain the action against a father than against a stranger. It ought to appear, either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. * * * The quo animo ought, then, in this case to have been made the test of inquiry and the rule of decision." Whilst such is the law, I think it sufficient to charge, as the declaration in this case does, that the defendant, "contriving willfully, knowingly, wrongfully, unjustly, and maliciously intending to injure, prejudice, and aggrieve the plaintiff" in her enjoyment of the companionship, aid, society, comfort, protection, and happiness derived from her husband, did the acts.

There are a great many bills of exceptions and assignments of error. We have considerably gone over them. We have not found reversible error in evidence admitted or rejected. It is useless to detail it. Nor have we found error in instructions. As we

have sought in this opinion to state the law applicable in such a case, we shall not incorporate the mass of instructions, as they do but reflect the law above stated. We think the court fairly and clearly presented the law suited to the case, leaving it to the jury to pass on the evidence. The court refused a peremptory instruction to the jury to find for the defendant, and overruled a motion for a new trial, and overruled a motion to render judgment for defendant non obstante veredicto. Thus we are called upon to say whether the verdict is warranted by the evidence. Here we state that this depends on a large volume of oral evidence, consisting of the conduct and action of the parties, letters, conversation, a great array of circumstances, and conflicting oral evidence. A verdict in such circumstance is well nigh conclusive. A verdict on evidence, not violating law, approved by a judge, is virtually above the touch of an appellate tribunal. On this principle, spoken by so many precedents, this court acts in the present case. The jury found the action of the father malicious and without good motive. We are asked also to set aside the verdict for excessive damages. Here, again, we are confronted with that verdict. The law gives a jury in the matter of amount of damages in tort cases, where the damages are indeterminate, measured by no fixed measure or rule, almost unlimited discretion. Unless we can clearly find that bias, prejudice, passion, or corruption animated a jury, its estimate must stand. It is hard to fix such an imputation. So, in favor of the plaintiff stands that bulwark, the verdict, sometimes the bulwark of justice, sometimes of error and oppression. Speaking only for myself, I doubt whether the jury accorded to the defendant the favor allowed him by law as a parent in the distressing circumstances surrounding him. His son had been in a hospital from a three months period of typhoid fever. He came from it weak in body, weak in mind, suffering from post typhoid insanity. He suffered from acute Bright's disease, and from orchitis, an ailment of the testicle. He had been nursed while in the hospital by the plaintiff, a young girl. A few days after leaving the hospital they were married, without knowledge of Ivan's family. Continuing ailing, he went for a few weeks rest to visit a brother in Indiana. When he returned, he resumed work, clerking at his father's lumber plant, but unable to do the work. Leaving his wife at his father's home in Randolph county, he went to Pennsylvania to visit sisters of a former wife, who kept his three children by that wife, and while there was visited by his father, and while there he wrote his wife that the marriage was void, that she had taken advantage of him while weak in body and mind, and allured him into marriage, and notified her of cessation of marriage relations. The father was in far off Oregon when this letter was

written. No doubt the jury had the right to say that the father assented to this absence, or advised it. He knew of the son's condition. Two physicians, the hospital physician and one in Pennsylvania, as well as other persons, had told the father that continuance of married relations would either retard the son's recovery, or permanently ruin body and mind. I doubt whether the jury gave Gross the right of a father. I doubt whether the proof does overcome the presumption of law that a parent acts under such conditions honestly, with good faith, moved by parental love. I doubt whether the evidence comes up to the standard fixed by law. "The measure of proof must be exceedingly high." *Beisel v. Gerlach*, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516. Speaking again for myself, it seems to me that the damages found are heavy, almost confiscatory. If the defendant had murderously slain the plaintiff, her father could not have recovered beyond \$10,000. Under the circumstances, and there are those mitigating, I would say that the verdict is heavy. If on the jury, I would not have found it; but there it is.

We are led to affirm the judgment.

(70 W. Va. 232)

STATE v. GEBHART.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1912. Rehearing Denied March
12, 1912.)

(Syllabus by the Court.)

1. ARSON (§ 37*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

A case involving circumstantial evidence discussed, and the evidence held to be sufficient to warrant a verdict of guilty.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 1162*)—WRIT OF ERROR—HARMLESS ERROR.

Error which works no prejudice to the party complaining is not cause for reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3085; Dec. Dig. § 1162.*]

3. FORMER DECISIONS FOLLOWED.

Insufficiency of affidavits in support of a motion for a new trial discussed. Points of syllabi in *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113, *State v. Stowers*, 66 W. Va. 198, 66 S. E. 323, and *State v. Huffman*, 73 S. E. 292, on this subject, approved and applied.

4. CRIMINAL LAW (§ 783½*)—TRIAL—RECEPTION OF EVIDENCE—STRIKING OUT EVIDENCE.

If the court is asked to strike out certain improper evidence that has gotten before the jury, and does so, and states, in the presence of the jury, that it is stricken out, specifying the part stricken out, it is not indispensable that he should expressly tell the jury not to consider it as evidence. This court will presume that the jury understood that they were not to regard such evidence in arriving at their verdict, and that they did not.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1879, 1986; Dec. Dig. § 783½.*]

(Additional Syllabus by Editorial Staff.)

5. ARSON (§ 31*)—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

In a prosecution for burning the building occupied by defendant's store to defraud insurance companies, evidence that the fire insurance rate in defendant's town was higher than in most towns in the state was admissible, as bearing on the defendant's motive for carrying a large amount of insurance.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 65-68; Dec. Dig. § 31.*]

6. CRIMINAL LAW (§ 670*)—TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF.

In a prosecution for burning the building occupied by defendant's store to defraud insurance companies, the exclusion of evidence of what defendant said at the time the alarm of fire was given, no showing being made as to what the statement would have been, was not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1593-1596; Dec. Dig. § 670.*]

7. CRIMINAL LAW (§ 683*)—ADMISSIBILITY OF EVIDENCE.

In a prosecution for setting fire to the building occupied by defendant's store, where defendant claimed that the fire had been started by a certain woman, evidence in rebuttal as to the value of property which her sister owned in the same block with defendant's building, and the amount of insurance thereon, was admissible in relation to her motive to set fire to defendant's building.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

8. CRIMINAL LAW (§ 1169*)—WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for setting fire to the building occupied by defendant's store, where a son of defendant was asked, on cross-examination, if he had not told a certain boy in the hearing of another witness that his father's store had been broken into, and that the thief had packed up some goods in sheets, and if his sister did not then come up to him and ask why he had told that, and if the defendant's son did not shake his head at her and beckon her across the street and have a whispered conversation with her, any error in admission of the testimony of a witness to such conversation was harmless, where the answers of defendant's son on the cross-examination amounted practically to admissions of the conversation.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1169.*]

9. CRIMINAL LAW (§ 958*)—NEW TRIAL—PROCEEDINGS TO PROCURE—SUFFICIENCY OF AFFIDAVITS.

In a criminal prosecution, affidavits for a new trial on the ground of after-discovered evidence that absent witnesses are not in the state, no affidavits of the absent witnesses themselves being produced, and no showing being made as to what they would swear to, and a counter affidavit being presented to show that the most important one of these witnesses was present in the courthouse on several days during the trial of the case, and was not called as a witness or consulted to ascertain what she could prove, were insufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.*]

Error to Circuit Court, Nicholas County. Charles Gebhart was convicted of arson, and brings error. Affirmed.

John B. Morrison, Linn & Byrne, and Edward A. Brannon, for plaintiff in error. William G. Conley, Atty. Gen., and J. O. Henson, Asst. Atty. Gen., for the State.

WILLIAMS, J. Charles Gebhart was convicted of arson in the circuit court of Nicholas county, October 29, 1910, and sentenced to confinement in the penitentiary for an indeterminate period of time, ranging from one to ten years. On his petition, a writ of error was granted at the June term, 1911.

[1] He was charged with having set fire to the building in which he conducted a mercantile business in the town of Richwood, for the purpose of injuring and defrauding certain fire insurance companies that had insured his stock of merchandise and household furniture against loss by fire. The evidence is voluminous and circumstantial in character. The building was a frame structure, 28x100 feet, and one story in height. It rested on posts, and a storage room was formed underneath by weatherboarding being nailed to the posts on which the building stood. Small rooms were partitioned off at the back end, and were occupied by defendant and his family as a dwelling place, and the front part of it was used as a storeroom. The family consisted of defendant, his wife, and four children; the oldest being 15 and the youngest 4 years old.

The fire originated in the basement, and was discovered about 4 o'clock on Monday morning, August 8th. The alarm was given and the fire extinguished before the building or any of the goods were consumed, but not until it had burned through the floor in one or two places, and had very much charred the joists underneath the floor.

On Sunday, the day before the fire, the Baltimore & Ohio Railroad ran an excursion train from Richwood to Clarksburg and return, and defendant and his wife had planned to go on this excursion. For some reason, however, defendant did not go, but remained at home with his children, and Mrs. Gebhart went in company with Mr. and Mrs. Andrews, friends who lived just across the street from the Gebharts. The train was due to return at 12 o'clock midnight, but did not arrive until something near 1:30 Monday morning. Defendant and his two daughters, Lillie and Thelma, did not retire, but remained up to meet the folks returning from the excursion. Defendant had prepared a lunch for them, and on their arrival they all went into the Gebhart dwelling by way of the front door of the storeroom, which was the main entrance to the dwelling apartments, as well as to the storeroom, and partook of the lunch. After this, Mr. and Mrs. Andrews went to their home across the street, and defendant and his family retired. Jerome

Gebhart did not remain up, but went to bed early in the night with his little brother, and was asleep until after the train came in. Defendant slept by himself, on a cot or lounge, near the door which opened out and near to a little back porch, from which a stairway led down to the basement door. About 4 o'clock Mrs. Gebhart was awakened by the presence of dense smoke in her bedroom, and immediately aroused the family, and they all came out by way of the front door; Jerome being the first one to get to the door and unlock it. There is much testimony to prove that defendant was dressed and had his shoes on, while the other members of the family were in their nightdresses, or had something loosely thrown around them.

In order to sustain the charge of arson, two essential facts must be proven: (1) That the fire was of incendiary origin; and (2) the identity of the incendiary. In the present case, it is admitted that the fire was not an accident. Every material circumstance in the case points to the fact that the fire was of incendiary origin. Indeed, the theory of the state, borne out by the facts and circumstances testified to by numerous witnesses, is that defendant deliberately planned to make it appear as if some one had broken into the basement and set fire to the house with the intention, not only to burn his store, but himself and family as well, and then set fire to it himself. And the theory of the defense is that the fire was started by one Sadie Bennett, whom defendant was instrumental in having arrested a week, or such time, before the fire on the charge of keeping a bawdyhouse. There is no evidence to connect Sadie Bennett with the crime, although suspicion for a while rested on her, because of defendant's declarations to several persons before the fire that he feared she would do him harm. She lived in an adjoining building.

The evidence of defendant's guilt is wholly circumstantial. No one saw him set the fire. But the following facts are strongly supported by testimony of many witnesses for the state, and some of them by witnesses for defendant as well, and from them the jury could very properly find defendant guilty:

At the time of the fire, defendant had his stock of goods insured to the amount of \$6,000 and his household effects to the amount of \$500. There was also insurance on the building, which belonged to defendant's brother, Joel Gebhart, to the amount of \$2,000. About four weeks before the fire, defendant advertised a "Special Clearance Sale," and conducted this sale up to the very day before the fire. Defendant himself says that this sale was very successful, and that his sales during this time ranged from \$200 to \$300 a day. An inventory of the stock of goods, taken by the state shortly after the fire, showed the value of the stock, at the date of the fire, to be much less than the amount of the insurance.

The basement extends the full length of the building, and boxes were ricked up under the storeroom, not under the dwelling rooms, and the fire appears to have originated in these boxes, but did not entirely consume them. An empty oil can or two were found in the basement, which were shown to have contained kerosene oil, and a couple of Hayner's whisky bottles, containing kerosene oil, were also found in an old cabinet in the basement. Defendant admits that he had Hayner's whisky bottles, and that some of them may have been in the basement. The door to the basement was at the back end of the building, and was kept locked with a padlock. Defendant's son Jerome testifies that he was in the basement, preparing kindling wood, on the Saturday evening before the fire, and that when he came out he locked the door. There is no evidence that any one was in the basement after that time until the night of the fire. After the fire, the door to the basement presented the appearance of having been broken open. The bow, or shackle, of the padlock was twisted, so that the loose end of it would not go in place in the lock. Defendant turned the lock and key over to the fire marshal, who had the lock opened and examined by a silversmith in the town of Richwood. This silversmith was a witness, and testified that the inside mechanism of the lock had not been broken or disturbed. The lock itself was also in evidence. The jury must have concluded from this evidence that the basement was entered by means of a key to the lock, and that the shackle was afterwards twisted, to create the impression that the cellar had been broken into.

The rope connecting with the bell on the hosehouse was cut off so high up from the floor that a man of ordinary height, standing on the floor, could not reach it. The fire plug wrenches, which were in a box on the hose cart in the hosehouse, could not be found at the time of the fire, and were found a short time afterwards hidden on the outside of the hosehouse underneath a hole in the wall, where they had apparently been dropped through from the inside. There was an empty box in the hosehouse, about two or three feet high, which could have been used by some one to stand on, in order to reach the point where the rope was cut. This box was, in fact, used by the man who rang the bell to give the alarm of fire. From the following facts and circumstances, and other evidence in the case, the jury were justified in believing that defendant himself cut the bell rope. One John Milam had been arrested for disorderly conduct on Sunday, and placed in the lockup. The lockup stood just back of the hosehouse. Milam was anxiously looking for the sergeant to release him from prison that night. He was examined as a witness, and testified that late in the night, about 11 or 12 o'clock, he heard some one in the hosehouse, and heard something drop that sounded like a piece of iron, and

that he thought it was the officer coming to release him. But when he, a little later, heard footsteps which indicated that the person who had been in the hosehouse was going away without releasing him he shook the door of the lockup and holloed to be let out of that place. A few moments after that defendant informed the sergeant, standing on the street corner, that some one was trying to break out of the lockup. Defendant admits giving this information; but he denies that he was in the hosehouse, and says that he heard the noise in the lockup as he was passing by, going from the central telephone station to his house; that he had gone to the telephone station to see his two daughters, Lillie and Thelma, who were there with Miss Clara Wentzell. This evidence places the defendant at or near to the hosehouse at a late hour on the night of the fire, and proves that he had an opportunity to cut the bell cord.

The town is lighted by electricity, and some of the lights are turned out at midnight. Clara Wentzell testifies that she and defendant's daughter Thelma went to the store just after the lights went off to inform him that Lillie, his other daughter, intended to stay at the telephone station until the train came in, and that defendant himself came to the store door. This fact is not denied, and it proves that defendant was in his store alone, after midnight, and before the train arrived. He therefore had opportunity to rick the boxes in the basement, and to pour the oil at the front door, both on the inside and outside. Defendant's son Jerome, it will be remembered, had retired early in the night with his little brother, and was then asleep in his room at the back part of the building. He says he did not wake up until "just a few minutes" before the train came. He also says that some time in the night, after he had gone to bed, he heard a noise in the cellar, and a little later heard some one at the back of the house, hammering on something. He does not testify that he then knew where his father was, and the jury may have believed that it was his father whom he heard, and that he was then ricking the boxes in the cellar, and twisting the shackle of the padlock, to create the impression that the cellar door had been broken open.

Some excelsior, which smelled strongly of kerosene, was found on the back steps, and kerosene was also found on the floor at the front entrance to the store, both on the inside and outside of the door. But it is proven that the floor on the inside slopes towards the door, and that liquid poured on the floor of the recess to the front door, on the outside, would not run through to the inside. This proves that the oil on the inside must have been put there by some one from the inside of the storeroom, and the jury may well have believed that person was defendant. When defendant's wife and her friends

returned from Clarksburg, and the company, including defendant, were going in at the front door of the store Mrs. Gebhart remarked that she smelled oil. Defendant did not investigate to ascertain where the odor originated, nor did he express surprise, notwithstanding he had previously expressed fear of Sadie Bennett, but replied immediately, and said that he had spilled some milk on the stove, and in order to kill the smell he had burned some sugar. The explanation, so readily forthcoming from defendant, adds much to the significance of the fact that oil was found at the door. The jury may have concluded that defendant put the oil on the floor, and that he burned the sugar, not, however, to kill the smell of milk, but to kill the smell of the oil. From this, and other facts and circumstances in the case, the jury must have thought the defendant had manufactured evidence, by creating certain appearances, for the purpose of inducing the belief in the minds of others that some person had planned to burn, not only his store, but himself and family also, and had arranged to cut off their escape, both at the front and the back entrance to the building, by the use of oil at those places. Defendant stated to the sergeant on the street the night of the fire that he was afraid that Sadie Bennett meant to do him harm. He made a similar statement to Mr. Eskridge in the afternoon of the same day. But does it not seem passing strange that, when his wife said she smelled oil, when they were entering the store door, he did not make investigation? No doubt, if he had done so, the oil would have been found, as it was found to be there after the fire was extinguished. One witness who was present at the fire testified that he struck a match at the front door to look for something, and dropped it while it was yet ablaze, and that there was so much oil that it ignited and flamed up.

It was proven that defendant used electric lights in his building; that he also had two large brass lamps suspended from the ceiling of the storeroom, to be used in case the electric light failed; that he had one small lamp for use in the dwelling rooms, in case of necessity. Notwithstanding defendant had little use for kerosene oil, especially in the summer time, it was proven by a number of witnesses that about a month before the fire he purchased two five-gallon cans of oil from two different dealers in Richwood. But he denies this, as he does also the testimony of all the other witnesses for the state who testify in relation to any fact or circumstance that points to his guilt.

Certain it is that the fire was of incendiary origin, and it is almost as certain, too, that, to insure the destruction of the building, if not of a large portion of the town as well, the bell cord was cut and the fire plug wrenches were hidden. It was undoubtedly a deep-laid scheme. But "the best-laid schemes 'o mice an' men gang aft agley."

So it turned out in this case; for the dry goods box in the hosehouse made it possible to ring the bell without much delay, and the fact that some members of the fire company had wrenches at their homes, and took them with them when the alarm was sounded, caused no delay in turning on the water. The building and its contents were saved.

In view of these facts that Jerome and the baby were sleeping in the building, that the town was lighted with electricity, that a number of people were on the street that night, passing back and forth, waiting for the return of the excursion train, that defendant's store was on one of the principal streets of the town, that defendant himself passed by his store several times late that night, and was in it at a very late hour, after some of the lights had been turned off, that defendant had the opportunity to do all these things which point so unmistakably to incendiarism, the jury evidently concluded that it was hardly possible for Sadie Bennett, or any other person without the guilty knowledge of defendant, to have committed the crime. In view of so strong a chain of connected circumstances, tending to connect defendant with the crime, and at the same time tending to exclude the hypothesis that another person could have committed it, the jury must have believed, without any reasonable doubt, that defendant was guilty. It is the case of a man's falling into the pit which he has dugged for another.

Counsel for defendant insist that it is unnatural, unreasonable, and therefore unbelievable, that defendant would have set fire to the building, and thus have risked his own life and the lives of his entire family. This is plausible, and strong argument, when we consider that no reason existed for defendant's wishing to destroy his family. But the jury may have believed, as they evidently had the right to do, that defendant was awake, and was only feigning sleep; that he would have given the alarm himself, if necessary, in order to rescue the family from the building, but that he thought he would be less likely to be suspected if some one else should give the alarm. The fire originated under the storeroom, not under the dwelling. The back door and windows in the sides of the building furnished means of escape, if necessary. He slept on a lounge near to the back entrance, by himself, and after the alarm of fire was given he appeared on the street dressed, according to some of the state's witnesses, while other members of the family were in their nightclothes. The state does not claim that any other member of the family knew of the scheme; nor does the evidence indicate that they did. Their conduct seems to be both natural and reasonable, in view of so exciting a time as to awake and find the house in which one is sleeping on fire. They were all very much excited. Jerome was the first to open the store door and run out into the street. He

was in his nightdress, but ran towards the hosehouse, holloing, "Fire!" A witness for the state testifies that he heard his father call to him to come back and put on his clothes, saying that he had plenty of time. Defendant denies this; but the jury judged between the witnesses. If it be true, it tends to prove that defendant was not anxious to have the fire extinguished. Jerome was the first to reach the hosehouse, and he says the bell rope had been cut off, and he could not reach it. Another man, dressed and sitting on the porch of a hotel nearby, arrived at the hosehouse a moment later, and he got on a box and rang the bell, and Jerome started, with the hose cart, for the fire, and others who had then gathered on the scene came to his assistance.

There is another circumstance which the jury must have believed was manufactured for defendant's purpose. It is this: Defendant testified that after the fire, and before the inventory of the stock of goods was taken, his store was broken into from the back door, and that some of the goods were stolen. This evidence was for the purpose of proving that he had more goods in the store at the time of the fire than were shown by the inventory. In rebuttal of this testimony, the state proved that the marks on the door and the door facing were made with a chisel, or some similar instrument; that the impressions in the wood showed that the door could not have been pried open in the manner indicated by the marks, because they had been made by prying the door shut, rather than open. Pieces of wood, bearing the impressions, were sawed out, and were exhibited to the jury at the trial. An old chisel was also found in a basket on the inside of the door shortly after the alleged breaking, which fitted into the marks on the pieces of wood. True defendant and every member of his family who testified on the subject disclaimed the chisel, and denied having any knowledge of it.

There are many other little facts and circumstances which point to defendant's guilt; but it is unnecessary to detail them further, nor would we have discussed the evidence to the extent which we have already done, except for its peculiar character, so apparently manufactured by the defendant for the purpose of diverting suspicion from himself, and yet so conclusively proving his own guilt. The trial of the case occupied nearly two weeks. There was an array of able counsel on both sides, and the case is briefed, elaborately and well, in this court on both sides. It was tried by a careful and able circuit judge, and he again reviewed the evidence and his rulings after the evidence had been transcribed, in passing on a motion to set aside the verdict. It is our opinion, as it was his, that the verdict is supported by the evidence.

[5] It is insisted that the court erred in admitting testimony concerning the rate of

fire insurance prevailing in Richwood, which seems to be higher than in most other towns in the state, because of the greater hazard on account of the character of the buildings in Richwood. Such evidence was admissible, as bearing upon the question of defendant's motive for carrying so large an amount of insurance. Whether defendant was paying a high rate of premium for legitimate protection, or for the purpose of injuring the insurer by burning his property, were questions to be considered by the jury. He would more likely be willing to pay a high rate if his purpose was to defraud.

[4] Fire Marshal Ellison, a witness for the state, was asked to state what his duties as fire marshal were, and replied as follows: "Well, the duties of the state fire marshal are rather numerous. My duty as fire marshal is to keep a record of all the fires that occur in the state of West Virginia, as reported to me by justices of the peace and chiefs of fire departments and mayors of towns, to establish, if possible, the causes of these fires and origin of the fires. Also my duty to take up properties where there is reports made on them of any hazards there, and endeavor to remove these hazards, and in that way keep down fire waste; and in connection with fires of unknown origin, if it develops in any circumstances that it is of incendiary origin, it is the duty of the fire marshal to take a note of that fire and establish who the guilty party is, and if they decide that there is evidence enough to warrant it it becomes their duty to go further and cause that party to be arrested, and follow the case then on through the courts. (Defendant, by counsel, objects to the foregoing answer and moves to exclude same.) Statement by the Court: I will strike out from that testimony that part of it in which he states his duty as to investigating and determining whether the evidence is sufficient to warrant prosecution, and follow it up. (To which ruling of the court in not sustaining all of said objection the defendant excepted.)"

It is insisted by counsel for defendant that this evidence was highly prejudicial, as constituting, in effect, an expression of opinion by the fire marshal that defendant was guilty; that simply striking it out was not sufficient to disabuse the minds of the jurors of the impressions which it had created. They say the court should have gone further, and have expressly told the jurors not to consider it as evidence in the case. But how could the jury have understood the court's language otherwise than to mean that it was not to be regarded by them as evidence? It does not seem to us that it could have had any other meaning to the jury. Juries must be given credit for a reasonable degree of intelligence, and certainly a reasonably intelligent man could not have misunderstood the court. It is not necessary to decide, and we do not decide, that the evidence was, in fact, prejudicial. But, assuming that it was, we

are clearly of opinion that the jury fully understood that they were not to consider it. We admit that it is the usual practice for the trial courts, when striking out improper evidence that has gotten before the jury, to tell them that the part stricken out is not to be considered as evidence. But must we be so technical as to say that the omission to do so constitutes reversible error? One or two of the courts of this country have apparently gone so far as to so hold. We do not think that the administration of justice is promoted by so technical a requirement, and we decline to establish such a rule in this state. We are not disposed to incur the trial of causes with any more purely technical rules than are essential in enabling courts and juries to arrive at just results. Such a rule as we are asked to declare could not promote the ends of justice. It would not only be a useless refinement, but an insult to the intelligence of the citizenship that supplies our jurors. The judge's statement that he struck out the evidence was intended as much for the jury as it was for counsel, and we mean no reflection on counsel when we say that both must have had equal understanding of its meaning. The court could have said nothing to remove it from the memories of the jurors.

[6] The court sustained the state's objection to a statement which Jerome Gebhart was about to make concerning what his father said at the time his mother gave the alarm of fire, and this is assigned as error. It may have been admissible, as constituting a part of the *res gestæ*. But it does not appear what the statement would have been, and we cannot see that it was important. Under the rule so well established by former decisions, we cannot say this was error. *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

[7] It was not error to admit the testimony of Edith Bacon, a sister of Sadie Bennett, in rebuttal, as to the value of certain property, and the amount of insurance thereon, which she owned, situated in the same block with defendant's store and the property occupied by Sadie Bennett. It was proper evidence to be considered by the jury in relation to any motive Sadie Bennett might have had to set fire to defendant's store. Defendant had offered evidence tending to prove malice on the part of Sadie Bennett toward him, and consequently a motive to do him injury. The testimony of Edith Bacon tends to prove that Sadie Bennett must have known that setting fire to defendant's property would have endangered her sister's property.

[8] For the purpose of laying a foundation to impeach the testimony of Jerome Gebhart, he and Thelma were both asked, on cross-examination, if Jerome had not told a certain Haley boy, on the street, fixing the time and place, in the hearing of Gordon Umbarger,

that his father's store had been broken into a few nights before that time, and that the thief had packed up some goods in sheets, but that he supposed he was frightened away before he had time to take them, and if Thelma did not then come up to Jerome and ask him why he had told the Haley boy that their father's store had been broken into, and if Jerome did not shake his head at her and beckon her across the street, and then have a whispered conversation with her. Jerome's answers amount practically to admissions of the conversation as comprehended in the question. Thelma did not admit or deny it, but claimed to have no recollection concerning it. Umbarger was then put on the witness stand in rebuttal, and permitted, over objection of defendant, to prove the conversation and conduct of the two children on that occasion. In their testimony in chief, the children had not been examined concerning the attempted robbery. But defendant himself had previously testified that his store had been broken into, and that he had missed some goods, and that some were piled up in sheets and left in the store. The robbery occurred, if at all, after the fire, and before defendant's arrest, and the purpose of defendant's testimony concerning it was to prove that defendant had more goods in the store at the time of the fire than were shown by the state's inventory. The state submitted evidence tending to prove that defendant's statement was not true; that it was a manufactured story for the occasion. Such evidence was proper, as bearing upon the question of motive for burning the store. The truth or falsity of the story was properly an issue before the jury; it was not a purely collateral matter. But the question presented to us is, Was it permissible to impeach the children in that manner? It is strenuously urged by defendant's counsel that it constitutes cause for reversal; that it is prejudicial to defendant. It has given us more concern than any other point assigned as error in the case. Speaking for myself alone, I am clearly of the opinion that, if Jerome had expressly denied what the question assumes to have taken place between him and his sister and the Haley boy, it would have been proper to admit the testimony of Umbarger to prove it, not as evidence of the breaking, because as to that fact it would be hearsay, but it was proper as tending to show the interest and bias of Jerome as a witness. It tended to show that he was biased in favor of his father to such extent as to engage, either in the manufacture of evidence, or the concealment of the truth. Otherwise why should he call his sister to one side and have a private conversation with her, after she had expressed surprise at the story of the burglary? It was likely the first time she had heard of it, and Jerome may have called her to one side to tell her what to say; in other words, to bribe her, so that when they should be ex-

amined there would be no conflict in their stories. In weighing the testimony of Jerome, I think his conversation and conduct on that occasion were proper to be considered by the jury. It is analogous to, indeed almost identical with, the case of a witness who has attempted to bribe another witness to testify falsely in a case. There can be no doubt of the cross-examiner's right to ask a witness, for the purpose of showing his bias, if he did not offer to bribe a certain other witness in the case, fixing the time and place, and, if he should deny it, to prove that he did in fact attempt to bribe such witness. From the conduct of Jerome on that occasion, the jury could well have inferred that he was helping his father to manufacture evidence to prove that the store had been robbed, and that his little sister was ignorant of it, and that he called her to one side for the purpose of explaining it to her. But it is not necessary for us to decide whether it was proper or improper to admit the testimony of Umbarger, for the reason that we unanimously agree that, inasmuch as Jerome Gebhart practically admitted what Umbarger was permitted to testify to, defendant was not prejudiced, and the error, if such it be, is no ground for reversal.

[2] Defendant offered evidence tending to prove that at the time of the fire some trunks and goods were carried into the street, and were left unguarded. This evidence was for the same purpose as the evidence of the burglary after the fire, and was therefore admissible. Defendant's own witness, R. L. Marshal, testified that the goods were not guarded, and was asked, on cross-examination, if he knew the trunks and goods were not guarded, and replied as follows: "I don't believe they were; and it was the talk there of a great many people." Defendant's motion to strike this answer out was overruled, and this is one of the errors assigned. But, notwithstanding the answer is hearsay, and therefore inadmissible evidence, still it was favorable to defendant; for it tends to establish the very fact that defendant sought to prove by the witness in chief. This court will not reverse the lower court for error committed on the trial, when it can be clearly seen that the error did not prejudice the party complaining.

A number of assignments of error relate to the refusal to give certain instructions on behalf of defendant, and to the giving of certain other instructions on behalf of the state. These instructions involve well-settled principles of law. Some of the state's instructions are verbatim copies of instructions recently reviewed and sustained by this court in *State v. Huffman*, 73 S. E. 292. It is hardly necessary to again review them in this opinion.

We think that a number of defendant's instructions which were refused correctly state the law, and are applicable to the case,

and might properly have been given. But the jury were fully and fairly instructed in regard to the questions embraced in them by others which were given. Indeed, the reason assigned by the court for refusing them was that they were repetitions of other instructions—a reason which our investigation has led us to believe was a good one. Defendant offered 27 in number, and the state 23, and the court refused defendant's Nos. 5, 11, 12, 14, 16, 18, 20, 21, 22, 23, 25, and 27, and gave, at the instance of the state, its Nos. 1, 2, 3, 5, 6, 9, 10, 12, 13, 14, 17, 19, 22, and 23. We have carefully considered both those given and those refused, and we are clearly of the opinion that those given covered the whole subject of the law bearing upon any material facts supported in the case, and that they fairly presented both the theory of the state and the theory of the defense. We are impressed with the judge's absolute fairness and impartiality in his rulings upon these instructions, and no useful purpose could be accomplished by an extended discussion of the various instructions. We have already extended this opinion to a much greater length than we thought would be necessary when we entered upon its preparation; but the size of the record, the unusual character of the case, the number and peculiarity of the circumstances, constituting an unbroken chain of evidence which the jury must have believed was sufficient to establish defendant's guilt, furnish some palliation for its length.

[3] Affidavits were filed in support of a motion for a new trial on the ground of after-discovered evidence. We have recently had occasion to pass upon affidavits filed for a like purpose, in *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113, *State v. Stowers*, 66 W. Va. 198, 66 S. E. 323, and *State v. Huffman*, 73 S. E. 292. We think the law on this question is well settled. The affidavits show that the absent witnesses are not in the state; that one of them, presumably the most important one, Maud Bennett, a daughter of Sadie Bennett, was in Pittsburgh at the time the affiants last saw her. Affidavits of the absent witnesses themselves are not produced; it does not appear what these absent witnesses would swear to; and, of course, it does not appear that their testimony would likely produce a different result, if a new trial were granted. They do not measure up to the rule laid down in the cases cited. Moreover, a counter affidavit proves that Maud Bennett was present in the courthouse on several days during the trial of the case, and that she was not called as a witness, or consulted by defendant or his counsel, to ascertain what she could prove. Some of these affidavits were made by expert detectives, who state that they had been employed by defendant to discover evidence, if any they could, relative to his defense. Two of them swear that they located Maud Bennett

in Pittsburgh; that she stated that some man who had been living with her in Pittsburgh set fire to defendant's store, but that, at another interview had with her, she declined to make any further statement. Such affidavits are entirely too flimsy and uncertain to justify the setting aside of a verdict otherwise apparently just.

The judgment will be affirmed.

(70 W. Va. 250)

NEAL v. HAMILTON CO. et al.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1912. Rehearing Denied
March 12, 1912.)

(Syllabus by the Court.)

1. WILLS (§§ 450, 462*)—CONSTRUCTION—GENERAL RULES—INTENTION OF TESTATOR.

In construing wills, words will not be interpolated, except when necessary to effectuate the manifest intention of the testator. Inference or conjecture is no justification; nor is the probability that if testator's attention had been called to a particular event he would have provided against it, justification for interpreting words to give the will that effect. The intent must be gathered from the will taken in all its parts, giving every word and expression its due weight and effect, if not inconsistent with the whole will when taken together.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 966, 981; Dec. Dig. §§ 450, 462.*]

2. WILLS (§ 462*)—CONSTRUCTION—SUPPLYING TECHNICAL WORDS.

Supplying technical words is only permissible when the intention to be aided thereby is apparent beyond reasonable doubt, the purpose being to develop a defectively expressed intent. If from the words employed the testator's intent can not be gathered, words can not be supplied to disclose that intent, for it may not have been his intent.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 462.*]

3. WILLS (§ 440*)—CONSTRUCTION—GENERAL RULES—INTENTION OF TESTATOR.

It is only where the will affords no satisfactory clue to the real intention of the testator, that resort may be had to legal presumptions and rules of construction, and then such rules must yield to the apparent intention of the testator, expressed in his will, for the true inquiry is not what the testator meant to express, but what the words he used do express.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

4. WILLS (§ 466*)—CONSTRUCTION—ESTATE CONVEYED—"IN CASE OF."

After the death of his wife, the life tenant, testator devised to his two sons, James and John, his farm to be equally divided between them; but in a subsequent paragraph provided that, "in case of the death of either of my sons above named I will and bequeath that the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land."

According to the plain intent, the words "in case of" should be construed to mean "at" or "upon"; and the whole phrase "in case of the death of" as referring to an event to occur subsequently to the death of the testator.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 466.*]

5. WILLS (§§ 601, 627*)—CONSTRUCTION—ESTATE CONVEYED—FEE SIMPLE—JOINT TENANCY.

The will expressly limiting the estate devised to James and John, to the survivor, they did not, on the death of the testator, by virtue of section 8, chapter 71, Code 1906, severally take fee simple estates in the land devised; nor by virtue of section 18 of said chapter, as tenants in common; but a joint remainder in fee simple, subject to the right of survivorship, with only the rights and subject to all the limitations attaching to estates in joint tenancy, as at common law.

[Ed. Note.—For other cases, see Wills, Dec. Dig. §§ 601, 627.*]

Appeal from Circuit Court, Roane County.

Bill in equity by Oscar L. Neal against the Hamilton Company and others. From the decree, the Hamilton Company and another appeal. Reversed, and bill and cross-bill dismissed.

Van Winkle & Ambler, Payne & Payne, Berkeley Minor, Jr., and Benjamin Trapnell, for appellant Hamilton Co. Pendleton & Pendleton, for appellant Neal. Linn & Byrne, for appellees. S. P. Bell, Geo. F. Cunningham, and Linn & Byrne, for appellee Neal. Harper & Baker, for appellees Goff and Heck.

MILLER, J. Oscar L. Neal, infant son of James L. Neal, and grandson of E. N. Neal, both deceased, plaintiff, and Lee Goff and A. S. Heck, defendants, and cross bill plaintiffs, and alleged purchasers of a part of the alleged one half interest of said infant in all the oil, and all the interest of said infant in all the gas in and under a tract of one hundred and thirty acres of land, in Roane County, have sued the Hamilton Company, the owners of a lease of said land for oil and gas, and the lessors Adaline Neal, widow, and John Z. Neal, son, and devisees under the will of said E. N. Neal, deceased, seeking to set aside and cancel said lease, and to remove the same as a cloud upon their titles; and an accounting of the oil and gas produced; and praying also for a receiver pending the suit, and for general relief.

The rights of the parties, it is conceded, depend wholly upon the proper construction to be given the will of said E. N. Neal, deceased.

The will, every part of which is important in arriving at the real intent of the testator, is as follows:

"In the name of God Amen. I, E. N. Neal, of the County of Roane and State of West Virginia and District of Walton being of sound and disposing mind but weak in bodily strength and knowing the uncertainty of life do make and establish this my last will and testament revoking all other wills heretofore made by me and want my property after my decease to be distributed as follows to-wit:

"First. I will and bequeath to my beloved

wife Adaline the sole use and occupation of my farm on which I now live together with all the horses, cattle, sheep, farming utensils, household and kitchen furniture and all other personal estate not herein enumerated during her natural life time after the payment of all my just debts.

"Second. Except the bay filly which I bought of J. T. Ward I will to my oldest son James Neal.

"Third. I will unto my daughter Sarah A. C. Daugherty the black colt bought of James Harper by her paying her mother, Adaline Neal the sum of three dollars.

"Fourth. After the death of my wife Adaline I will and bequeath unto my two sons James L. Neal and John Neal the Farm I now live on to be equally divided between the two above named sons. The above bequest includes both tracts of land I now own adjoining the lands of William Harmon, J. H. Dougherty, Mathew Hively, D. T. Fleshman, Zaddock Canterbury, H. F. Gibson, heirs of J. R. Ryan and Henry Summers.

"Fifth. I will and bequeath that my wife Adaline, or in case of her death, my two sons, James L. Neal and John Z. Neal shall pay unto the following named children of Adaline and E. N. Neal, to-wit: M. J. Neal, M. E. Neal, Martha Ellen Neal, Emma J. Neal, Rebecca A. Neal, the sum of twenty five dollars or the value of twenty five dollars at marriage and in case they remain single they shall have a home on my farm during their natural life.

"Sixth. In case of the death of either of my sons above named I will and bequeath that the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land."

The facts and circumstances surrounding a testator when making his will are often important in interpreting the language employed, perhaps never more than in this case. Counsel, therefore, have stipulated, substantially, as follows:

First, that Neal, the testator, was a farmer, and died, testate, November 18, 1881, leaving surviving him, Adaline Neal, his widow, a married daughter, Sarah A. C. Daugherty, five unmarried daughters, and two unmarried sons, James L. and John Z. Neal. Second, that the testator, his wife, his unmarried daughters and his two sons, were at the time of the execution of the will, at the time of the testator's death, and for a long time prior thereto, had been living together on the farm. Third, that James L. Neal was born August 20, 1866, and John Z. Neal, August 19, 1880; that at the time of the execution of the will, and the date of the death of the testator, he owned no other lands, and that there had been no prospecting or drilling for oil or gas, and none had been discovered on or near his farm, and none known to exist within at least twenty five miles thereof. Fourth, that the testator had

been sick for some time prior to the execution of his will, and was then dangerously ill, and fully informed by attending physicians that he could not get well; that his death was only a question of a few days at best, and that he then fully understood and realized that fact. Fifth, that after the death of the testator his son James L. married Chloe F. Daugherty, by whom he had one child, the plaintiff Oscar L. Neal, born October —, 1894, and that he died intestate, in 1899, leaving his widow and his said son, his only heir, surviving him; and that he had in no way attempted to dispose of any supposed interest in the land involved in this suit. Sixth, that the widow, Adaline Neal, and the said John Z. Neal, both of whom survived said James L. Neal, are still living.

On the pleadings and these facts, the court below in the decree appealed from, was of opinion and so decreed, that upon the death of the testator his sons James L. and John Z. Neal took by the will a defeasible estate in fee simple in said farm, subject to the life estate of the widow; and that the defendant John Z. Neal could have become the owner of the whole farm described, "only upon the contingency of the said James L. Neal dying before him *without issue*." And that the plaintiff Oscar L. Neal, as the heir of his father, James L. Neal, is entitled to the undivided one half interest and estate in said land, and to a like undivided interest in and to all the oil, gas and other minerals thereunder, subject to the life estate of his grandmother, Adaline Neal.

It is conceded, that to give the will this construction, it is necessary, as the court did, to interpolate in the sixth paragraph, after the words, "in case of the death of either of my sons above named," the words "without issue." In the light of the language of the testator in the several paragraphs of his will, and of the stipulated facts, was the court justified in so interpolating these words? Both sides agree that if these words were necessary to effectuate the manifest purpose and intent of the testator, the court was justified in reading them into the will. We emphasize the words "manifest purpose and intent of the testator."

Able and elaborate briefs have been submitted by the numerous counsel engaged on both sides of this controversy. If the old farmer, who made and executed this will could have survived the present controversy, he would certainly have been greatly surprised that so much could be said and written concerning his testamentary instrument.

We cannot within the limits of this opinion undertake to review, criticize or differentiate all the many decisions cited by counsel in support of the many propositions advanced. As many times said by courts and text writers precedents are of little value in interpreting wills; each case must necessarily depend on its own facts and circumstances.

es, and the particular language employed by the testator to manifest his intention.

[1] A comprehensive statement of a few general rules will be sufficient for our present purposes: First, that in construing and interpreting wills, courts are justified in interpolating words not used by the testator, only when it is necessary to do so in order to effectuate the manifest intention of the testator. Bare inference or conjecture will not do; nor will the fact that it is probable if the testator's attention had been called to a particular event he would have provided against it, warrant the interpolation of words to give the will such effect; intent must be gathered from the will itself taken in all its parts, giving to every word or expression its due weight and effect, if not inconsistent with the general intent of the whole will when taken together. *Liston v. Jenkins*, 2 W. Va. 62; *Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364; *Augustus v. Seabolt*, 3 Metc. (Ky.) 156, 159; *Butterfield v. Hamant*, 105 Mass. 338; *Hamilton v. Boyles*, 1 Brev. (S. C.) 414; *Selden v. King*, 2 Call, 72. [2] A second or co-ordinate proposition, supported by the authorities cited, and by many others, applicable here, is, that supplying technical words is only permissible when the intention to be aided is apparent beyond a reasonable doubt, the purpose being to develop a defectively expressed intent; for if from the words employed by the testator his intent cannot be gathered, words cannot be supplied to disclose his intent, for it may not have been the intent of the testator. Courts are not at liberty to guess or conjecture. Besides the authorities cited, see *McKeehan v. Wilson*, 53 Pa. 74; *Lynch v. Hill*, 6 Munf. 114; *Abbott v. Middleton*, 21 Beav. 143.

A proposition laid down by this court in *Graham v. Graham*, supra, and re-enforcing the above rules, and pertinent here, is: "When a testator in the disposal of his property overlooks a particular event or matter, which, had it occurred to him, he would probably have guarded against, the court will not employ or insert the necessary clause for the purpose of supplying the omission." And "though the inference of intention be more or less strong, yet if not necessary or indubitable, the court will not aid the supposed intention by adding or supplying words. All the parts of a will are to be construed in relation to each other so as, if possible, to form a consistent whole."

[3] It is only where the will affords no satisfactory clue to the real intention of the testator, say the decisions, that courts may from necessity, resort to legal presumptions and rules of construction, and then such rules must yield to the apparent intention of the testator, expressed in his will, for the true enquiry is not what the testator meant to express, but what the words he used do express. *Couch v. Eastham*, 29 W. Va. 793,

3 S. E. 23; *Cresap v. Cresap*, 34 W. Va. 815, 12 S. E. 527; *Tebbs v. Duval*, 17 Grat. 349; *Moon v. Stone*, 19 Grat. 130; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389.

Limited by these rules, let us endeavor to place ourselves in the situation of the testator, and with due regard to the simple language of his will, try to interpret his meaning.

We observe that he was fully advised and understood that death was imminent, and that he had but a few days left of his earthly existence. Besides his widow, whose welfare was naturally uppermost in his mind, and for whom he would naturally make ample provision, he had five dependent, unmarried daughters, and two infant sons, the eldest, James, being then but fifteen years of age, the youngest, an infant of only fifteen months. The family was large and the farm on which he lived quite small, in comparison, on which to charge, as the testator did, the burden of family support. It was manifestly in his thought that his widow would live to enjoy her life estate for many years, and with their help to bring up, maintain and educate her children. His unmarried daughters, of whom he had five, and for whom he could and did make but small pecuniary provision, were also manifestly the special subjects of his concern. The pecuniary provision made for them was, that as they should marry, his widow during her life should pay them the sums stipulated in his will; after her death that burden was to be borne by his sons. But this was not all, these daughters were to have a home upon the farm so long as they should remain single. It could not have been in the mind of the testator, however, that his infant sons would soon come into possession of the estate devised to them, nor that when they did do so, they should take and hold the land devised, or divide the same between them in any way inconsistent with the expressed intention of the testator that the daughters should be paid by them or the survivor of them, the stipulated sums on their marriage, and that they should have a home there, so long as they remained single. True we must say the testator contemplated a division of the land, between the sons, for the language of the fourth paragraph is, "to be equally divided between the two above named sons." But the plain, manifest intent of the testator was that that division should be consistent with his expressed intention that his daughters should enjoy the home provided for them during their maidenhood, and subject also to the rights of the survivor.

Such having been the manifest plan, scope and purpose of his will, it seems to us, the testator could not better have expressed his intent than by the plain language employed by him, and that it is wholly unnecessary to interpolate words to effectuate that intent. Evidently grandchildren were not in his

thought. The words "heir" or "heirs" are words of very common use, and their meaning well understood by people in the country; yet the testator nowhere makes use of these words. The testator thought first of his widow, then of his dependent unmarried daughters, and of his two infant sons. In disposing of his farm, he also contemplated the burden, first cast upon the widow, then upon the sons, or the survivor of them, to pay the daughters as they should marry the sums he provided, and the maintenance of a home for them during maidenhood, however long continued. Our knowledge of human nature satisfies us that the purposes of the testator, after the death of his widow, and one of the sons, would be best accomplished through the agency of the surviving son, than through grandchildren. The probable inharmony that would follow a division of his land and of its use and occupation, between a surviving son and immediate or remote issue of the one dying, if he thought on the subject, would naturally occur to him and justify him in disposing of his farm according to the plain language of the will. If by giving effect to the plain words employed by the testator we can best effectuate his manifest intention, we are not permitted by rules of construction to interpolate words and thereby defeat his purpose, though we might think it right, or equitable, in order to provide against a contingency which the testator might have provided against if it had occurred to him, for this the authorities say would be to make a new will for the testator.

How can we say then that the testator by the sixth paragraph of his will, intended that the surviving son "should have and hold in his own right the whole" on the death of the other, only on condition that the one dying should leave no issue? We can guess, and imagine and speculate and theorize on the subject, but we are not justified we think in saying that such an intent manifestly appears, or that it is necessary to interpolate any words of a technical character to effectuate a plain intent.

[4] On what principle or theory then can the decree below be sustained? for it must not be forgotten that we must interpolate the words "without issue," or the decree is manifestly wrong. It is sought to support the decree by reference to decided and analogous cases; by referring the words of the sixth paragraph, "in case of the death of," to the death of the devisee occurring in the life time of the testator; and lastly, appellees rely on the provisions of sections 8, 18 and 19 of chapter 71 of the Code, as converting a joint estate into a tenancy in common, and devolving the estate of the son first dying on his surviving issue.

The case of *Liston v. Jenkins*, supra, is regarded by counsel for appellees decisive of their contention. This case not only recog-

nizes, but affirms the general rule, that words will only be supplied in order to effectuate the manifest intention of the testator, "and for this purpose only." While in that case a divided court thought, the words "without issue" were necessary to express the true intent of the testator, it was because the grandson affected, then in being, a namesake of the testator, had been first preferred, and a special object of the testator's bounty, and that the testator manifestly had not intended, by omitting the technical words, to cut him off with a bare life estate; for in that event the estate given him would have gone to his brothers and sisters, less preferred, contrary to the manifest intention of the testator. No such considerations are presented here.

In *Abbott v. Middleton*, supra, another case relied on, the bequest was to the widow for life, at her death to testator's son for life, and on his demise to any children he might have. Then there was a gift over in case the son died before his mother. The master of the rolls in that case, justifying the interpolation of the words "without leaving any child," said, that the testator manifested a great and solicitous anxiety to provide for his grandchildren. The father and mother both survived the son. Without interpolation of the words "without leaving any child" the gift over would have wholly cut out the grandchildren, manifestly in the mind of the testator, for whom it was evident he entertained anxious solicitude.

The case of *Selden v. King*, supra, cited in *Liston v. Jenkins*, is also relied on. The court in that case having held, that as an estate tail had been devised to the daughter, a gift over upon her death, simply, was repugnant, and that the testator evidently meant to add the words "without heirs of her body."

Dulaney v. Dulaney (Ky.) 79 S. W. 195, is another case cited. There was a devise in trust for W. to receive the income until he was twenty five years old; then to him absolutely if he was capable of managing the estate; otherwise to trustees for his sole benefit. Should he die before he reached the age stated, there was a devise over to other persons. The court thought the words "without issue" should be interpolated, as there was no reason for supposing that the testatrix ever had the absurd purpose of disinheritting W.'s children if he should die before he was twenty five years old, but if he managed to live until he was twenty five, they were to have his property upon his dying intestate.

In the cases of *Spalding v. Spalding*, Cro. Car. 185, and *Strong v. Cummins*, 2 Burr. 767, relied on, the devise was to the testator's son and his heirs, with devise over in case of the son's death. In each of these cases the intention of the testator, with respect to the heirs, was manifest, and he

clearly meant a devise over in default of issue.

Among other cases relied on are *Nelson v. Combs*, 18 N. J. Law, 27, and *Baker v. McLeod*, 79 Wis. 534, 48 N. W. 657. It will be found that these and other cases, as those we have just been considering, are clearly distinguishable from the case we have here. It should also be noted in this connection that not all the cases in which a remainder is limited upon the death of a devisee, after the devise of land to him, and to his issue or heirs, justify the interpolation of the phrase "without issue," as a qualification, making the remainder contingent instead of certain to vest. See *Butterfield v. Hamant*, *Augustus v. Seabolt*, and *Hamilton v. Boyles*, supra. It is wholly unnecessary to further continue this review of the decisions.

But appellees seek to support the decree below by referring the words "in case of death" in the sixth paragraph, to the death of the testator. Thus construed the effect would be to make the paragraph read, "In case of the death of either of my sons (before my death and without issue) the surviving son shall have the whole of above land." We cannot accept this interpretation. The testator upon his death bed was not contemplating the death of his infant sons, or either of them, as an event to happen before his death. Much time and space are devoted to this proposition in the briefs of counsel; but it is wholly unnecessary to elaborate the subject here. By the use of the words "in case of" the testator evidently meant at or upon "the death of either of my sons," and as an event to occur subsequently to his death. *Ewing v. Winters*, 34 W. Va. 24, 11 S. E. 718. The old rule of referring survivorship to the death of the testator, though another period be intended, is not the rule in this state. The more modern rule obtains here, that survivorship will be referred to the event plainly intended by the testator, whether that event be before, at the time of, or after the death of the testator. *Schaeffer v. Schaeffer*, 54 W. Va. 681, 46 S. E. 150; *Dent v. Pickens*, 61 W. Va. 488, 58 S. E. 1029.

[5] Lastly, are the plain provisions of the will, and the estate or estates created thereby, materially controlled or affected, or prejudiced, by the provisions of sections 8, 18 and 19 of chapter 71, Code 1906? The pertinent provisions of these sections are: "8. Where any real estate is * * * devised * * * to any person without any words of limitation, such devise * * * shall be construed to pass the fee simple * * * unless a contrary intention shall appear by the will." "18. When any joint tenant shall die * * * his part (of real estate) shall descend to his heirs or pass by devise, * * * subject to debts, curtesy, dower, * * * as if he had been a tenant in common." "19. The preceding section shall not apply * * * to an estate conveyed or

devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others."

Though the devise of the fourth paragraph of the will is to the two sons without words of limitation, it is insisted, that the provisions of said section 8 carried the fee simple to the sons, subject to the life estate, and though a joint tenancy at common law was thereby created, the estate of the deceased son, upon his death, by virtue of said section 18, passed to the plaintiff, his heir, "as if he had been a tenant in common." But section 8 says, unless a contrary intention shall appear by the will; and section 19 says, "the preceding section shall not apply * * * to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." Does not a contrary intention appear in the sixth paragraph of the will? And though survivorship at common law be abolished by said section 18, converting a joint tenancy into a tenancy in common, it is only by virtue of that section; and section 19 dissolves that effect, "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." How could a testator have more clearly manifested his intention that the "part of the one dying should then belong to the others," than by saying as he did in the sixth paragraph of his will, that "the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land"? The words of the devise in the fourth paragraph must be placed in juxtaposition to these plain and positive words of the sixth paragraph. The provisions of the statute cannot be applied or otherwise enforced, except by due regard to both provisions of the will.

Is there anything then in the nature, character or quality of the estate which the two sons took on the death of the testator, to let in the plaintiff by inheritance, to succeed to the share which his father might have taken, and intercepting the operation of the sixth paragraph, in favor of the surviving son? We think not. True in this State as in Virginia the right of survivorship, at common law, is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted or devised to the survivor. When so limited the grantees or devisees take joint estates only, subject to all the limitations attaching to such estates as at common law. 2 Minor's Inst. 410. Thus dower would not attach in favor of the widow of the one dying, for at common law to give dower the husband must not be seized as a joint tenant, in consequence of survivorship. 2 Minor Inst. 121. And of

course nothing would at his death go by inheritance to his heirs.

These conclusions call for reversal of the decree below, and a decree here that the bills and cross bill be dismissed.

(70 W. Va. 389)

PLEASANTS et al. v. LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCIDENT INS. ASS'N et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 771*)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES.

The mere declaration in a by-law of a fraternal life insurance association of the object of the organization, without more, constitutes no restriction on the rights of a member in naming a beneficiary in his policy or certificate of membership.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1935; Dec. Dig. § 771.*]

2. INSURANCE (§ 726*)—MUTUAL BENEFIT INSURANCE—CONSTRUCTION OF CONTRACT.

In construing contracts of life insurance made by a fraternal life insurance association, that construction must be put upon the laws of the order, taken as a whole, which is most favorable to the insured, and will most protect the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.*]

3. INSURANCE (§ 724*)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—WAIVER OF PROVISIONS IN POLICY.

Unless some statute or rule of public policy forbids, restrictions in a by-law or contract of a fraternal life insurance association, as to the beneficiaries, to be named, are to be regarded for the benefit of the insurer alone, which it may waive, and the association is the only one that can object that the beneficiary designated does not come within the class of persons who by the by-law or contract are entitled to be so designated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1866-1868; Dec. Dig. § 724.*]

4. INSURANCE (§ 724*)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—WAIVER OF PROVISIONS IN POLICY.

Where in an action on such a contract, by the beneficiary named, defendant appears, admits its liability, and pays the money into court, such act constitutes a waiver of objection to the beneficiary, and an intervening claimant is not entitled to object, defend or claim the benefit accrued under the contract on that ground.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1866-1868; Dec. Dig. § 724.*]

Error to Circuit Court, Mercer County.

Action by Norman Compton Pleasants and another, infants, etc., against the Locomotive Engineers' Mutual Life & Accident Insurance Association and others. Judgment for plaintiffs, and defendants William Compton and others bring error. Affirmed.

Ritz & Ritz and James H. Gollehon, for plaintiffs in error. Ross & Kahle and Sanders & Crockett, for defendants in error.

MILLER, J. Norman Compton Pleasants and Ira Compton Pleasants, otherwise known as Norman Compton and Irb Compton, infants, by Lillie A. Pleasants, their mother and next friend, claiming as beneficiaries named, sued the defendant company, upon two certificates of membership, or policies of life insurance, on the life of Shannon Compton, deceased, calling for \$1,500.00 each.

The defendant appeared, and not desiring to defend the action, acknowledged its liability, in the net sum of \$2,851.50, and which sum, on filing its two affidavits, pursuant to section 1, chapter 107, Code 1906, it was permitted to pay into court, and was relieved from all further liability on account of the policies sued on. By the first affidavit defendant alleged that James H. Gollehon, administrator of the estate of Shannon Compton, deceased, claimed the fund; by the second, that one William Compton, father and sole heir of decedent, claimed the money.

Issues were joined on the two interpleaders filed by these claimants, the plaintiffs in the action being made plaintiffs therein, and the claimants, defendants thereto. On the trial of these issues, the court below, in lieu of a jury, found for the plaintiffs, and pronounced the judgment complained of, that they were entitled to the fund in controversy, and ordered payment and distribution of said money accordingly.

The policies themselves each provide as follows: "All payments or benefits, that may accrue or become due by virtue of this policy, will be payable to Norman and Irb Compton, cousins, or his lawful heirs." It is fully proven and now practically conceded that plaintiffs in the action, though described in the policies as Norman and Irb Compton, and by which names they are also sometimes called, are the sons of Mrs. Lillie A. Pleasants, and are usually known as Norman Compton Pleasants and Ira Compton Pleasants, the nickname "Irb," having been given the latter by the deceased; and though erroneously designated in the policies, as cousins, that they are in fact the persons designated and intended as the beneficiaries named in the policies.

To defeat the plaintiffs, the intervening claimants rely on section one of the by-laws of the association, by the terms of the policies made a part thereof, stating the object and purposes for which the organization was formed, to be the "mutual protection and relief of its members, and for the payment to the family, heirs, relatives by blood, marriage or legal adoption, affianced wife, or to a person or persons dependent upon the members of said association, stipulated amounts from \$1,500 to \$4,500 by the issue of policies of \$1,500 each as provided for in sections 42 and 45."

Though other questions are argued, the controlling points presented on behalf of Gol-

lehon, administrator, and of William Compton, as sole heir, plaintiffs in error, are, first, that plaintiffs below, though specifically named as beneficiaries in the policies, having proven themselves to be the illegitimate children of their mother by the deceased, Shannon Compton, are, under the by-laws, ineligible as such; second, that the beneficiaries named being so ineligible, the benefits either go to the administrator of the insured; or, third, if not to him, to William Compton, his sole heir, whom they contend is by the terms of the policies the alternative beneficiary named, and as such a party to the contract. If the first proposition be sustained, and plaintiffs have not been otherwise rendered secure in their judgment, it is plainly immaterial whether the administrator or the heir prevails, for in either event the heir would finally get the fund.

In reply to these propositions it is said on behalf of the infant plaintiffs, first, that notwithstanding they are not designated in the policies by their full names, and are erroneously described as bearing the relationship of "cousins" to the insured, and whether or not they come within either of the classes of persons particularly enumerated in said section one of the by-laws, nevertheless, their identity as the persons named, and as the persons intended by the insured, being fully established, and there being nothing in the contract or by-laws specifically restricting the insured in naming his beneficiaries, they were lawfully designated as such beneficiaries, and are lawfully entitled to the money; second, that whether the first proposition be true or not, no statute or rule of public policy inhibiting it, even had the policy otherwise provided, the defendant having waived the question of their eligibility as beneficiaries, and its rights, if any, to defend on that ground, and having paid the money into court, no one else can lawfully contest their rights as beneficiaries named in the policies.

[1] As is apparent, the basis of the several propositions of plaintiffs in error is that section one of the by-laws, properly construed, is a restriction or a limitation on the insurance association, and on its members, in naming beneficiaries. Is this true? In terms the by-law is merely a statement of the object of the organization. Neither this nor any other section of the by-laws, so far as the record shows, imposes in positive terms any restriction on a member in naming his beneficiaries, and no statute is pleaded or pointed out that does so.

The proposition that the mere declaration in a by-law of the object of the organization constitutes no restriction on the rights of a member of a mutual benefit insurance association, in naming his beneficiary, seems well supported by authority. 1 Cooley's Briefs on the Law of Ins. 797, and numerous cases cited. In *Sulz v. Mutual Reserve Fund Life Association*, 145 N. Y. 563, 40 N.

E. 242, 28 L. R. A. 379, Mr. Justice Peckham says: "Attention is then called to the by-laws of the defendant, which states its object to be to promote the well-being of all its members, and to furnish substantial aid to their families or assigns in the event of a member's death." And commenting on this provision he says: "As the members are not in any way restricted in the naming of a beneficiary by any by-law of the company, or by its constitution, if there is any beneficiary named in the certificate or policy itself, that person is the one to whom the money shall be distributed."

[2] The general rule applicable to insurance contracts is that that construction must be put upon the laws of the order, taken as a whole, which is most favorable to the insured, and most protects the beneficiaries; and the court is not bound by the construction adopted by the society. 29 Cyc. 17, and cases cited. This rule is especially applicable where there is doubt as to who is intended to be designated as beneficiary. 1 Cooley's Briefs, 820; *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 908; *May on Ins.* 182; *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88, 104. In a note to *Lake v. Minnesota, etc., Ass'n*, 52 Am. St. Rep. at page 559, it is said, that if the by-laws of a mutual benefit society imposes no limit as to the persons to whom certificates shall be payable, the person insured in such an association has the right to direct the amount of his certificate to be paid to a stranger, having no insurable interest in his life. *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Ingersoll v. Knights of Golden Rule (C. C.)* 47 Fed. 272.

[3] But assuming that the by-laws do impose restrictions on the naming of beneficiaries, in whose favor or benefit does such restrictions operate? The authorities seem uniform, that unless some statute or rule of public policy controls, such restrictions are to be regarded for the benefit of the insurer alone, which it may waive, and that the association is the only one that can raise the objection, that the beneficiary designated does not come within the class of persons who may be so designated. 2 Cooley's Briefs, 3722; 1 Cooley's Briefs, 815; 29 Cyc. 105; *Taylor v. Hair (C. C.)* 112 Fed. 913; *Order Golden Chain v. Terrell (C. C.)* 99 Fed. 330; *Johnson v. Supreme Lodge, Knights of Honor*, 53 Ark. 255, 15 S. W. 794, 8 L. R. A. 732; *Tepper v. Supreme Council of Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449; *Mechanics' National Bank v. Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; *Cowin v. Hurst*, 124 Mich. 545, 83 N. W. 274, 83 Am. St. Rep. 344; 29 Cyc. 105, 106, and cases cited in notes.

In *Taylor v. Hair*, supra, the court says: "While the order is under no obligation to pay a benefit to a beneficiary named who

does not sustain to the holder of the certificate such a relationship as is mentioned in section 119, the law imposes no limitations upon it in this respect. The order decides for itself who may become beneficiaries in the membership certificates which it issues, and it decides for itself whether in the particular case it will take advantage of a misrepresentation in an application of the relation which the beneficiary sustains to the applicant, and refuse to pay the insurance. The injury arising out of such misrepresentation is to the order, and it confers no right upon strangers to the transaction."

[4] As we are disposed to hold that the by-laws imposed no restriction on the insured in naming his beneficiaries, and that Compton violated no provision of his contract in naming the infant plaintiffs as beneficiaries in his certificates, it seems useless to discuss the question whether the defendant waived any supposed right to defend the action by paying the money into court. But we are disposed to hold, assuming such restrictions to be in the contract, such provision being solely for the benefit of the insurer, that the admission of liability by defendant and payment of the money into court did constitute a waiver of any objection to the beneficiary, and that neither of the intervening claimants are entitled to object or defend on that ground. This proposition is abundantly supported by authority. 1 Cooley's Briefs, 815, and cases above cited.

Our conclusion, therefore, is that the judgment below should be affirmed.

(70 W. Va. 383)

BOAL et al. v. WOOD et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1912.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 92*)—ACTION AGAINST HEIRS—STATUTES.

When an intestate leaves living heirs and an unborn heir of the same class, and the estate is thereby vested in the living heirs subject to the contingency that the unborn heir will come into life and inherit with them, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of courts to deal with the same, represent the whole estate and stand not only for themselves but also for the person unborn.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 382-388; Dec. Dig. § 92.*]

2. DESCENT AND DISTRIBUTION (§ 92*)—ACTIONS AGAINST HEIRS—JURISDICTION.

Where the court once legally acquires jurisdiction of an unborn heir by representation through living heirs of the same class, its subsequent birth without thereafter being made a direct party to the cause does not divest the court of jurisdiction to decree against it, though to do so is error.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 382-388; Dec. Dig. § 92.*]

3. EXECUTORS AND ADMINISTRATORS (§ 335*)

—SALES UNDER ORDER OF COURT—PARTIES.

Decrees supporting a judicial sale, in a suit brought by an administrator to subject the decedent's lands to the payment of his debts, to which suit the widow and living heirs were parties, are not void for want of jurisdiction as to one who, when the administrator's suit was instituted, was an unborn heir of the decedent, of the same class as the living heirs who were parties to the suit, notwithstanding he was never made a direct party to the suit after coming into life.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1379-1384; Dec. Dig. § 335.*]

Appeal from Circuit Court, Logan County.

Suit by Ella M. Boal and another against Stuart Wood and others. From an order dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

Lilly & Shrewsbury, Chafin & Bland, and Cox & Baker, for appellants. Campbell, Brown & Davis, for appellees.

ROBINSON, J. The suit is one for partition. Plaintiff claims a one-tenth interest in the lands of which her father, Levi Vance, died seized and possessed. These lands were sold in a suit brought by the administrator of Vance to subject them to the payment of his debts. Defendants hold under purchasers at judicial sales made in that cause.

Vance died intestate in the year 1887. He left a widow, nine living children, and an unborn child. That unborn child is now the plaintiff here. She was born within ten months after her father's death. Prior to her birth, the suit to sell the lands had been instituted by the administrator. It had proceeded to a decree of sale as to a part of the lands. As is usual in such cases, that suit had been instituted within six months after the qualification of the administrator. The widow and the nine living children were parties defendant thereto. But plaintiff not being yet in life, was not named as a party. Nor was she ever brought in by process after she was born. The suit, after her birth, proceeded to a sale under the decree which had theretofore been entered and to a confirmation of that sale. A subsequent decree of sale, as to the lands not embraced in the former one, was entered, and a sale made under that subsequent decree was confirmed.

[3] Plaintiff contends that the judicial sales are void as to her—that the suit in which they were made did not divest her of title to the lands. She says the court had no jurisdiction in the premises since she was never made a formal party to the suit. Her bill asserting this claim was dismissed on demurrer, and she has appealed.

If, as plaintiff submits, the court had no jurisdiction as to her in the administrator's suit, then it is true that she did not lose

title by the proceedings therein. Her suit is a collateral attack. She does not come within six months after reaching twenty-one years of age to show error in the proceedings. She comes, after that opportunity has passed, alleging absolute want of jurisdiction.

There is no allegation in the bill that plaintiff's rights were not fairly defended by those present as parties—her mother, brother and sisters—having interests identical with hers. Indeed, it appears there was full opportunity for defense against the subjection of the lands to the decedent's debts by those who had motives of interest for themselves and affection for the plaintiff to make that defense. The administrator prosecuting the suit was plaintiff's brother—himself an owner of the lands and a defendant in his own right. It is not to be assumed, nor is anything alleged to make it appear, that the lands were needlessly or injudiciously subjected to sale. Though plaintiff had an interest in the lands, she took that interest subject to the debts of the ancestor from whom she inherited. Those debts were a paramount charge on the lands. It must be presumed that those interested with plaintiff were careful to preserve the joint estate as far as could be done under the circumstances surrounding that estate. The case presents merely the question whether plaintiff's interest was illegally sold—whether it was sold without jurisdiction in the court to order a sale and to consummate one when made.

[1] We have noticed that plaintiff, though legally in being as an unborn child, was not in life at the time the suit was instituted. It was impossible to make her a formal party thereto. It was not then known that plaintiff would be born alive and take the inheritance which she should have in the event that she came into life. Conditions of the estate demanded that the suit proceed. The necessity of the case demanded that it proceed without her as a formal party. The law provided a way for the court to take jurisdiction notwithstanding the situation. The law provided a way for the court to take hold of the interest of this unborn child and to deal therewith in judicial proceedings affecting it. Though that child might thereafter come into life and an interest in the lands devolve on it as of the time of the death of its father, still the court could take jurisdiction in relation to it even before its birth. The court's power to do so, arose out of the very necessity of things. "The rule in regard to parties is a rule of convenience, and the court will never allow it to be so applied as to do an injury, to obstruct the administration of justice." *Faulkner v. Davis*, 18 Grat. 693, 98 Am. Dec. 698. The living owners of the estate were the only ones that could be made actual parties to the suit. But this unborn child was so

virtually made a party through them that jurisdiction attached as to it also. It was a party by representation. "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity." *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693. "Where the legal title to an estate is vested in a class subject merely to open and let in after-born children, the members of the class in being at any given time represent not only themselves but also the persons not born, in any litigation with reference to the estate." 15 Enc. Pl. & Pr. 650. "Whenever the court of chancery has power to decree the conversion of real estate into personal, it may do so notwithstanding the contingent interests of some of the parties who are not yet in being, or not ascertained, provided all the parties are brought before the court that can be brought before it, and especially where the rights of the non-existent, or as yet unascertained, parties will be represented and sufficiently defended by the persons who are made parties, and who have motives of self-interest and affection to make such defense. And this is styled the doctrine of representation of parties." 2 Minor's Inst. (4th Ed.) 238. "Under the laws of Virginia parties in being, possessing an estate of inheritance in property, are regarded as so far representing all persons, who, being afterwards born, may have interests therein, that a decree for the sale thereof binding them will also bind the latter party." *Knotts v. Stearns*, 91 U. S. 638, 23 L. Ed. 252.

[2] The court acquired jurisdiction to hear and to determine the rights of this unborn infant. It acquired that jurisdiction by making the living owners of the same class with the unborn owner parties to the suit. Having thus acquired jurisdiction of the party, the court possessed the power to proceed to the final disposition of the suit. *Black on Judgments*, § 243. True, when the infant came into life, it should have been made a party in person. Not to do so was error, just as it is error not to revive a suit against the heirs or legal representatives when a party dies. But the failure to do so could not divest the court of the jurisdiction it had lawfully acquired. "The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." *Van Fleet on Collateral Attack*, § 61. "When once the jurisdiction of the court has attached, no subsequent error or

irregularity in the exercise of that jurisdiction can make its judgment void." 1 Black on Judgments, § 204. The jurisdiction by representation continued for a longer time than necessity demanded, but it continued nevertheless. To allow it so to continue was error which would call for a reversal. But mere error cannot avail plaintiff in this suit. The court legally acquired jurisdiction over her which it later erroneously employed; but it never lost the jurisdiction which it lawfully acquired before she was born. It had the power to proceed to final judgment though it proceeded thereto erroneously by a failure to make her a personal party to the suit when she came into life. This principle is well illustrated in a Virginia case, from which we quote: "The authority to decide being once shown, it can never be divested by being improperly or erroneously employed. Freeman on Judgments, § 135; Cox v. Thomas' Adm'r, 9 Grat. 312. If, for example, a suit be commenced against a feme sole, it does not abate by her subsequent marriage, but it may proceed against husband and wife jointly. If the plaintiffs, however, without noticing the marriage take judgment against the feme, the judgment is not thereby rendered void, but is regarded as valid and binding until and unless reversed by some direct proceeding in that court. In a number of cases this doctrine has been carried to the extent of holding that when process is served in the lifetime of the defendant and he afterwards dies, a judgment against him subsequent to his death is not absolutely void, but simply voidable. The court having obtained jurisdiction over the defendant whilst living, is thereby empowered to proceed with the case to judgment; and although the court ought to cease to exercise jurisdiction over the party when he dies, its failure to do so is an error to be corrected on appeal, or writ of error coram nobis, as the case may be." Neale v. Utz, 75 Va. 480. See, also, King v. Burdett, 28 W. Va. 601, 57 Am. Rep. 637; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; Black on Judgments, § 200.

In the case under consideration, necessity made the court to take jurisdiction of the unborn infant by representation; the court then had power to go on by representation to the end, though to do so was erroneous. Just as the court may erroneously go on after the death of a party as to whom jurisdiction has attached while living, so it may proceed after the birth of a party as to whom jurisdiction theretofore attached while unborn. The court having legally acquired jurisdiction over the infant whilst unborn, that court was empowered to proceed to judgment. The change from an unborn child to one in the arms of the mother could not divest the court of jurisdiction over it. It was the

same person. It had already been constructively brought before the court by the bringing in of those of the same class who in law represented it. A change in the status of a party does not call for a new summons to enable a court to keep the jurisdiction it has once acquired. If it were so, jurisdiction would readily be lost; a party could voluntarily divest the court of jurisdiction. Surely constructive service by publication as to a non-resident continues to give the court jurisdiction notwithstanding the party afterwards becomes a resident of the state and is not personally served. So constructive service by representation as to one an unborn infant continues to give the court jurisdiction though the infant is afterwards born alive. "The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked, and if the jurisdiction once attaches to the person and subject-matter of the litigation, the subsequent happening of events, though they are of such a character as would have prevented jurisdiction from attaching in the first instance, will not operate to oust the jurisdiction already attached. This is the statement of the rule that subsequent events will never defeat jurisdiction already acquired." 12 Enc. Pl. & Pr. 171.

Plaintiff was before the court in the suit of which she complains. She was there by representation which the law deems sufficient to give the court jurisdiction as to her. She cannot collaterally attack the decrees. If the suit had been brought after her birth, the case would be entirely different. The demurrer was rightly sustained. We must affirm the order.

(113 Va. 121)

SOUTHERN RY. CO. v. McMENAMIN et al.
(Supreme Court of Appeals of Virginia, Jan. 18, 1912. Rehearing Denied March 14, 1912.)

1. APPEAL AND ERROR (§ 1041*) — REVIEW—HARMLESS ERROR—PLEADING.

The allowance of an amendment before defendant had pleaded which did not change the cause of action could not have prejudiced defendant, where the trial was then postponed for two months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

2. RAILROADS (§ 222*)—OPERATION—NUISANCE—ACTION—PLEADING.

In selecting a place for its yards and coal chutes and power house, a railroad is acting in its private capacity, such acts being mere incidents to the operation of the road, in which the public has no concern, and so, if the yards and coal chutes constitute a nuisance, it is unnecessary to allege or prove negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.*]

3. NUISANCE (§ 53*)—ACTIONS—DAMAGES—EVIDENCE.

In an action for maintaining a smoke nuisance near plaintiff's residence, where the jury viewed the premises and the evidence fully

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

showed the character of the injury complained of, the question of damages was properly submitted to the jury, despite the absence of evidence of the pecuniary loss.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 53.*]

4. RAILROADS (§ 222*)—OPERATION—NUISANCE.

That the operation of trains casts some smoke upon the property of plaintiff will not warrant a railroad company in maintaining yards and coal shutes so near the property of plaintiff as to depreciate its value by reason of smoke.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.*]

5. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action against a railroad company for maintaining a smoke nuisance near plaintiff's residence, error in an instruction which eliminated from the consideration of the jury any question as to injury of plaintiff's personal property was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

6. LIMITATION OF ACTIONS (§ 55*)—PRIVATE NUISANCE—PERMANENT NUISANCE.

A railroad is a permanent structure, and, where it is a nuisance, there is only one right of action therefor, which will be barred within the statutory period, and the entire damage suffered both past and future must be recovered in one action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

7. LIMITATION OF ACTIONS (§ 55*)—ACTION FOR NUISANCE—RAILROAD COMPANY—INCREASE OF BUSINESS.

Where a railroad company's yards were a nuisance when constructed, there was a single cause of action which accrued when the nuisance began, though the business of the road increased and the nuisance became greater from year to year.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

8. LIMITATION OF ACTIONS (§ 197*)—ACCRUAL OF CAUSE OF ACTION—NUISANCE—EVIDENCE.

In an action against a railroad company for a nuisance arising from its establishment of its yards and coal chute near plaintiff's residence, where it appeared that the yards and chute had been there more than the statutory time, plaintiff's evidence that the damage was not appreciable until within recent times was not contradicted by proof that the railroad company had ceased to have some of its engines coaled at that yard, for the use of inferior coal or other causes might have operated to cause the increase of the injury.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

Error to Circuit Court of City of Alexandria.

Action by Alice McMenemy and another against the Southern Railway Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Robert B. Tunstall and Francis L. Smith, for plaintiffs in error. J. K. M. Norton and Edmund Burke, for defendant in error.

HARRISON, J. This action of trespass on the case was brought by Alice McMenemy and her husband, Richard McMenemy, to recover of the Southern Railway Company damages for injuries resulting, as alleged, from the maintenance by the defendant company of a nuisance on its property.

The declaration alleges that the plaintiff, Alice McMenemy, is the owner of a large brick dwelling house in the city of Alexandria, which she has occupied with her family as a home during the time of the grievances complained of, and is still occupying; that the defendant company, has, for a number of years, owned property and operated railroad yards in the city of Alexandria in close proximity to the property of the plaintiff, and has, since she bought and improved her property, erected in its yards, and established in connection therewith, a large plant for the generation of electricity, and has also erected in its yards a large structure known as a coal chute, from which the tenders of the defendant's engines are filled with coal, and has established in connection with each of these structures large stationary engines. The plaintiffs further aver that the defendant, for five years past immediately preceding the institution of this suit has so operated its electric plant, coal chute, and stationary engines in connection therewith, and in filling its engines with coal from said chute, and in firing such engines, as to cause great injury to the property of the plaintiff, Alice McMenemy, as a dwelling place, and to her personal property of every description situated therein. It is further averred that the defendant, its agents and employees, have within the five years last past caused to be emitted from its electric plant, coal chute, and stationary engines, and from its train engines, while the same are being filled with coal and fired at such coal chute, great clouds of dense, black smoke, cinders, and soot, impregnated with acid, and has emitted also therefrom poisonous and disagreeable gases, as well as much noise, and that these dense clouds of greasy and acid impregnated smoke, soot, cinders, and poisonous gases have filled the air and settled over, in, and upon the property of the plaintiff, and through the windows of her house upon the person and clothes of the occupants, to such an extent as to be almost unbearable; that her fruit trees, plants, and flowers situated upon her said premises have been greatly injured, the fruit trees being either dead or dying. It is further averred that this serious injury comes, not continuously, but whenever the wind blows in the direction of such property; that these acts of the defendant have caused a great nuisance, and in the past three years have become almost unbearable when the wind blows in the direction to bring the smoke, soot, cinders, etc., over the

property and into the house of the plaintiff, thereby preventing its full, proper, and useful enjoyment, and rendering the same almost uninhabitable, and also thereby greatly depreciating the value of her said lot and dwelling house.

The declaration contains no averment of negligence; the theory of plaintiffs' case being that the structures and operations maintained by the defendant constituted a nuisance, which caused the injuries complained of.

The defendant railroad company filed pleas of the general issue and the statute of limitations. The trial resulted in a verdict and judgment thereon in favor of the plaintiffs, which this writ of error brings under review.

[1] The objection to the action of the court in allowing the plaintiffs to amend their declaration by striking out the words, "and also thereby depreciating the value of her said lot and dwelling house," is not well taken. The record does not show, as contended, that at the time the amendment was allowed the defendant had filed its pleas of the general issue and the statute of limitations. On the contrary, it appears that the amendment was first allowed, and thereupon the defendant pleaded. Nor is it tenable that the effect of the amendment was to make a new and different case. The whole proceeding was on the same day, and the trial then postponed for two months, so that the defendant could not have been prejudiced.

Instructions "A" and "B," as modified by the court, fairly submitted the plaintiffs' theory of the case to the jury, without prejudice to the rights of the defendant.

[2] Two objections are suggested to these instructions. The first is that the defendant's engines were engaged in transportation service; that the acts complained of constituted a legalized nuisance, for which the plaintiffs were not entitled to recover, because there was no averment or proof of negligence.

In selecting the site for its yards and the location therein for its coal chute and power house, and in the operation of those plants as well as in firing its engines on the yards and otherwise preparing them for use in the transportation of persons and property, the defendant company was acting in its private capacity, such acts being incidents to the operation of the road with which the public had no concern. *Townsend v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842; *Terrell v. C. & O. Ry. Co.*, 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371.

It is not necessary to allege or prove negligence where the acts complained of result from a nuisance committed by a railroad company in its private capacity, for, as a rule, it is liable under such circumstances,

even though the nuisance is not negligently caused. *Terrell v. C. & O. Ry. Co.*, supra.

[3] The second objection to these instructions is that there was no evidence of the amount or value of the injury to guide the jury in arriving at their verdict.

The jury viewed the premises and saw the conditions. The evidence abundantly shows the character of the injury complained of, the conditions under which plaintiffs suffered, and the inconvenience to them in the enjoyment of their property.

Where the injury is discomfort and inconvenience, the amount of damages must be left to the jury in view of all the facts. Absolute certainty in such cases is not attainable, and is not required. The injured party cannot be denied the right to recover because he cannot show the exact amount with certainty, although he is ready to show to the satisfaction of the jury that he has suffered large damage. Where from the nature of the case the amount of damage cannot be ascertained with certainty, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit. 1 *Sedgwick on Damages*, § 170.

[4] There was no error in the refusal of the court to grant instruction No. 4 asked for by the defendant. There was evidence tending to show that some smoke was thrown upon the plaintiffs' premises from the engines of passing trains on the tracks of the defendant, which lay between its yards and the plaintiffs' house. The effect of instruction No. 4 was to tell the jury that if any smoke, gas, etc., was cast upon the plaintiffs' premises from any of the operations of the defendant, or from any other railroad, no matter how slight the cause, this was a license for the defendant to make the home of the plaintiffs uninhabitable by deluging it with smoke, soot, cinders, and poisonous gases from the operations in its yards of the coal chute and power house, and the coaling and firing of engines therein, upon the theory that when the smoke, etc., from the causes imposing liability upon the defendant is mingled with the smoke for which there is no liability, the plaintiffs cannot recover, no matter how great they may have shown their damage to be from the causes which made the defendant responsible.

In no aspect of the present case could such an instruction be proper. The plaintiffs alleged and proved that serious damage was done them by the smoke, gases, etc., from the operations on the defendant's yards, and this responsibility cannot be escaped by showing that a modicum of smoke was thrown upon the plaintiffs from a lawful source.

[5] Instruction No. 5 as asked tells the ju-

ry that they must find for the defendant, because there was no evidence of depreciation in the value of the property or as to the amount of damages sustained.

This was error, as shown in commenting upon the second objection to instructions A and B, asked for by the plaintiffs. It was certainly not prejudicial to the defendant for the amendment complained of to eliminate from the consideration of the jury any question of injury to the plaintiffs' personal property.

The real question in this case and the one to which the argument has been chiefly directed involves the right of the defendant to the defense of the statute of limitations, and the propriety of the court's action in modifying instruction No. 3 asked for by the defendant, which reads as follows:

"If the jury believe from the evidence that the structures designated as the 'coal chute' and 'power plant' were put in operation prior to five years before the institution of this action, and that the firing and coaling of defendant's engines at said coal chute commenced more than five years before the institution of this action, that said structures are of a permanent character, that they have been operated since first used, and its engines fired and coaled at said coal chute since it was first used in the same manner to the time of the institution of the suit, and that the operation of said coal chute and power plant, and firing and coaling of said engines have injured the property of the plaintiffs, and that the nuisance caused by said operations is of such a character that its continuance necessarily constituted a permanent injury to plaintiffs' property, then the jury are instructed that the plaintiffs' cause of action accrued when said power house and chute were first operated, and said engines were first coaled, or their draught increased by the use of blowers at said chute; that the claim of the plaintiffs is barred by the statute of limitations, and their verdict shall be for the defendant."

The substantial difference between the foregoing instruction, asked for by the defendant, and its modification as given by the court, is the addition of the words, "and to substantially the same extent," making the instruction where the addition occurs read as follows: "That said structures are of a permanent character, that they have been operated since first used, and its engines fired and coaled at said coal chute since it was first used in the same manner and to substantially the same extent, during the whole period from the construction of said coal chute," etc.

The evidence of the defendant tends to show a continuous damage to the property of the plaintiffs from the time the structures complained of were erected and the operations there begun down to the date of the institution of this suit—a period of more than five years. Instruction No. 3 involves a

consideration of the questions arising upon the plea of the statute of limitations; it being contended on behalf of the plaintiffs that the statute of limitations cannot be invoked in this case, and that an instruction recognizing its application should not have been given in any form.

[6] The general rule with respect to nuisances undoubtedly is that repeated actions may be brought as long as the nuisance continues, but an exception to the general rule, as well established as the rule itself, is that where a permanent nuisance, the consequences of which in the normal course of things will continue indefinitely, there is but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued. *Va. Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465.

The principles enunciated in the case cited are sustained by the great weight of authority, and in no class of cases is the doctrine more frequently invoked and applied than in cases involving the construction and operation of railroads, which are presumed to be permanent structures. *Highland, etc., Co. v. Matthews*, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462; *Frankle v. Jackson, Receiver (C. C.)* 30 Fed. 598; *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495; *Chicago, etc., v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Fowle v. New Haven, etc., Co.*, 107 Mass. 352; *Id.*, 112 Mass. 334, 17 Am. Rep. 106; *Louisville, etc., Co. v. Orr*, 91 Ky. 109, 15 S. W. 8; *Illinois, etc., Co. v. Hodge (Ky.)* 55 S. W. 688; *Porter v. Midland, etc., Co.*, 125 Ind. 476, 25 N. E. 556; *De Geofroy v. Merchants', etc., Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; *Chicago, etc., Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326; *Williams v. Southern, etc., Co.*, 150 Cal. 624, 89 Pac. 599; *Jacksonville, etc., Co. v. Lockwood*, 83 Fla. 573, 15 South. 327.

[7] The effect of the modification by the court of instruction No. 3 was to require the jury to believe, before applying the bar of the statute of limitations, that the injuries to the property of the plaintiffs had been "continuous in the same manner and substantially to the same extent during the whole period from the construction of the coal chute and power house." Under the instruction as modified if it appeared that the business of the defendant had increased during the five-year period, thereby causing an increased damage to the plaintiffs, the jury would not have been authorized to sustain the defense of the statute of limitations.

We are of opinion that it was not essential to the defense of the statute of limitations that the damage complained of should exist to the same extent during the period of five years. *Louisville, etc., Co. v. Orr*,

supra; Kilcoyn v. Chicago, etc., Co., 141 Ky. 237, 132 S. W. 438.

In the case last cited it is said: "There is nothing in this case to take it out of the rule laid down in the cases cited. In those cases, as here, traffic over the road had been begun more than five years before the suit was brought. It had increased within five years before the suit was brought and greater damage had been done, but this does not affect the question. The railroad is a permanent structure, and the property owner must know that, as the business of the road increases, the trains will increase. He has five years in which to bring his action, and the time cannot be extended by reason of the fact that the business of the road has greatly increased. To so hold would be to ignore the rule; for the reason that, as the country builds up, the business of all railroads increases. The railroad has the right to use its tracks for its business as it increases, and its lawful use of its own property cannot give rise to a fresh cause of action."

In the light of the authorities cited, we are of opinion that instruction No. 3 embodied a correct statement of the law, and should have been given in the form in which it was asked by the defendant.

[8] In connection with this last-mentioned assignment of error, the defendant contended that, with respect to the time when the damage complained of began, the plaintiffs' evidence could not be considered because in conflict with physical facts which made it impossible for such evidence to be true. The physical facts relied on in support of this contention consisted of the defendant's evidence that the use of its yard and the structures therein was less extensive at the end of the five-year period than in the beginning, for the reason that during that period the passenger operations of the defendant were transferred entirely from the yard to the Union Station, some distance from the plaintiffs' property; and that the freight operations, other than those involving freight destined locally to Alexandria, were transferred to the Potomac yards, several miles from Alexandria. It is insisted that these changes necessarily resulted in diminishing the damage accruing to the plaintiffs' property, but that, notwithstanding these facts, both plaintiffs testified that their damage was insignificant in the beginning of the five-year period, and very great in the latter part thereof; indeed, the plaintiffs' evidence tended to limit the damage sustained by them to the three years immediately preceding the institution of their suit.

The evidence of the defendant, tending to show that it had transferred a large part of its business from the yard in question to other places, did not establish such physical facts as to render the evidence of the plain-

tiffs untrue. Many causes, such as inferior coal, increase in the number of engines fired and coaled at the chute and power house, etc., may have operated to make the damage greater after the business mentioned had been transferred to other places. It was for the jury to say, upon all the evidence, when the damage began which gave the plaintiffs a cause of action.

For the error of the circuit court in refusing instruction No. 3, as asked for by the defendant, and in modifying the same, its judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had, not in conflict with the views expressed in this opinion.

Reversed.

WHITTLE, J., absent.

(113 Va. 150)

WALTER v. WHITACRE et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1912. Rehearing Denied March 14, 1912.)

1. WILLS (§ 706*)—ACTION TO CONSTRUCT—RIGHT TO APPEAL—ESTOPPEL.

By suing to sell testamentary property and have the proceeds distributed according to a construction placed on the will by a decree, testator's widow waived her right to appeal from that decree, and a decree directing distribution of proceeds according to such construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1683; Dec. Dig. § 706.*]

2. LIMITATION OF ACTIONS (§ 146*)—"NEW PROMISE IN WRITING"—SUFFICIENCY—PLEADING.

That an inventory filed with a bill brought by testator's brother and others to construe the will listed a debt as due the estate from the brother did not constitute a "new promise in writing," removing the bar of limitations, under Code 1904, § 2922, where the inventory was not signed by him or his agent, and the bill was not signed by him, but by counsel.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.*]

For other definitions, see Words and Phrases, vol. 5, p. 4788.]

3. LIMITATION OF ACTIONS (§ 146*)—NEW PROMISE IN WRITING—SUFFICIENCY—DEPOSITIONS.

Where an inventory of testator's estate scheduled a debt due from a brother, the brother's deposition cannot be regarded as a new promise in writing, removing the bar of limitations, within Code 1904, § 2922, where it contained a denial that the debt stated in the inventory was a correct statement of his debt to testator.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.*]

Appeal from Circuit Court, Frederick County.

Bill by W. C. Whitacre and others against Merrie Walter. From certain decrees, defendant appeals. Affirmed.

R. T. Barton, for appellant. Ward & Larrick, M. M. Lynch, and Sipe & Harris, for appellees.

BUCHANAN, J. [1] The first question to be determined is the motion of the appellees to dismiss this appeal. The ground of the motion to dismiss is that the appellant has waived her right of appeal, or is estopped from asserting it.

The facts and circumstances relied on to establish such waiver or estoppel, briefly stated, are as follows: James P. Whitacre died in the year 1909, leaving valuable real and personal estate, which he disposed of by his last will to his widow and his six brothers, who were his next of kin. The widow and one of the brothers qualified as executors of the decedent's estate. During the same year the six brothers, five in their own right and one in his own right and as one of the executors of Jas. P. Whitacre, instituted their suit for the purpose of having the will construed, as to which construction they alleged that they and their deceased brother's widow differed, the interest of the parties in his estate ascertained and determined, the creditors convened, and the estate administered under the direction of the court, and for general relief.

The appellant, the decedent's widow, answered the bill, admitting that she and the other parties in interest differed as to the construction of her husband's will, praying for a construction thereof, and for substantially the same relief sought by the bill.

In March, 1910, a decree was entered, construing the will and ordering accounts necessary to enable the court to carry out the purposes for which the suit was brought. By that decree the circuit court held that the appellant took under her husband's will a life estate in a house and lot, described as No. 215 North Washington street, in the city of Winchester, an absolute estate in all the tangible personal property in and upon the said premises, and, after the payment of the testator's debts, etc., a one-third interest in fee in his other real estate and a one-third interest absolutely in his other personal estate, and that the six brothers were entitled to the residue of the testator's property after the payment of his debts, etc., and the payment or setting apart of the several devises and bequests made the appellant.

In May, 1910, the appellant filed her bill in the same court against the six brothers, who were the complainants in the above-described suit in which her husband's will was construed, and the rights of the parties ascertained and determined, in which she set out the proceedings had in that suit, the construction placed upon the will and what the rights of the parties were under that construction, and made the bill, answer, and decree in that case a part of her bill. It was further alleged in her bill that the

Washington street property was not susceptible of partition in kind, and that it would be to the interest of all parties to sell that property and divide the proceeds among them. After giving reasons why it was best that the property should be sold and the proceeds divided, and that she was willing to accept a gross sum in lieu of her life estate therein, she prayed "that the interest of your complainant in said premises as adjudged and determined by said decree of March 2, 1910, be commuted and determined and paid to her in a gross sum in cash out of the proceeds of said sale; that the balance of said proceeds of sale be distributed and paid to the parties entitled thereto, as adjudged and determined by said decree. * * *

The relief prayed for was granted, except as to commutation of the value of the appellant's life estate in the property sold. Her one-third interest in fee in the proceeds of the sale was paid to her, and the other two-thirds of the proceeds of the sale in which she had a life estate was placed in the hands of a receiver, who was directed to pay the appellant during her life the income, interest, and profits thereof, and the cause placed upon the "deferred docket," with the right to any party in interest to ask for such further order as might be necessary.

After that suit was brought, such proceedings were had in the suit for the construction of the will and the administration of the decedent's estate as resulted in a sale of all his other real estate, consisting of several tracts, and a division of the proceeds thereof, and a distribution of the other personal estate of the decedent ordered to be made, and made to a very large extent, between the appellant and the other devisees and legatees of the testator, in accordance with the will as construed by the court in that case, without objection or exception by the appellant as to the manner of division and distribution.

By these appeals the appellant seeks to have this court review and reverse three decrees of the circuit court. One of them is the decree which construed her husband's will, and ascertained and determined the rights of herself and the other legatees and devisees therein, and another is the decree which directed that the division and distribution of the proceeds of the real estate of her husband other than the Washington street property should be made in accordance with the construction which the court had placed upon the will. If this court were to take cognizance of these appeals, and place the construction upon the will which the appellant claims is the proper construction, she would take a much larger interest in her husband's estate than the circuit court decided that she had, and it would result in reversing the decree in which the will was construed, and in reversing or modifying the decrees based upon that construction,

under which the proceeds of sale made in that case were distributed, by compelling other legatees to pay back money which had been paid them under decrees carrying out the provisions of the will as construed by the circuit court—a construction which the appellant has not only acquiesced in, by not objecting or excepting to the manner of distributing the testator's estate, but a construction upon which she based her right to the relief sought and obtained in the suit for the sale of the Washington street property.

This is a very different case from *Southern Ry. Co. v. Glenn*, 98 Va. 309, 319, 36 S. E. 395, and cases therein cited and relied on by the appellant to show that she has not by her conduct lost her right of appeal from the two decrees mentioned. In that case it was held that, where a decree is entered for less than a party claims, the mere receiving payment of the sum so decreed did not estop him from appealing from the decree as to the sums not allowed. But in this case the provisions of the decree construing the will were inseparable, and the appellant did not merely receive what under the decree construing it she was entitled to, but she brought a suit based upon that construction of the will, and asked to have sold and divided the proceeds of the Washington street property among the parties as ascertained and determined by the decree construing the will. The right to do this and the right of appeal from the decree were not concurrent, but, on the contrary, were totally inconsistent rights. Her election to bring the suit for the sale of the Washington street property and to have the proceeds divided between her and the other parties in interest, in accordance with the construction placed upon the will by that decree, was a renunciation of her right to appeal from that decree, which she was seeking to and did enforce in the other suit. See *Carpenter v. Camp Mfg. Co.*, 112 Va. —, 70 S. E. 496, and *Bennett v. Van Syckel*, 18 N. Y. 481, 483, 484, cited with approval in that case. See, also, *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436.

We are of opinion that the appellant is estopped from appealing from the decrees of March 2, 1910, and of August 25, 1910, and that the motion to dismiss her appeal from those decrees must be sustained.

[2] The other decree appealed from was entered on the 7th of April, 1911, and has no such connection with the construction of the will, or the distribution and division of the testator's estate under that construction, as estops the appellant from appealing from that decree, so far as it involves the question whether or not a debt alleged to be due from W. C. Whitacre to the estate of the testator was barred by the statute of limitations.

The appellant insists that the court erred in holding that the debt in question was barred by the statute of limitations, because the

bill in the case, filed by W. C. Whitacre and others, contains an acknowledgment of the debt due from him, which amounts to a new promise, under section 2922 of the Code, and thus removes the bar of the statute of limitations; (2) because the deposition of W. C. Whitacre taken in the cause contains such an acknowledgment of the debt as amounts to a promise to pay, and removes the bar of the statute, under the provisions of section 2922 of the Code; (3) because W. C. Whitacre is estopped by his bill from pleading the statute of limitations; (4) because the commissioner's report of May, 1910, and the decree of June, 1910, are a binding adjudication of the validity of the said debt.

The court is of opinion that this assignment of error cannot be sustained upon either of the grounds relied on. While the inventory filed with the bill does list the debt in question as due from W. C. Whitacre, it was not signed by him or his agent; neither was the bill with which it was filed signed by him, but by his counsel, who brought the suit for him and others for a construction of his brother's will, and a settlement, division, and distribution of his estate under the direction of the court. Taking into consideration the purpose for which the suit was brought, and that the bill was only signed by counsel employed to bring the suit, and without any evidence to show that he was authorized to make any admission that would amount to a new promise to pay the debt, we are of opinion that it was not such an acknowledgment of indebtedness by the debtor or his agent that a promise to pay would naturally and irresistibly be implied, as is required by section 2922 of the Code. *Dinguid v. Schoolfield*, 73 Va. 803, 807, 808, and authorities cited.

[3] Neither is there any such acknowledgment in the deposition of W. C. Whitacre. In that he denies that the debt stated in the inventory is a correct statement of what he owes his brother's estate, and it cannot be considered as containing an unqualified and direct acknowledgment of a subsisting indebtedness, from which a promise to pay could be inferred. *Dinguid v. Schoolfield*, supra, 73 Va. 807, 808, and authorities cited.

Neither of the other grounds upon which this assignment of error is based can be considered, since no such objections were made to the commissioner's report. A party cannot except to a commissioner's report on one ground in the trial court, and rely upon a wholly different ground in the appellate court, unless the objection made in the appellate court is apparent upon the face of the report.

We are of opinion that the decree of the April term, 1911, appealed from, should be affirmed.

Affirmed.

(113 Va. 90)

MOORMAN et al. v. CITY OF LYNCHBURG.
(Supreme Court of Appeals of Virginia. Jan. 18, 1912. Rehearing Denied March 14, 1912.)

1. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—EQUITABLE ISSUES.

Where a defendant, in a suit by a city to compel the removal of obstructions placed by him in a street, establishes a bona fide claim of title to the land in the street, he is entitled to a jury trial to determine the ownership of the land; but where he shows no such bona fide claim he cannot demand a jury, nor deprive equity of jurisdiction to compel the removal of the obstruction.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 14.*]

2. JURY (§ 14*)—RIGHT TO JURY TRIAL.

An owner platted land into lots and blocks, and sold lots described by calls for street lines. For many years the street was marked by a well-defined, traveled way, and was used by the public at will. The owner in his lifetime, and his heirs after his death, did not question the right of the city to the street. The street was never obstructed until the city began the construction of sewers. *Held*, that a grantee of the owner of property described by the street lines had no such bona fide claim of title to the street as entitled him to a trial by jury of a suit by the city to compel him to remove obstructions placed in the street, or to deprive equity of its jurisdiction to compel removal of the obstructions.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 14.*]

Appeal from Corporation Court of Lynchburg.

Suit by the City of Lynchburg against Winington L. Moorman and another for a mandatory injunction. From a decree for plaintiff, defendants appeal. *Affirmed*.

Coleman, Easley & Coleman, for appellants. Wilson & Manson, for appellee.

WHITTLE, J. The appellee, the city of Lynchburg, filed its bill against the appellants, Winington L. Moorman and William Hurt, praying for a mandatory injunction to compel the defendants to remove certain obstructions alleged to have been placed by them in Miller and Knight streets, and also to establish those streets as indicated on the "Miller map" exhibited with the bill.

The defendants, by demurrer and answer, denied the jurisdiction of a court of equity to take cognizance of the controversy, and controverted the proposition that the streets in question were ever dedicated by Mrs. Miller (the former owner), or accepted by the city. They insisted that they were the owners of the land included in the streets, that the litigation involved a bona fide claim of title to land, and that the determination of that issue ought to have been submitted to a jury. *Manchester Cotton Mills v. Manchester*, 66 Va. 825; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Miller v. Wills*, 95 Va. 337, 28 S. E. 837; *Calloway v. Webster*, 98 Va. 790, 37 S. E. 276.

From decrees granting the city the relief prayed for, this appeal was allowed.

[1] The crucial question for our determination is whether the appellants have made good the pretension that they have a bona fide claim of title to the land embraced in these streets. If they have, then their right to a trial by jury is clear under the authorities cited. But if they have shown no such bona fide claim, they are neither in position to demand such trial, nor to question the right of the city to proceed with its work. In the latter case, they would be bare trespassers, who had precipitated a controversy which did not concern them.

[2] We are of opinion that the city has, at least, made out a prima facie title to the streets in question by plat dedication from Mrs. Miller in 1886, accompanied by sale of lots and user and subsequent recognition of and acquiescence in the city's claim to and improvement of these streets by the heirs of Mrs. Miller and their alienees. *City of Richmond v. Stokes*, 72 Va. 713; *Elliott on Streets and Roads* (3d Ed.) § 129; *Campbell v. City of Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159.

The lots on the "Miller map" contiguous to Miller and Knight streets, both in the deeds from Mrs. Miller and her children and their grantees, have always been described by calls for the street lines, and Knight street had for years been marked by a well-defined, traveled way, and used by the public at will. The city's right to these streets, as thus acquired, was never drawn in question by Mrs. Miller in her lifetime or by her heirs since her death.

The case of *Manchester Cotton Mills v. Manchester*, supra, is chiefly relied on by the appellants to maintain their contention. A comparison of the facts of that case with those of the instant case will show that in essentials they are wholly dissimilar. In the former case the city of Manchester undertook to remove three brick tenements held by the Cotton Mills, which the city claimed encroached upon a public street. The Cotton Mills and those under whom they claimed had been in possession of the houses for more than 20 years, and had title to the land much longer. The city contended that the ground in controversy had been dedicated as a street by a former owner; and it was conceded that, unless there was a dedication, the plaintiffs had a clear legal title to the premises. In these circumstances the court enjoined the city from removing the buildings until the rights of the parties could be settled by a trial at law.

In the present case the appellants claim title to their holdings mediately through Mrs. Miller, and it affirmatively appears that they have never bought or paid for, or obtained title to or possession of, the land included in

the streets, and have no interest therein, save in common with the general public. The conveyances by which Moorman acquired his property all describe the lots conveyed by the street lines, and thus exclude the streets from the grants to him; and Moorman conveyed a one-half interest in his holdings to Hurt. Moreover, the streets were never obstructed until the city began the construction of sewers, and only a short time before the institution of this suit. It plainly appears, therefore, that there is no such bona fide assertion of title to the streets on the part of the appellants as should entitle them to a trial by jury, or deprive a court of equity of its undoubted jurisdiction to compel the removal of the obstructions complained of by mandatory injunction. *Sanderlin v. Baxter*, 76 Va. 305, 44 Am. Rep. 165; *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250; *Williams v. Green*, 111 Va. 205, 68 S. E. 253; *Chambers v. Roanoke, etc., Ass'n*, 111 Va. 254, 257, 68 S. E. 980; *Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Eau Claire v. Matzke*, 86 Wis. 291, 58 N. W. 874, 39 Am. St. Rep. 900; *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 573; *Madison v. Mayers*, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127; *Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 864.

Of course, this litigation in no wise affects the ultimate right of an abutting owner on a street to one-half of the land occupied by such street, in the event of its discontinuance. *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Durbin v. Roanoke Building Co.*, 107 Va. 753, 60 S. E. 86.

Upon these considerations, the decrees appealed from are affirmed.

Affirmed.

CARDWELL, J., absent.

(158 N. C. 588)

O'NEAL v. HENRY SEIM & CO.

(Supreme Court of North Carolina. March 6, 1912.)

SALES (§ 420*)—BREACH OF CONTRACT—SPECIAL DAMAGES—QUESTION FOR JURY.

In an action for special damages for the breach of a contract for the shipment of glass for mirrors in a restaurant, evidence held to present question for jury whether defendant had notice of the purpose for which plaintiff desired the glass and of the damages claimed, and hence the direction of a verdict for nominal damages was improper.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 420.*]

Appeal from Superior Court, Beaufort County; E. B. Cline, Judge.

Action by J. D. O'Neal against Henry Seim & Co. From a judgment on a directed verdict for insufficient damages, plaintiff appeals. Reversed, and new trial ordered.

This is an action to recover special damages for breach of contract in the shipment of certain plate glass. The plaintiff offered evidence tending to prove a breach of the contract, and that he was damaged thereby, but at the conclusion of the evidence his honor held that there was no evidence of notice to the defendant of the purpose for which the glass was ordered, or of the damages claimed, and directed the jury to answer the issue as to damages, "five cents," and the plaintiff excepted.

Rodman & Rodman, for appellant. Ward & Grimes, for appellee.

PER CURIAM. Upon an examination of the record we are of opinion that there is evidence which entitles the plaintiff to have his case considered by a jury.

It is in evidence that W. G. O'Neal, on April 18, 1908, ordered for the plaintiff from the defendant 33 plate glass mirrors 20x36, A plate, 30 division bars, 1 A plate glass, 66x78, to be shipped at once, and notified the defendant in the order that the mirrors were for the side walls of a restaurant; that the plaintiff was a contractor in Washington, N. C., and was fitting up the restaurant under contract; and that, by reason of the breach of the contract by the defendant, he and at least one employé, to whom he paid wages, remained idle 15 or 20 days. W. G. O'Neal was a brother of the plaintiff, and there is evidence that he knew of the facts recited, and that he represented the defendant at Washington.

There must be a new trial.

New trial.

(158 N. C. 204)

BODDIE v. BOND.

(Supreme Court of North Carolina. March 6, 1912.)

1. WILLS (§ 561*)—DEVISE—DESCRIPTION.

Testator devised to his wife the house in which they then lived, with all the outhouses and premises embracing the peach and apple orchard, etc. Held, that the description was sufficiently definite to pass title to the property and permit the reception of parol evidence to fit the description to the land intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1221-1224; Dec. Dig. § 561.*]

2. ESTOPPEL (§ 87*)—EQUITABLE ESTOPPEL—GROUNDS.

A devisee took, under her devise, two adjoining lots, one of which was wrongfully held by defendant, who had purchased it previously from one who had no title, the devisee having no knowledge that she owned the same. She sold the lot of which she was in possession, and her grantee and defendant agreed to straighten the line between the two lots, which line was surveyed in the presence of the devisee, and her deed referred to it as an agreed line. Held, that she was not thereby equitably estopped from claiming the lot in defendant's possession, as defendant did not

rely on and was not misled to his damage by the devisee's acts or conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 230-234; Dec. Dig. § 87.*]

Appeal from Superior Court, Warren County; Justice, Judge.

Action by Viola Boddie against V. N. Bond. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 154 N. C. 359, 70 S. E. 824.

T. T. Hicks and J. M. Picot, for appellant. T. M. Pittman, S. G. Daniel, and J. H. Kerr, for appellee.

HOKE, J. This case was before the court on a former appeal from a ruling of the superior court judge that plaintiff was barred of recovery by reason of an equitable estoppel arising on the facts then presented. The court held there was error (see 154 N. C. 359, 70 S. E. 824), and, this opinion having been certified down, there was recovery by plaintiff and the case is now here on appeal of defendants.

[1] On the present trial, it was agreed that both parties claimed under Jno. W. Heptinstall, deceased, and plaintiff's legal title was made to rest on a devise in his last will and testament to his wife, Cornelia, and by devise of Cornelia to plaintiff. The descriptive words of the devise to Cornelia are as follows: "I give my wife, Cornelia, the house where we now live, with all the outhouses and premises embracing the peach and apple orchard," etc. Under our authorities this description is sufficiently definite to pass title to the property, and permit the reception of parol evidence to fit the description to the land intended. *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884; *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891. And, the jury having found that the locus in quo is included within the terms of the devise to plaintiff, the question is again presented as to the existence of an equitable estoppel.

[2] On that position we find nothing in the present record which materially differs from the case as formerly presented, and for the reasons so clearly stated in the opinion by Associate Justice Walker the judgment in favor of plaintiff must be sustained. On the present trial, as heretofore, it was made to appear that plaintiff, the devisee under the will of Jno. W. Heptinstall and subsequently of Cornelia, his wife, on the 24th day of March, 1911, sold and conveyed to a Mrs. Miles, wife of T. J. Miles, a portion of the land, being under the impression that it was all she owned in that locality or under the devise, and in the deed described the same on one side as bordering on the "line of V. N. Bond, defendant." The plaintiff, who resided in Greensboro, N. C., having come to Littleton on the day her deed bears date for the purpose of attending a sale of her

aunt's personal property, the witness T. J. Miles, husband of the purchaser of plaintiff's lot, determined to have the dividing line between the two lots determined upon, defendant contending that the true dividing line ran straight back from the Presbyterian church lot, and T. J. Miles, the husband of the purchaser, contending that a slight deflection should be made; and a dividing line was agreed upon between T. J. Miles, the witness, and the defendant. The only difference in the evidence as shown on the two appeals is that it did not appear in the former case that plaintiff was at any time present or knew anything whatever of the occurrence; while there is evidence now appearing that she was present at the time or cognizant of what was being done, but this fact does not at all affect the result as applied to the issue.

It is well understood in this state that boundary lines as contained in written deeds dividing or other may not be changed by parol evidence except in the one case where, contemporaneously with the execution of a deed, the physical boundaries are actually run and marked for the purpose of making the deed, and are thereby given a different placing. And that as to deeds already executed and under ordinary circumstances parties are not estopped by their parol agreements fixing boundaries at a place different from that shown in the deeds. *Buckner v. Anderson*, 111 N. C. 575, 16 S. E. 424; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033; *Caraway v. Chancy*, 51 N. C. 361; *Davidson v. Arledge*, 97 N. C. 185, 2 S. E. 378. The case of *Hanstein v. Ferrall*, 49 N. C. 240, 62 S. E. 1070, in no way conflicts with these authorities. In *Hanstein's Case* long acquiescence in a certain drain as the dividing line between two lots and recognition of it as such by the adjoining proprietors was held competent and material as evidence to properly fix the correct dividing line between them, but not to change or vary it from the boundaries as contained in their deeds; and on the title to this adjoining lot, this lot in dispute held and claimed by defendant, it appears in the record, as we understand it, that defendant had bought and paid for this lot and taken a deed from one of the other devisees or heirs at law of Jno. Heptinstall, nearly three years before this, to wit, on the 10th day of December, 1907. As to the title, therefore, there is no evidence which shows or tends to show that what plaintiff did or said on this or any other occasion had any effect whatever in inducing defendant to buy and pay for the lot in controversy. He simply bought the lot from some one who did not own it, and he must surrender it to plaintiff, who has the true title. As it was well said on the former appeal: "A party claiming title to lands only by reason of an equi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

table estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused him loss or damage." There is nothing to withdraw defendants' claim from the effect and operation of the principle, and the judgment for plaintiff, therefore, must be affirmed.

No error.

(153 N. C. 207)

**COLUMBIAN CONSERVATORY OF MUSIC
v. DICKENSON.**

(Supreme Court of North Carolina. March 6, 1912.)

1. BILLS AND NOTES (§ 493*)—CONSIDERATION—BURDEN.

The burden is on the maker of a note to show want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. CONTRACTS (§ 93*) — TERMINATION — GROUNDS.

Where defendant gave a note and a check for a course of musical instruction, he cannot terminate the contract merely because he thought the check was a note.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

3. DAMAGES (§ 120*)—BREACH OF CONTRACT—MEASURE.

Defendant gave plaintiff a note and a check for a course of musical instruction for his daughter, but terminated the contract and refused to let his daughter continue with the course. *Held*, that the measure of damages for defendant's breach of contract was the amount of the note and check.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

Appeal from Superior Court, Vance County; Cooke, Judge.

Action by the Columbian Conservatory of Music against J. H. Dickenson. From a judgment for insufficient damages, plaintiff appeals. Reversed, and new trial ordered.

This was a civil action, commenced before a justice of the peace, and tried on appeal in the superior court of Vance county, October term, 1911; his honor Judge Cooke presiding. The action was brought to recover on an unpaid and protested check for \$12, and on a note for \$33, dated March 22, 1910, given by defendant to plaintiff, and payable December 1, 1910, with interest after maturity.

T. T. Hicks, for appellant. J. C. Kittrell and Thomas M. Pittman, for appellee.

BROWN, J. The pleas of defendant in answer interposed two defenses: (1) Fraud in procuring the execution of the note and check; (2) a failure of consideration. His honor instructed the jury that there was no evidence of fraud, which is patent from an examination of the evidence. Plaintiff re-

quested the court to instruct the jury upon all the evidence, if believed, to render a verdict for the amount of both note and check. This instruction was refused. All the evidence shows that the note and check were given for a course of musical instruction to be given by mail by plaintiff to defendant's daughter. She made the application in due form, and received a certificate of enrollment or scholarship, which defendant produced on the trial, on notice. Defendant testified that he thought it was a note for \$12 and not a check that he had signed, payable April 12th, and that "when he found out, April 18th, that it was a check, he refused to have anything more to do with the instructions or to allow his daughter to take the course." He admitted that the plaintiff tendered the instructions called for by the contract, and that he refused to allow his daughter to receive them.

[1] We fail to see a partial, much less a total, failure of consideration. Although notes as simple contracts require a consideration to support them, it has been long settled that they import a consideration *prima facie*, so as to throw on the maker the burden to show a want of consideration. *McArthur v. McLeod*, 51 N. C. 475; *Campbell v. McCormac*, 90 N. C. 492. In the latter case, Mr. Justice Ashe, quoting from *Story & Daniel*, says: "That it is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity, and value which the law raises." The note sued on was given in consideration of an agreement in writing upon the part of the plaintiff to give to defendant's daughter musical instruction by mail. The contract was duly entered into and acted upon for three weeks; the plaintiff furnishing all the contract called for—music, instructions, lessons, grading, etc.

[2] The feasibility of teaching music in a "correspondence school" is beyond our ken, and it is not a question within our domain, but the evidence shows that the plaintiff entered upon the performance of the contract, and its services accepted for three weeks, and then abruptly terminated by defendant because he thought he had signed a note for \$12 instead of a check. The excuse is utterly insufficient. *Sapona Co. v. Holt*, 64 N. C. 335.

[3] As to the amount the plaintiff is entitled to recover under the evidence in this case, that is to be measured by the face of the note, for there is no evidence whatever which warrants the court in permitting a diminution from the face of the paper. The basis of the action is a special contract to pay so much money, founded, as we have shown, upon valuable consideration, and it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

must regulate the plaintiff's right to recover, as well as the amount. *Engine Company v. Paschal*, 151 N. C. 30, 65 S. E. 523. It seems to be generally held that in action on a written contract, or a stipulated amount, the contract itself furnishes the measure of damages. 8 A. & E. 636. We find nothing whatever in the case of *Horner School v. Westcott*, 124 N. C. 518, 32 S. E. 885, which militates against anything which we have here said, as the facts in that case were entirely different.

The plaintiff is entitled to the prayer, as requested.

New trial.

HOKE, J., concurs in result.

(158 N. C. 210)

ROBERTS v. BULLOCK.

(Supreme Court of North Carolina. March 6, 1912.)

1. REPLEVIN (§ 70*) — INTERVENTION — BURDEN OF PROOF.

Where, in claim and delivery, defendant B. intervened and claimed the property under a sale from H., to whom it was claimed plaintiff had sold the same, the burden was on B. to show that the title had passed to H.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 70.*]

2. SALES (§ 454*) — EXECUTORY CONTRACT — TRANSFER OF TITLE.

Plaintiff permitted H. to cut certain cross-ties from plaintiff's land, haul them to a station, and deposit them on the railroad right of way under an agreement to pay plaintiff 12½ cents each and that they were not to be moved from the railroad right of way until paid for. H. was indebted to intervenor, and consented to furnish ties in payment, and, as intervenor was about to ship the ties without paying plaintiff, he sought to recover them in replevin. Held, that the contract between plaintiff and H. was not a conditional sale, but an executory contract, under which the title did not vest in H. until plaintiff was paid the contract price, so that prior to such payment intervenor could acquire no title from H.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 454.*]

Appeal from Superior Court, Franklin County; Ferguson, Judge.

Action by R. B. Roberts against W. T. Hudson, in which John Bullock intervened. Judgment for plaintiff, and Bullock appeals. Affirmed.

W. H. Yarborough, Jr., for plaintiff. T. T. Hicks, for defendant.

CLARK, C. J. The defendant W. T. Hudson, by permission of plaintiff, cut 516 cross-ties on the latter's land and hauled them to Youngsville, where he deposited them on the right of way of the defendant railroad under an agreement that they were not to be moved thence till paid for. Hudson owed to the defendant Bullock money on a mortgage and consented to furnish ties in payment thereon. These ties were about being loaded on

the cars for the Pennsylvania Railroad Company, to whom Bullock had sold them, when the plaintiff took out claim and delivery for recovery of the ties. Bullock was not served with process, but on his own application was made a party as interpleader (Rev. § 800), gave bond, and claimed the ties. The plaintiff testified that he allowed Hudson to cut the ties and haul them to Youngsville under an agreement that the title was to remain in himself until the ties were paid for; that Hudson afterwards told him that he expected to sell the ties to Bullock, who would send plaintiff a check direct for the money, but that in the meantime the title to the ties would remain in plaintiff till they were paid for; that he never saw Bullock and did not receive the check. Hudson agreed to pay the plaintiff 12½ cents each for the ties without grading. Hudson was to receive from Bullock 30, 35, and 50 cents for the ties according to grade. There was no conflicting testimony, and the court charged the jury that if they believed the evidence of the plaintiff to return a verdict for the amount of the cross-ties at 12½ cents each, \$64.50. This presents the question whether the contract between the plaintiff and Hudson was a conditional sale or an executory contract. If it was the former, the plaintiff could not recover because the contract was not reduced to writing and recorded.

[1, 2] The defendant Bullock being an interpleader, the burden was upon him to show that the title of the property had passed to Hudson. *Mfg. Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026, and cases cited. This he did not do, because the undisputed evidence is that the contract between the plaintiff and Hudson was that the title to the ties was to remain in the plaintiff till paid for. The plaintiff did not part with the right of possession, but merely permitted the ties, as a matter of convenience, to be hauled to the station, there to remain, without being loaded on the cars, till the sale should be consummated by payment of the purchase money upon which, and not till then, the title was to pass. Upon the attempt being made to load the ties upon the cars, the plaintiff promptly asserted his right of possession by claim and delivery.

The line between an executory contract and a conditional sale is sometimes difficult to draw, but here it is clear that there was no sale to Hudson by plaintiff. Hudson was to do two things. He was to cut the ties and pay for them, and when these things were both done, and not till then, the sale was to be consummated and Hudson was to be vested with the title and possession. The ties were not sold to Hudson and delivered to him upon condition that if not paid for the plaintiff could retake them. Bullock could acquire no title when Hudson himself had not acquired any, and could not do so

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under his agreement, until the ties were paid for.

It is probably more than a coincidence that deducting the cash payment, \$95, which Bullock made to Hudson, the balance due by Bullock on the ties is \$65, almost the exact amount due plaintiff for the ties.

No error.

(158 N. C. 603)

STATE v. WILKINS.

(Supreme Court of North Carolina. March 6, 1912.)

1. HOMICIDE (§ 169*)—MURDER—PRIOR RELATIONS OF PARTIES—EVIDENCE.

Where, in a prosecution for murder, there was no direct proof of guilt apart from defendant's admission, but there was strong circumstantial evidence to show that defendant with premeditation murdered his wife, evidence of the relations previously existing between them, that they had quarreled, that he appeared to be the aggressor, had threatened her life, and had attempted to use his knife and to draw a pistol, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

2. CRIMINAL LAW (§ 342*)—MOTIVE—IDENTITY—EVIDENCE.

Though it is not necessary to show motive for committing a crime when motive is not of its essence, evidence is nevertheless relevant to prove motive as a circumstance to identify the prisoner as the perpetrator and to establish malice, deliberation, and premeditation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 773, 774; Dec. Dig. § 342.*]

Appeal from Superior Court, Nash County; Ferguson, Judge.

G. G. Wilkins was convicted of murder in the first degree, and he appeals. Affirmed.

The prisoner was indicted in the court below for the murder of his wife, and was convicted of murder in the first degree. The evidence tended to show the following facts: The prisoner and deceased, who was his wife, lived about one mile from the town of Spring Hope in Nash county. For some time prior to the homicide there had been misunderstandings and quarrels between defendant and his wife, and about two weeks before the homicide the defendant drove his wife from their home, to the house of her mother, about 25 or 30 yards away. He then tried to drive her back, and upon her refusal to go defendant struck the deceased and she returned the blow. On the same day, defendant had a knife out and threatened to cut the clothes off the woman. He also made an attempt to draw a pistol, when a bystander caught him and took the pistol from him. About two days before the homicide, the defendant said to a witness, Bunn, that his (defendant's) wife thought she was fooling him, dealing with other men, but, God damn her, he would kill her and be hung for it. It further appears that the

deceased and the defendant quarreled about another woman by the name of Lewis, and the defendant told deceased that she could get out, that he was going to bring another lady in there. On the morning of the homicide, defendant said to a witness, one Bettie Wiggins, that he had something to tell her, that he was not going to tell it then, but when he told it it would be in red letters. On the same morning the defendant stated to another witness, Nellie Wiggins, that the deceased would not be with him but two days more; that she had other men, and he was going to kill her; that he would rather kill her than to have her live with other men. On the morning of the homicide, deceased and defendant were both seen at their home about 11 o'clock. The woman was doing some washing, and the man was cleaning his gun. About 11 o'clock his gun was heard to fire, and shortly thereafter the defendant remarked to a witness, Sessoms, who lived near, that his gun shot all right—right to the spot. An hour or two later, this same witness heard the gun fire again, but paid no special attention to it. During the same morning, a witness, Mamie Wiggins, saw the defendant and deceased at their home together. In the presence of the defendant, deceased said she was going to the cotton patch, but that it would be 12 o'clock before she could go, as she had to iron a shirt. About 3 o'clock p. m. the witness came back from the cotton patch, and defendant met her at his front gate, and asked her if she had seen Ida, his wife. Witness answered that she had not, and defendant said, "Yes, you have, because she put on some more clothes and went to the cotton patch." About 4 o'clock in the afternoon defendant left his home and went to the town of Spring Hope. About night the mother of the deceased came home from the cotton patch, and neither the defendant nor the deceased could be found at their home. The mother made inquiry for her daughter, but nobody knew anything about her. The next morning search for the missing woman was renewed. A pile of "strips," presumably tobacco strips, was seen in the yard, which had not been there before. Under these strips was some fresh dirt with blood on it. Inside the house was found an empty shell, on the floor, a shotgun with the barrel full of dirt, and the overalls of the defendant with spots on them that looked like blood. Fresh dirt was noticed under the crib. The floor of the crib was torn up by the searchers, and there, about 10 inches under the ground, was the dead body of Ida Wilkins. There was an ugly gunshot wound in her neck, made by small shot at close range. The prisoner was arrested in Spring Hope on the day after the homicide, and, after he was put in jail, he said that his wife had gone down to her father's. Thereafter, upon being told that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he had killed his wife, he said that he was cleaning his gun and did not know his finger was on the trigger, when the gun went off and killed her. He said that she had laid out in the yard for about an hour, and then he buried her; that he started up town to tell about it, but he was so frightened that he could not. The defendant offered no evidence. There is a single exception to the testimony. The solicitor asked Rhoda Ann Westray, mother of the deceased, how her daughter and her husband got along together. She answered, "Well, they did not live good together." Q. State what you have seen transpiring between them in the way of quarreling." The prisoner objected to the question; the objection was overruled, and he excepted. The witness then proceeded to state that they quarreled, and related the quarrel that took place two Sundays before the homicide, when defendant drove deceased from his home, threatened to use the knife, and attempted to draw a pistol. The prisoner asked the court to give instructions to the jury upon the different degrees of homicide, calling their attention to the essential elements of each offense and with special reference to the bearing of the evidence upon them; but it is not necessary to set them out. The jury convicted of murder in the first degree, and from judgment entered upon the verdict, the prisoner appealed, after having duly excepted to the rulings of the court.

Attorney General Bickett and T. H. Calvert, for the State. F. S. Spruill, for appellee.

WALKER, J. [1, 2] There is but one exception in this case that calls for any discussion, as we will presently show. The prisoner objected to the testimony of the witness Rhoda Ann Westray, the mother of the deceased, as to whether the prisoner and his wife had lived together peaceably and as to any quarrels between them that she had seen. She answered that they did not live "good together," and that they had quarreled two Sundays before the homicide was committed, when the prisoner drove his wife from his home, threatening to cut her with his knife and attempting to draw his pistol. Except the admission of the defendant, which was made in contradiction of a previous statement by him as to the manner of the killing, there was no direct or positive proof of his guilt; but the evidence was circumstantial, there being no eyewitness to the tragedy. The circumstances tending to show that the prisoner had killed his wife were very strong, apart from his admission of the fact, and the state was compelled to rely upon the circumstances to show that he had murdered her deliberately and with premeditation. In this state of the proof, we fail to see why it was not competent and relevant to prove the relations between the par-

ties, and especially that they had quarreled, the husband appearing to be the aggressor, and that he had even gone so far as to threaten her life, and had attempted to use his knife and draw his pistol. These facts, especially in connection with proof of the other circumstances, tended to show his malice towards her, and to assign a motive for the killing. But we think it has been expressly decided by this court that such evidence is competent and is also relevant to the issue. In *State v. Rash*, 34 N. C. 382, 55 Am. Dec. 420, similar evidence was offered against the defendant in that case; that is, to show ill treatment of his wife by him—the charge being that he had murdered her. It was held that the evidence was competent, not only to identify the husband as the slayer of his wife, but to show his malice towards her. Judge Nash, delivering the opinion of the court, said: "The first inquiry would be: Who could be the perpetrator? And the mind would naturally turn upon the person who, either from interest or malice, might desire her death. Interest, in this case, could not exist, and malice alone could lead to the deed. Ordinarily, the eye of suspicion cannot turn upon the husband, as the murderer of his wife, and when charged upon him, in the absence of positive proof, strong and convincing evidence—evidence that leaves no doubt in the mind that he had toward her that *mala mens* which alone could lead him to perpetrate the crime—is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity?" He then proceeds to show that no stronger proof of malice could be offered than the husband's brutal treatment of his wife and his suspicion that she had been unfaithful to him; his conduct evincing "a settled state of feeling inimical to her." Underhill on Cr. Evidence, §§ 323, 327; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681. In the case last cited, it was held that, where an indictment charges the defendant with the murder of his wife, testimony as to relations existing between them, previous to the homicide, and as to his treatment of her, is competent. It is not necessary to show a motive for committing the crime, when motive is not of its essence, but it is relevant to prove a motive as a circumstance to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation and premeditation. *State v. Adams*, 138 N. C. 688, 50 S. E. 765. This exception cannot be sustained.

The other exception taken to the refusal of the court to give the instructions requested by the prisoner are equally untenable. A perusal of the charge of the court will disclose that the learned judge, who presided at the trial, gave full, clear, and accurate instructions with reference to every question contained in the prayers of the prisoner, and

not only responded to them directly, but he presented the case to the jury in every possible phase, and was exceedingly fair and favorable to the prisoner in what he said. He might have charged more strongly against him, and yet have been well within the law.

We find no error in the record.

No error.

(158 N. C. 313)

STATE BOARD OF EDUCATION v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. March 6, 1912.)

1. EVIDENCE (§ 472*)—OPINIONS OR STATEMENT OF FACTS.

A witness who is familiar with land may testify that it is swamp land, although that is the precise question to be determined by the jury; this being a statement of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

2. PUBLIC LANDS (§ 164*)—GRANTS—VALIDITY.

A charge that, if the land which the state board of education sought to recover was in a swamp of over 2,000 acres at the time the grants under which defendant claimed were taken out, the grants were void, was proper under Revisal 1905, § 1693, subd. 3, providing that swamp land, where the quantity in any one swamp exceeds 2,000 acres, is not subject to entry and grant.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 164.*]

3. PUBLIC LANDS (§ 164*)—GRANTS—AVOIDING—EVIDENCE REQUIRED.

In an action by the state board of education to avoid grants of land claimed to be swamp land, a failure to charge that the grants could be avoided only by clear, strong, and convincing evidence is not error, especially in the absence of a request for such instruction, where the court charges that the burden is on plaintiff to establish by the greater weight of the evidence that the lands covered by the grants were part of a swamp of more than 2,000 acres, since under Revisal 1905, § 4047, lands within such a swamp are presumed to be the property of the board of education.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 164.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—CONFORMITY TO PRAYERS.

Where prayers are charged in substance, a failure to charge their exact words is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Superior Court, Washington County; E. B. Cline, Judge.

Action by the State Board of Education against the Roanoke Railroad & Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. O. Gaylord and Small, MacLean & McMullan, for appellant. W. M. Bond, W. M. Bond, Jr., and Ward & Grimes, for appellee.

CLARK, C. J. Rev. 1693 (3) withdraws from being granted by the state all "marsh

or swamp land, where the quantity of land in any one marsh or swamp exceeds two thousand acres, or where, if of less quantity, the same has been surveyed by the state, or by the state board of education, with a view to draining and reclaiming the same." This is an action to declare void certain grants embracing land which it is claimed came within the terms of the above section, and also to recover damages for timber cut by defendants on said land. The plaintiff did not ask to recover damages for timber cut more than three years before suit brought, and, as to the action for the land, the plaintiff is not barred by the statute of limitations which does not run in such cases (Rev. 4048), unless the state would have been barred by adverse possession which is not the case here.

[1] The first five exceptions are because the witnesses, who stated that they were familiar with the land, upon being asked what kind of land it was, answered that it was "swamp land." This being a matter of personal observation, as to a fact within the knowledge of the witness, the answer was competent, subject to cross-examination by the defendant. It is true the jury must find the issue, but the answer of the witness was competent to be submitted to them. Britt v. Railroad, 148 N. C. 40, 61 S. E. 601.

[2] The court charged the jury: "If this was swamp land and in a swamp of over 2,000 acres prior to and at the time the grants under which the defendant's claims were taken out, then the lands were not subject to entry and grant, and the defendant's said grants would be void and of no effect, for in such case there was no power and authority to grant same." The exception to this charge cannot be sustained. It complies with Rev. 1693 (3). The court charged the jury: "Was the land in question swamp land as is generally called and known? Some authorities have defined 'swamp land' as wet, spongy ground, soft, low ground, saturated with water, but not usually covered with it, marshy ground away from the seashore; another, as land the greater part of which is wet and unfit for cultivation, land which requires draining in order to make it fit for successful or useful cultivation." Exception 7 was to this charge, and cannot be sustained. The court went on to quote the statutory definition of swamp land enacted March 4, 1891, now Rev. 1695, and told the jury that this statutory definition would not apply against the defendant who held under a grant issued prior to that date, and further added that, as to the definition given above, the court did not mean to lay down any hard or fast rule by which the jury were to determine whether the lands in question were swamp land, but merely to give it as assistance to them in ascertaining

what was the common and generally accepted definition of the words "swamp land." The court charged the jury: "It is not necessary that every bit of the land in controversy should be swamp land in order to enable the plaintiff to recover; that is to say, if there be some knolls or higher and dryer places in this piece of land that taken by themselves might not be deemed swamp, yet if they had swamp land around them in sufficient quantity so that the latter largely prevailed, and taking the whole body, by and large, the general effect was to make and call the land swamp land, then the knolls or higher ground could be taken in as a part of the whole." The eighth exception was to this charge, and cannot be sustained.

[3] The ninth exception is because the court did not instruct the jury that the grants could be vacated only by "clear, strong, and convincing evidence." There was no prayer to this effect, and it could not have been given if asked. The charge put the burden on the plaintiff to make out his case by the preponderance and the greater weight of the evidence, and this is the correct rule in this case. Board of Education v. Makeley, 139 N. C. 34, 51 S. E. 784. The court properly charged the jury to answer the issues "no," unless by the greater weight of the evidence the plaintiff had shown that the lands covered by the grants were swamp lands, and part of a swamp of more than 2,000 acres. The statute provides that, when it is shown that the land is swamp land and within a swamp of more than 2,000 acres, the law presumes that the board of education is the owner thereof, because grants of such land are void and unauthorized. Rev. 4047; Board of Education v. Makeley, supra.

[4] The prayers of the defendant so far as they were correct were given in substance in the charge. It was not necessary that they should have been given in the exact language asked for, if given in substance. Horton v. Railroad, 145 N. C. 132, 58 S. E. 993.

No error.

(125 N. C. 608)

STATE v. BAGLEY.

(Supreme Court of North Carolina. March 6, 1912.)

1. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

It is not necessary to the admission of a dying declaration of deceased that he should have himself declared that he believed he was about to die, if all the circumstances and surroundings in which he was placed indicate that he was fully under the influence of the solemnity of such belief.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

2. HOMICIDE (§ 203*)—DYING DECLARATIONS—FEAR OF DEATH.

Prior to the making of an alleged dying declaration by deceased, the physician who

was present when deceased expired told him that he was in a critical condition, was likely to die, and if there was any message he wanted to leave he had better do so; whereupon deceased stated that it was the prisoner who shot him, and that he saw the prisoner's outline very distinctly as he ran down the street, and was certain it was he. Held, sufficient to justify the admission of decedent's statement as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

3. CRIMINAL LAW (§ 889*)—VERDICT—CORRECTION.

Under Revisal 1905, § 8271, providing that in a prosecution for homicide the jury shall determine by their verdict whether the crime is murder in the first or second degree, where the jury, in a prosecution for murder, returned with their verdict and, in response to the clerk, replied, "Guilty," the court properly directed them to reconsider their response and specify the crime of which they found defendant guilty; whereupon they stated they found him "guilty of murder in the first degree."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2110; Dec. Dig. § 889.*]

Appeal from Superior Court, Martin County; C. M. Cooke, Judge.

Brad Bagley was convicted of murder in the first degree, sentenced to death, and he appeals. Affirmed.

Winston & Matthews, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

BROWN, J. The prisoner was convicted of the murder of one William R. White, who died on the night of August 15, 1911. The evidence tends to prove that while passing a gate on one of the public streets of the town of Williamston, about 9 o'clock p. m., the deceased was shot from behind, and died the same night.

[1] There is evidence of circumstances tending to prove that the prisoner waylaid and shot the deceased. But it is contended by the learned counsel for the prisoner that the evidence is insufficient to convict, if the dying declarations of the deceased are excluded. Many exceptions of the prisoner relate to the competency of these declarations. Dying declarations are admissible in cases of homicide when they appear to have been made by the deceased in present anticipation of death. It is not always necessary that the deceased should declare himself that he believes he is about to pass away; but all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief.

[2] The evidence in this case shows that the doctor who was present with the deceased when he expired told him that he was in a critical condition, and was likely to die, and that if there was any message he wanted to leave he had better do so. The doctor informed him distinctly that he could not

live, and it was then that he said that it was the prisoner who shot him; that he saw his outline very distinctly as he ran down the street, and he was certain it was the prisoner. The witness says that the deceased's mind was perfectly clear as long as he had sense to talk; that he made the same statement to different persons as they would come in the room; and that he repeated it only 15 minutes before he died. Other testimony corroborates this evidence. We think the evidence indicates clearly that the deceased fully realized, not only that his death was sure, but that it was also near, and that the court properly admitted his declaration. *State v. Quick*, 150 N. C. 820, 64 S. E. 168; *Wigmore on Evidence*, § 1430 et seq.

[3] We have examined carefully all the exceptions in the case, and are unable to find anything whatever that will warrant a new trial. The last exception which was taken to the manner of receiving the verdict is untenable. When the jury came in with their verdict, in reply to the clerk, they responded, "Guilty." His honor told the jury to reconsider their response and specify the crime of which they found the prisoner guilty. The jurors stated they found the prisoner guilty of murder in the first degree. This was in accordance with the statute (Revisal 1905, § 3271), which requires the jury to determine in their verdict whether the crime is murder in the first or second degree. In *State v. Godwin*, 138 N. C. 583, 50 S. E. 277, the principle is recognized and enunciated that, before a verdict returned into open court by a jury is complete, it must be accepted by the court for record. It is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the court, and to accomplish such ends it is the duty of the court to see that the jury may amend their verdict in form, so as to meet the requirement of the law. *State v. McKay*, 150 N. C. 813, 63 S. E. 1059.

No error.

(158 N. C. 312)

BLOUNT v. BLOUNT.

(Supreme Court of North Carolina. March 6, 1912.)

APPEAL AND ERROR (§ 105*)—JUDGMENTS APPEALABLE—VOLUNTARY NONSUITS.

Appeal does not lie from a voluntary nonsuit, taken on the trial judge overruling a motion for judgment on the pleadings and for a reference, as such refusal did not affect a substantial right of plaintiff or terminate his case; the proper remedy being to reserve exception and proceed with the trial, leaving the ruling for review, if judgment was finally rendered against plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 722; Dec. Dig. § 105.*]

Appeal from Superior Court, Pitt County; Whidbee, Judge.

Action by H. L. Blount against Agnes Blount. Plaintiff submitted to nonsuit and appeals. Appeal dismissed.

Guion & Guion, F. C. Harding, and Harry Skinner, for appellant. Jarvis & Blow and Albion Dunn, for appellee.

BROWN, J. We are unable to pass upon the question so earnestly pressed by the learned counsel for the plaintiff. The appeal of the plaintiff is fragmentary and premature, and the motion of the defendant to dismiss the appeal for that reason must be granted.

In the first place, the plaintiff voluntarily submitted to a nonsuit, and thus put himself out of court. It is not a case of involuntary nonsuit submitted to for the purpose of testing the correctness of a ruling which is vital to the plaintiff's cause. The refusal of the trial judge to grant a judgment upon the pleadings and order a reference did not affect a substantial right of the plaintiff, or terminate his case. Instead of voluntarily going out of court, he should have noted his exception and proceeded with the trial of the cause, and if judgment was finally rendered against the plaintiff he could then have reviewed the ruling of the judge. *Hayes v. Railroad*, 140 N. C. 131, 52 S. E. 416; *Midgett v. Manufacturing Company*, 140 N. C. 362, 53 S. E. 178. In this last case, it is stated that an intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law which does not take the case from the jury, and which leaves open essential matters of fact still to be determined, will not justify the plaintiff in suffering a nonsuit and appeal. Such nonsuits are premature, and the appeals will be dismissed.

Appeal dismissed.

(158 N. C. 312)

POCOMOKE GUANO CO. v. BIDDLE, Sheriff.

(Supreme Court of North Carolina. March 6, 1912.)

1. TAXATION (§ 194*)—EXEMPTIONS—STATUTES.

Whatever was intended by Revisal, § 3955, providing that when a manufacturer of fertilizer has paid the inspection tax required thereby his goods shall not be liable to any further tax, it will not be supposed violation of Const. art. 5, § 3, expressly requiring a uniform ad valorem tax of all property, was intended.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 310, 311; Dec. Dig. § 194.*]

2. TAXATION (§ 101*)—SITUS OF PROPERTY—IN TRANSIT.

Though property while in transit to the state from another is not subject to taxation,

it is taxable where it has reached its destination, and is awaiting sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 201; Dec. Dig. § 101.*]

Appeal from Superior Court, Craven County; Carter, Judge.

Action by the Pocomoke Guano Company against J. W. Biddle, Sheriff of Craven County, to restrain collection of taxes levied on property of plaintiff, and to have them declared illegal and void and stricken from the tax books, submitted on an agreed statement of facts. Judgment for defendant, and plaintiff appeals. Affirmed.

Moore & Dunn and Peatross & Savage, for appellant. E. M. Green and R. A. Nunn, for appellee.

BROWN, J. An analysis of the facts agreed shows: (1) That plaintiff, a Virginia corporation, doing a fertilizer business in this state and paying taxes on its property in Virginia, owned personal property, valued at some \$25,000, stored on June 1, 1910, in a warehouse in Craven county. The property consisted of fertilizer and fertilizer materials. (2) That said property was not listed for taxation, and plaintiff has paid no tax thereon, but has paid the tonnage tax, collected for the purpose of defraying expenses connected with the inspection of fertilizers, as provided for in section 3955, Revisal of 1905. (3) That said property was held by plaintiff until it had thereafter sold the same to various and sundry customers. (4) That the board of county commissioners for the county of Craven placed the said property on the delinquent tax list of said county, and by virtue of said tax list the sheriff of said county has demanded payment of the regular taxes thereon.

The plaintiff contends: (1) That section 3955 of the Revisal of 1905 exempts said property from said tax. (2) That the said tax is illegal and void, and is an interference with interstate commerce, "and plaintiff especially pleads the federal statute applying to such interstate commerce and the Constitution of the United States regulating the same as a defense to the collection of the tax levied and assessed against it." (3) That said property is not liable for taxation both within the state of Virginia and the state of North Carolina. (4) That said tax is a double tax.

The plaintiff does not in this proceeding attack the constitutionality of the inspection tax levied under said section, and which has been collected regularly for many years. The right to levy such taxes has been sustained by the Supreme Court of the United States in *Patapasco Guano Company v. North Carolina Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, and reaffirmed in the recent case of the *Red O. Oil Company v.*

Same, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. —.

[1] The plaintiff claims exemption from an ad valorem tax upon its property by reason of the following language contained in the statute, "Whenever any manufacturer of fertilizers or fertilizing materials shall have paid the charges required by this section, his goods shall not be liable to any further tax, whether by city, town or county," and it is a part of section 3955 of the Revisal of 1905. Whatever may have been the intention of the General Assembly in employing language so broad and comprehensive, we are forced to the conclusion that, under the Constitution of North Carolina, all real and personal property owned and located within the borders of the state is subject to an ad valorem tax, and it is not to be supposed that the Legislature intended to violate the fundamental law of the state (article 5, § 3), which requires in express terms that all real and personal property be taxed by a uniform rule according to its true value in money. In this respect, the Constitution "shows no favor and allows no discretion." *Wiley v. Commissioners*, 111 N. C. 397, 16 S. E. 542; *Puitt v. Commissioners*, 94 N. C. 709, 55 Am. Rep. 638; *Vaughan v. Murfreesboro*, 96 N. C. 319, 2 S. E. 676, 60 Am. Rep. 413. The imperative demand to levy the property tax upon its assessed value is in no way connected with the right to levy an inspection tax, or a tax on trades, professions, etc. These principles of taxation have been discussed and enforced in many cases, and a further elaboration of them is now unnecessary.

[2] We are of the opinion that the personal property of the plaintiff stored in North Carolina, and owned and located within its borders, is liable to the ad valorem tax imposed upon the property of the citizens of the state. It is undoubtedly true that personal property actually in transit is not subject to state taxation. *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359. In this case it is said: "The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although, if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." After citing several cases, viz., *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, *Pittsburg & S. Canal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538, *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, and discussing them, Mr. Justice Brown continues: "The substance of these cases is that, while the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state it becomes the subject of interstate commerce, and is exempt from local assessment." The facts agreed show that the fertilizer sought to be taxed was not in transit, but had reached its destination, and was stored in Craven county for purposes of sale or distribution. We think it unnecessary to discuss the matter more at length, as the authorities cited seem to dispose of plaintiff's contentions.

Affirmed.

(158 N. C. 226)

HIGHSMITH et al. v. PAGE et al.
(Supreme Court of North Carolina. March 6, 1912.)

1. HUSBAND AND WIFE (§ 14*)—CONVEYANCE—TENANCY BY ENTIRETY OR IN COMMON.

Intention that husband and wife should not take an estate by the entireties, but that they should take as tenants in common, is shown by a deed, which, though by its first clause purporting to be to P. and E., his wife, recites that half the consideration was paid by P. and half by E., out of the sale of her own land, and then makes the conveyance to P. and his heirs and to E. and her heirs, and to their heirs jointly, and in the habendum and the warranty specifies that it is made to P. and his heirs and to E. and her heirs and their heirs and assigns.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-89; Dec. Dig. § 14.*]

2. REFORMATION OF INSTRUMENTS (§ 46*)—MISTAKE—SUFFICIENCY OF EVIDENCE—PROVINCE OF COURT AND JURY.

While the evidence for reformation of a deed for mistake must be clear, strong, and convincing, yet, where there is testimony sufficient to take the case to the jury on such issue, it is with them to determine whether the proof meets the required standard.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Dec. Dig. § 46.*]

Appeal from Superior Court, Pitt County; Frank Carter, Judge.

Action by S. G. Highsmith and wife and others against M. R. Page and others to reform a deed by reason of mistake, to remove cloud from title, and to restrain cutting of timber. From a judgment of nonsuit, granted on motion of defendants at close of the testimony, plaintiffs appeal. Reversed.

Julius Brown and Moore & Long, for appellants. Col. Harry Skinner, for appellees.

HOKE, J. On the trial it was made to appear that on November 8, 1875, S. R. Ross and wife conveyed M. R. Page and his wife, Elizabeth, a tract of land lying in Pitt county, containing about 235 acres, more or less. The portions of the deed more directly relevant being in terms as follows: "This deed made by S. R. Ross and wife, Margaret, of

the county of Pitt and state of North Carolina, of the first part, to M. R. Page and Elizabeth Page, his wife, of the county and state aforesaid, witnesseth: That the said S. R. Ross and wife, for and in consideration of twelve hundred dollars (\$1,200.00) to them in hand paid, one-half by M. R. Page and one-half by Elizabeth Page, out of the sale of her own land, the receipt of which is hereby acknowledged, hath bargained and sold, and by this deed doth bargain sell and convey to the said M. R. Page, his heirs and to Elizabeth Page, her heirs, and to their heirs and assigns jointly, the following described piece or parcel of land: Situate in the county of Pitt, adjoining the lands of John H. Raules, J. M. Rollins, John Page and others, and containing 235 acres, more or less, together with all the privileges and appurtenances thereto belonging or in any wise appertaining. To have and to hold the said piece or parcel of land, to them the said M. R. Page, his heirs, and the said Elizabeth Page, her heirs, and to their heirs and assigns, in fee simple, and the said S. R. Ross and wife, for themselves, their heirs and executors and administrators, doth covenant and agree with the said M. R. Page, his heirs, and Elizabeth Page, his wife, and her heirs, and their heirs and assigns," etc. That 125 acres of the land, including the dwelling house and improvements, were situate on the east side of a canal or large ditch, and the remainder on the west side; that M. R. Page and wife entered into possession, under the deed, and some time thereafter Elizabeth, the wife, died, leaving her surviving one child by a former husband and three surviving children of another such child, and two children by the marriage with M. R. Page, to wit, Nana Highsmith, all of plaintiffs, and S. C. Page. It further appeared that M. R. Page also had a son, John, by a former wife; but the record does not disclose whether this son is now living. During the marriage, M. R. Page and Elizabeth, by mortgage, and afterwards by deed, conveyed away the portion of the land lying west of the canal, and after the death of said Elizabeth, to wit, in 1903, M. R. Page sold and conveyed the timber, of specified dimensions, on the 125 acres lying east of the canal to the Eureka Lumber Company, one of the defendants, and later, in February, 1907, he sold to S. C. Page, his son by Elizabeth, the remainder in the 125 acres, subject to his own life estate therein, and subject to the conveyance of the timber to the lumber company. There was also allegation, with evidence, on the part of plaintiffs tending to show that at or before the time of buying the Ross land in 1875 Elizabeth Page, holding a tract of land as devisee of her former husband, had sold the same and paid the money received therefor as part of the purchase price for the land in controversy;

and, further, that this was done with the understanding and agreement that the purchase of the Ross land, lying east of the canal, the part now in controversy, should belong and be conveyed to Elizabeth Page as her part. The present suit was instituted by the children and heirs at law of Elizabeth Page, other than S. C. Page, against M. R. Page, S. C. Page, his son, and the Eureka Lumber Company to reform and correct the deed, to restrain the cutting of timber by the lumber company, and to remove the cloud from the title created by the deeds of M. R. Page to his codefendants.

[1] Numerous and repeated decisions of our court recognize and apply the principle that, where land is conveyed to "husband and wife jointly, they will take and hold an estate by entireties, and that, on the death of one, the whole belongs to the survivor." *Morton v. Blades Lumber Co.*, 154 N. C. 278, 70 S. E. 487; *Hood v. Mercer*, 150 N. C. 699, 64 S. E. 897; *Jones v. Smith & Co.*, 149 N. C. 318, 62 S. E. 1092, 19 L. R. A. (N. S.) 1037, 128 Am. St. Rep. 661; *West v. Railroad*, 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360. It is also well established with us that where, in a conveyance to a husband and wife, it appears that no such estate was intended, but the parties were to take and hold their interests as tenants in common, the intent as expressed in the deed must be allowed to prevail (*Isley v. Sellars*, 153 N. C. 374, 69 S. E. 279; *Stalcup v. Stalcup*, 137 N. C. 305, 49 S. E. 210; *Miner v. Brown et al.*, 133 N. Y. 308, 31 N. E. 24); and that this intent must be arrived at from a perusal of the entire instrument. *Hendricks v. Furniture Co.*, 156 N. C. 569, 72 S. E. 592; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514. In *Hendrick's Case*, the correct rule was stated as follows: "The court, in construing a contract, will examine the whole instrument, with reference to its separate parts, to ascertain the intention of the parties, and will not construe as meaningless any part or phrase thereof, when a meaning may thus be found by any reasonable construction." Applying this wholesome rule of interpretation, a perusal of the entire instrument will disclose that, while the deed, in its first clause, purports to be made to M. R. Page and Elizabeth Page, his wife, the parties, throughout the remaining portions of the deed, make it clear that an estate by entireties was not intended. It recites that one-half of the consideration was paid by M. R. Page and one-half by Elizabeth Page, out of the sale of her own land, and the conveyance is then made to M. R. Page and his heirs and to Elizabeth Page and her heirs, and to their heirs jointly, and in the habendum and the warranty the parties are careful to specify that the same is made to M. R. and his heirs and to Elizabeth and her heirs and *their* heirs and assigns; the

intent evidently being that the parties should take and hold as tenants in common, in equal interests, and that of Elizabeth should descend to her children as her heirs at law, subject to curtesy of her surviving husband, M. R. Page. There was error, therefore, in the judgment of nonsuit; for on the face of the deed we are of opinion that the instrument, as now expressed, creates a tenancy in common between the husband and wife and the plaintiffs, the heirs at law of Elizabeth, have an interest in the land which entitles them to maintain the action.

[2] We are of opinion, also, as stated, that there is evidence in the record requiring that an issue be submitted as to the alleged mistake in the original deed from S. R. Ross and wife. This, under our authorities, must be established by clear, strong, and convincing evidence; but, where there is testimony sufficient to carry the case to the jury on such an issue, it is with them to determine whether the proof meets the required standard. The rule prevailing in such cases is very well stated in *Gray v. Jenkins*, 151 N. C. 80, 65 S. E. 644, as follows: "The evidence to reform a written deed must be clear, strong, and convincing; but when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the requirements of this rule as to the degree of proof."

This opinion will be certified, to the end that the order of nonsuit be set aside, and the issues properly arising on the pleadings be referred to a jury.

Reversed.

(153 N. C. 539)

MAKELY v. MONTGOMERY.

(Supreme Court of North Carolina. March 7, 1912.)

REFERENCE (§ 105*) — REPORT — DETERMINATION BY JURY.

Confining the trial of the issues by the jury on the coming in of the report on a compulsory reference to the evidence taken before the referee is in accordance with Pub. Laws 1897, c. 237, and proper; no additional matters entering into the controversy on the amendment to the pleadings.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 205; Dec. Dig. § 105.*]

Appeal from Superior Court, Beaufort County; E. B. Cline, Judge.

Action by Metrah Makely against W. O. Montgomery. From the judgment, defendant appeals. Affirmed.

Upon the report of referee there were submitted to the jury issues as follows:

"Does M. Makely hold the land conveyed by the deed dated May 14, 1897, from Calhoun Tooley to M. Makely in trust for the

firm of Montgomery & Makely?" Answer: "No."

"What amount, if any, does the defendant owe the firm of Montgomery & Makely for cash sales of oysters from 1893 to 1909?" Answer: "\$1,500 (fifteen hundred dollars)."

Rodman & Rodman and E. F. Aydtlett, for appellant. Small, MacLean & McMullan, for appellee.

PER CURIAM. This is an action brought for the settlement of a copartnership. A compulsory reference is had, exceptions filed to the report of the referee, and the cause tried on issues submitted to the jury.

1. The defendant excepts because his honor confined the trial upon the issues to the evidence taken before the referee. This was in accordance with the Act of 1897, c. 237. So far as the record discloses, there are no additional matters entering into the controversy upon the amendment to the pleadings, and we think the case falls within the principle laid down in *Moore v. Westbrook*, 156 N. C. 482, 72 S. E. 842.

2. As to the quantum of proof required to establish a trust under the first issue, we think the charge of his honor was substantially correct, and practically followed the principle laid down in *Ely v. Early*, 94 N. C. 1, and *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, and many subsequent decisions of this court.

3. One of the claims of the defendant in the settlement of the copartnership account was that under the terms of the copartnership he was entitled to be credited with his living expenses as a part of the current expenses of the firm. This claim was allowed him by the referee, but the defendant excepts to this finding with reference to the amount allowed, and demanded a jury trial as to this.

We agree with his honor that there was no sufficient evidence that the defendant was entitled to have credited to him his living and family expenses as a part of the expenditures of the firm. The language employed in the conversation between plaintiff and defendant in respect to this matter is entirely too indefinite and uncertain to warrant any such conclusion.

We have examined the several assignments of error and the record, and are of opinion that the judgment should be affirmed.

(158 N. C. 610)

STATE v. WILLIAMS.

(Supreme Court of North Carolina. March 6, 1912.)

LICENSES (§ 7*) — OCCUPATION TAX — UNIFORMITY.

A license tax imposed by ordinance merely on every agency for sale of merchandise not manufactured in the town, being aimed only at nonresidents, is discriminatory and unrea-

sonable, and violative of Const. art. 5, § 3, requiring such tax to be uniform.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

Appeal from Superior Court, Carteret County; Carter, Judge.

Norman Williams, prosecuted for violation of an ordinance imposing a license tax, was discharged on the ground of invalidity of the ordinance, and the State appeals. No error.

Attorney General Bickett and T. H. Calvert, for the State.

WALKER, J. The defendant was convicted in the mayor's court of Morehead City for the violation of an ordinance of the town which required "every person, firm or corporation in the state, soliciting or taking orders for goods at retail, to be delivered in the town by nonresident merchants, firms or corporations resident in the state, to pay a tax of ten dollars per day or thirty dollars per year." Defendant appealed to the superior court, in which a special verdict was returned by the jury finding that the defendant represented one A. A. Joseph, a merchant tailor or clothier of Goldsboro, N. C., and solicited and received orders in said town of Morehead City for tailor-made clothes, to be delivered to customers there, without having paid the tax imposed by the ordinance. Upon this finding, the court held the ordinance to be invalid, directed a verdict to be entered accordingly, and discharged defendant, and the state appealed. The Constitution (article 5, § 3) authorizes the Legislature to tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which it is derived is taxed. In accordance with this article, the Legislature, by Private Laws of 1905, c. 254, § 12, provided that the commissioners of Morehead City should have the power to levy and collect a fair and reasonable special or license tax, and, among others, on the following subjects: "Itinerant merchants, peddlers and transient dealers, drummers or commercial travelers, and every agency for the sale of merchandise not manufactured in the town, and all other subjects taxed by the state." The ordinance in question was enacted under authority supposed to have been given in the passage we have taken from the amended charter of the town, and we are to say whether it is valid or not. The Constitution (article 5, § 3) provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money;" and there is conferred in the same section the power to tax trades, professions, and so forth, as above set out.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This court has held that the rule of uniformity applies to the latter provision as much as to the former, although there are no express words to that effect in the section; it being considered that a tax not uniform, as properly understood, though levied on trades, professions, or privileges, would be so inconsistent with natural justice and with the intent so apparent in the section we have quoted that its collection would be restrained as unconstitutional. *Gatlin v. Tarboro*, 78 N. C. 119; *Worth v. Railroad*, 89 N. C. 291, 45 Am. Rep. 679. And this may be taken as the settled construction of the section. It may also be considered as settled that in laying the tax the different subjects may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it was made. *Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Railroad v. Worth*, supra. As stated in those cases, the result must be to prevent discrimination among the individuals or subjects of any one class, based upon special privileges, immunities, or exemptions allowed to one and not to the others. If an ordinance, therefore, is not founded upon this fair and just basis, it will be deemed unreasonable and violative of the fundamental principle of taxation. Constitutional and legislative authority conferred upon a municipality to tax does not enable it to create a privilege for the purpose of taxing it, or to discriminate between persons exercising the same privilege, by imposing a tax upon one of a class at a higher rate in a different mode or upon other principles than one applied to the exercise of the same privilege by others of the same class. The power to tax extends no further than is permitted by its charter, and any attempt to impose burdens upon some of a class from which others are exempted would be void, as being beyond the granted powers of the municipality, and as an exercise of partial legislation. *Nashville v. Althorp*, 45 Tenn. 554; *Cooley's Const. Lim.* 390. The defendant can be held liable to taxation as a merchant, under the general laws of the state or of the municipality, in the same manner and to the same extent as all other merchants of the same class exercising these privileges within the corporation, but not otherwise, or further than they. When the by-law of a municipal corporation, enacted under a general grant of power, or by virtue of its incidental authority, is partial, unreasonable or oppressive, it will be declared void, as an unwarranted exercise of its taxing power. *Simrall v. Covington*, 90 Ky. 444, 14 S. W. 369, 12 Ky. Law Rep. 404, 9 L. R. A. 556, 29 Am. St. Rep. 398.

"Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare

them void. * * * So a by-law, to be reasonable, should be in harmony with the general principles of the common law." *Cooley on Const. Lim.* 200, 202. "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and, if done by another, not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." 1 *Dillon's Mun. Corp.* § 322. As said in *Simrall v. Covington*, supra: "The above views are enforced in the cases of *Mayor of Mobile v. Yuille*, 3 Ala. 137 [36 Am. Dec. 441], *Robinson v. Mayor of Franklin*, 1 *Humph. (Tenn.)* 156 [34 Am. Dec. 625], *Anderson v. City of Wellington*, 40 Kan. 173 [19 Pac. 712, 2 L. R. A. 110, 10 Am. St. Rep. 175], and many other cases that might be cited. All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country. Thus in *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, an ordinance of a city, passed under a general charter power, exacting a license for selling goods, and fixing one rate for selling goods at the time within the city, and another and much larger for those without, was held invalid, as unjust, partial, and oppressive. In *Mayor, etc., of Nashville v. Althorp*, 5 *Cold. (Tenn.)* 554, an ordinance discriminating between merchant and other dealers residing within and those without the limits of the city, and prescribing a special rate of taxation for the latter, was declared to be beyond the limit of constitutional legislation. In this state we have no constitutional provision as to taxation so nomine, but it is the settled constitutional rule, declared by oft-repeated decisions of this court, that every tax must be certain, universal, and so far as practicable, equal, and uniform. Burdens cannot constitutionally be imposed upon particular individuals, while others of the same class or locality who have rendered no public service are exempt." The case of *Simrall v. Covington*, supra, is directly in point, as will appear from this extract: "The ordinance now in question not only discriminates between residents of the

city of Covington and those residing outside of it, whether within or without the state, but it places a burden upon some within the city, while others of its residents engaged in a like business are exempt. It is, therefore, unreasonable partial legislation. To be reasonable, a municipal by-law should be equal in its operation. *Tugman v. Chicago*, 78 Ill. 405; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576. This one being clearly an infringement of individual right, partial and unreasonable in its character, cannot be sustained."

This doctrine appears to have been adopted by practically all the courts, and is clearly founded in reason and justice. Some courts hold that such an ordinance is invalid because it authorizes the taking of one citizen's property for the benefit of the public, and, worse still, for private use or advantage, without just compensation. *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440. But a sufficient reason under our Constitution is that the discrimination in favor of the resident of the town and against the nonresident violates the rule of uniformity. It has been held that such distinctions between the inhabitants of the state, based upon no other ground than the place of actual residence, are in restraint of trade, invidious, unjust, and illegal. *Muhlenbrinck v. Long Branch*, 13 N. J. Law, 364, 36 Am. Rep. 518. Ordinances passed in the exercise of the police power or for the purpose of revenue, and intended to regulate or control the sale of articles in a town or city, or in other matters, must, of course, be reasonable, and it belongs to the courts to determine what are reasonable regulations within the power granted by charter. *Kip v. Paterson*, 26 N. J. Law, 298; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240. In the case last cited it was held that an ordinance imposing a larger license fee on a nonresident than on a resident was illegal, as being discriminating, and therefore unreasonable. Other decisions to be examined, and which seem to be directly in point, are *Atlanta v. Jacobs*, 125 Ga. 523, 154 S. E. 534; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Saginaw v. Circuit Judge*, 106 Mich. 32, 63 N. W. 985; *Clements v. Casper*, 4 Wyo. 494, 35 Pac. 472; *Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862; *Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Grafty v. Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; *Fechelmer v. Louisville*, 84 Ky. 306, 2 S. W. 65. "The corporation is not endowed with power to pass ordinances in restraint of trade. *Kip v. Paterson*, supra; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462. The control it may exercise over business and trade is such only as belongs to the necessities and demands of

local government, such as have relation to the general prosperity of the citizen, the public health, order, and morals of the community. It cannot, outside of these considerations, enter into the arena of business competition to advance a favored class and retard others. All citizens in pursuit of legitimate, honest occupations, stand equal before the law, and a police power intrusted to a corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights. It is incompetent for this board of commissioners, intrusted as it is with the rule in local municipal affairs, to erect walls of exclusion against citizens without its limits, or obstruct free commerce and trade between them and its own inhabitants." *Muhlenbrinck v. Commissioners*, 42 N. J. Law, 364, 36 Am. Rep. 518. It seems to us that the ordinance in question is aimed at nonresidents, and there is room for the reasonable suspicion that it was designed principally for the benefit of residents in erecting a barrier against the introduction of foreign trade for their protection. It is therefore open to the just criticism that it is discriminative, in restraint of trade, and not authorized by the terms of the Constitution which were intended to secure equality in such matters. *Saginaw v. Circuit Judge*, supra. "Municipalities are not in any sense close corporations. They are not vested with rights of local legislation, in order that they may arrogate to their own inhabitants additional rights and privileges to those enjoyed by other citizens of the state or nation. Neither may rights be denied to its citizens and still allowed to be exercised by nonresidents who may come within the corporate limits. Discrimination against residents is equally odious as discrimination in their favor." *Horr & Bemis on Mun. Police Ordinances*, § 137.

We conclude, therefore, that the ordinance of Morehead City under which the defendant was charged criminally before the justice is invalid, in that "it spends its whole force on nonresidents and spares residents entirely." The superior court properly directed that a verdict of not guilty be entered upon the findings of the jury. The defendant was entitled to his discharge.

No error.

(158 N. C. 305)

MOORE v. GENERAL ACCIDENT, FIRE & LIGHT INS. CORPORATION.

(Supreme Court of North Carolina. March 6, 1912.)

1. INSURANCE (§ 530*)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.

Where an accident policy provided for an indemnity at the rate of \$100 a month for a period not exceeding 24 months for injuries sustained while riding within a passenger car,

a further provision, limiting to 4 weeks in any one year the liability for disability due to either accident or illness caused by or resulting, wholly or in part, directly or indirectly, in paralysis, etc., the limitation of 4 weeks is only applicable when accident or illness is the ultimate cause of paralysis, etc., coming at a time more or less remote after the injury, so that liability for injuries received while riding on a railroad train will extend to the entire 24 months, though, as the direct result of the accident, the injured person was paralyzed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 530.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS OF FACT.

The court on appeal will not review findings of the jury on disputed questions of fact under correct instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, Nash County; Ferguson, Judge.

Action by W. B. Moore against the General Accident, Fire & Light Insurance Corporation. From a judgment for plaintiff, defendant appeals. No error.

Brooks & Taylor, for appellant. F. S. Spruill, for appellee.

CLARK, C. J. [1] The plaintiff, an illiterate man, took out an accident policy of insurance in the defendant company. On the first page thereof, in large type, defendant insured the plaintiff "at the rate of \$50 per month for a period not exceeding 24 consecutive months, against total loss of time resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means and which wholly and continuously, from the date of the accident disable and prevent the assured from performing every duty pertaining to any business or occupation." And further on the same page the policy undertook to pay double indemnity "if such injuries are sustained by the assured while riding as a passenger within the enclosed part of any R. R. passenger car provided for the exclusive use of passengers and propelled by steam."

In December, 1908, the plaintiff was seriously injured while a passenger on a railroad. The first issue was in the exact language of the first quotation from the policy above set out, to which the jury responded, "Yes."

The defendant claimed that the plaintiff had received \$20 in full compromise and settlement of said injuries, to which the jury responded, "No."

The defendant further relied upon a provision inside the policy, as follows: "In the event of disability due to either accident or illness caused by or resulting wholly or in

part, directly or indirectly, in tuberculosis, rheumatism, paralysis, apoplexy, orchitis, neuritis, locomotor ataxia, lumbago, lame back, strains, sciatica, vaccination, Bright's disease, dementia, insanity, hernia * * * the limit of the company's liability shall be an indemnity for the period disabled, not exceeding four weeks in any one year, at the rate which would otherwise be payable under this policy, anything herein to the contrary notwithstanding." The defendant pleads that the plaintiff suffered with paralysis which was produced by his injury; and therefore it is liable to the plaintiff only in a sum not exceeding that which would otherwise be due for a disability not exceeding four weeks in any one year. This paragraph, if construed as the defendant claims, is in direct contradiction of the terms and purpose of the insurance as stated in the first quotation above given from the front page of the policy.

We do not think that this would be a just construction. Here the paralysis is a direct incident and a part of the "bodily injury effected through external, violent, or accidental means," and to hold that in such case the insurance is reduced to a very small part of the sum stipulated for would be in effect to destroy the insurance. To say that such was the intent of the defendant company in executing the policy would be to charge it with fraud. The only reasonable and just construction is that, when an accident or illness is the ultimate cause of paralysis, or of one of the other diseases named, which diseases accrue at a more or less remote period of time after the injury, then the liability of the insurance company is reduced to compensation for disability not exceeding four weeks in any one year, and the same reduction could be claimed when one of those excepted diseases cause the injury.

The jury found that the plaintiff had complied with every condition in his policy; that the statements made in his application for insurance were true, and that, though the plaintiff had received \$20 from the defendant, there had not been a valid and full compromise for the injuries sustained; that the plaintiff's cause of action accrued prior to the institution of this action; and that the plaintiff was entitled to recover \$2,380, with interest—that is, indemnity at the rate of \$100 per month for 24 months, less \$20 received.

[2] We have examined all the exceptions in the record carefully, but, excepting the propositions of law above discussed, the case was almost entirely dependent upon the disputed matters of fact, which the jury have found in favor of the plaintiff, under a correct charge as to the law.

No error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

(158 N. C. 199)

JOYNER et al. v. CRISP.

(Supreme Court of North Carolina. March 6, 1912.)

1. SPECIFIC PERFORMANCE (§ 14*)—CONTRACT TO CONVEY—PARENT AND CHILD.

A contract by parents to convey their children's land under promise to resort to a court to obtain a decree for a sale is not subject to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 33, 41; Dec. Dig. § 14.*]

2. SPECIFIC PERFORMANCE (§ 10*)—CONTRACTS TO CONVEY—PARTIAL INTERESTS.

Though, generally, where a vendor has not substantially the whole interest which he has contracted to sell, the purchaser can insist on having all that the vendor can convey with compensation for the difference, a contract will not be specifically performed as to part if it appears that it was to be performed as a whole.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.*]

3. SPECIFIC PERFORMANCE (§ 10*)—CONTRACTS TO CONVEY—PARTIAL INTERESTS.

Under a contract to convey land, in which the vendor has a limited interest only, the purchaser is not entitled to specific performance to convey as much of the property as the vendor can, if, when the contract was made, the purchaser knew of the defect in the vendor's title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.*]

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Action by A. L. Joyner and another against S. M. Crisp. Judgment for plaintiffs, and defendant appeals. Affirmed.

The action was brought by the plaintiffs to have set aside and canceled upon the ground of fraud a certain paper writing, or contract, in reference to the selling of land entered into on the 15th day of September, 1910, between Alice Lee Joyner and her husband, Andrew Joyner, and S. M. Crisp. The defendant, among other things in his answer, set up a counterclaim in the nature of a cross-action, and asked for a decree compelling the specific performance of the said contract upon the part of the plaintiffs.

The following is the contract between the parties:

"State of North Carolina, County of Guilford.

"This indenture, made this the 15th day of September, 1910, by and between Alice Lee Joyner and husband, Andrew Joyner, of the county of Guilford and state of North Carolina, parties of the first part, and S. M. Crisp, of the county of Pitt and state of North Carolina, party of the second part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of two hundred dollars (\$200.00) to them paid by the party of the second part, the receipt of which

is hereby acknowledged, hereby agree to sell and convey by good and sufficient deed in fee simple to the party of the second part, at his option, the following described land, to wit: Situate and being in the county of Pitt, in Falkland township, known as the John Peebles farm, and bounded as follows: On the north by Tar river, on the east by the lands known as the Hearne lands, now owned by O. L. Joyner and Mrs. Corbett, continuing east and southeast along the line of the John Randolph lands; thence west, adjoining the lands of Walter Corbett, until the line of what is known as the old William Peebles eastern boundary is reached; thence north along this line and that part of the William Peebles line known as the Windom land; thence along this line north to its northwestern corner; thence west along the Windom line to a small branch at the western corner of the Windom line; thence to the line of the R. R. Cotten land; from thence north along said Cotten's line, known as the Southwood farm, to the main road leading from Falkland to Greenville; thence across said road north along said Cotten's line to Tar river; containing by estimation seven hundred and twenty (720) acres.

"This option is to remain in force for ninety days or until such time as the parties of the first part can obtain by special proceedings in the superior court of Pitt county a judicial decree confirming to the party of the second part a fee-simple title. Should the said party of the second part fail to avail himself of said option, upon the securing of this judicial decree at or near the time specified, then this agreement shall be void, but in case the said party of the second part shall tender to the parties of the first part, or to the trustee appointed by the court in the judicial decree heretofore mentioned, the sum of eight hundred dollars (\$800.00) in cash and eight notes of two thousand dollars (\$2,000.00) each, with interest, payable annually, on each note, at six per cent., the said notes, with interest each year on the unmatured notes to be due and payable as follows, respectively: January first of the years 1912, 1913, 1914, 1915, 1916, 1917, 1918, and 1919, said notes to be secured by a proper and sufficient lien upon the said land for the purchase money, as the law provides, or as may be agreed upon by the parties hereto, or provided in the judicial decree above referred to.

"Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the superior court a deed in fee simple to the said tract of land as described above, together with all the appurtenances thereunto belonging.

"The said parties of the first part cove-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nant with the said party of the second part that the said lands are free from all encumbrances, except such as will be removed by the judicial decree above referred to, and that they, in addition to said judicial decree, will provide to warrant and defend the title to the same against the claims of all persons whatsoever.

"In testimony whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written."

Moore & Long and F. G. James & Son, for appellant. Jarvis & Blow, S. J. Everett, and Albion Dunn, for appellees.

BROWN, J. In the view we take of this case, it is unnecessary to consider the first exception of the defendant in respect to the refusal of the court to make one O. L. Joyner and others parties to the action. If the contract is one which a court of equity will not require to be specifically performed, then a defect of parties is of no material matter.

[1] His honor ruled that the contract is one upon its face with which the plaintiffs cannot comply, and therefore a court of equity will not attempt to enforce it, and consequently in respect to a decree compelling partial performance, as asked by the defendant, his honor was of opinion that the contract was intended as an entirety, and must stand or fall as such, and that the court will not under the circumstances compel partial performance of the contract, and require abatement of the price.

The facts are, as appears by the pleadings: That the property in question, known as the "Peebles Place," belonged to the feme plaintiff for her life, and after her death to her children, some of whom are minors. At the time the contract referred to was entered into between the plaintiffs and the defendant, the defendant admits he knew the status of the title, and there is nothing in the pleadings themselves which indicate, or even allege, that any imposition was practiced upon the defendant, or that he entered into this contract except with his eyes open. The contract upon its face indicates plainly that it does not lie within the power of the plaintiffs of their own will to comply with it. It appears upon its face that the plaintiffs own practically nothing but a life estate, and that the only method to carry out the contract was by appealing to the judicial tribunal to decree a sale of the infants' estate. The following excerpts from the contract are plainly indicative that resort to a judicial tribunal was absolutely essential to its performance, viz.: "This option is to remain in force for ninety days, or until such time as the parties of the first part can obtain by special proceedings in the superior court of Pitt county a judicial decree confirming to the party of the second part a fee-simple title." Again: "Upon the performance of the

above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the superior court a deed in fee simple," etc.

The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be. Upon this principle it is held that a party cannot recover upon a contract wherein a guardian who owned certain interest in land of which his ward was part owner agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. *Zander v. Feeley*, 47 Ill. App. 660; *Le Roy v. Jacobosky*, 136 N. C. 444, 48 S. E. 798, 87 L. R. A. 470. There have been cases where guardians have entered into such contracts, and, upon failure to perform them, have been held liable in damages personally. *Mason v. Waitt*, 4 Scam. (Ill.) 127, and *Mason v. Caldwell*, 5 Gilman, 198, 48 Am. Dec. 330. But we find no instance where such contract has been specifically performed by decree of court, unless it was to the ward's interest.

[2] In regard to the contention that the defendant is entitled to the partial performance and conveyance of the life estate, and damages in the way of abatement of the price, it may be said that we recognize the general rule that, where the vendor has not substantially the whole interest he has contracted to sell, yet the purchaser can insist on having all that the vendor can convey with compensation for the difference. But in this case it is apparent on the face of the contract that it was to be performed as a whole, stand or fall as an entirety; and therefore it cannot be specifically enforced as to part.

[3] It is admitted by the defendant in his answer that he knew that the land in fee belonged to the plaintiffs' children. It seems to be well settled that the rule that when a person makes a contract for the sale of real estate, in which he has only limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price, does not apply where the purchaser at the time of the sale had notice of the defect in the vendor's title. *Knox v. Spratt*, 23 Fla. 64, 8 South. 924; 26 Am. & E. Ency. p. 84.

For the reasons given, we think the contract is one which cannot be specifically performed, nor can the defendant recover damages for a failure on the part of the plaintiffs to perform it.

The judgment of the superior court is affirmed.

(158 N. C. 299)

PHILLIPS et al. v. DENTON et al.
(Supreme Court of North Carolina. March 6, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 383*)
—SALE OF LAND TO PAY DEBTS—PRESUMPTION OF REGULARITY.**

Where the original papers in a proceeding to sell land to pay the debts of an intestate have been lost, but there is enough in the record to indicate that the proceeding was conducted with regularity, and to show that the infant parties were represented by a guardian ad litem, the validity of the proceeding will be presumed, in an action involving the title to the land sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1554; Dec. Dig. § 383.*]

**2. EXECUTORS AND ADMINISTRATORS (§ 397*)
—SALE OF LAND—DEED—DESCRIPTION OF LAND.**

A deed from the administrator of an intestate, of a specified number of acres of land, without further describing it, is sufficient, in an action involving the title to the land, where it does not appear that the intestate owned more than one tract of land, especially where the deed recites that it is subject to an allotment of dower to the intestate's widow, and the record of this allotment describes both the entire tract and the dower tract by metes and bounds.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1598-1604; Dec. Dig. § 397.*]

**3. EXECUTORS AND ADMINISTRATORS (§ 397*)
DEED—RECITING ORDER OF COURT.**

Where an administrator in conveying the land of his intestate is acting under an order of the court, his deed is not invalid, because it does not recite the order.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1598-1604; Dec. Dig. § 397.*]

Appeal from Superior Court, Franklin County; Ferguson, Judge.

Action by W. K. Phillips and others against Sherrod Denton and others. From a judgment for plaintiffs on a directed verdict, defendants appeal. Affirmed.

This action was brought to recover a tract of land which was originally owned by Sherrod Denton, and was sold by John Chamblee, his administrator, under an order of court, to pay debts of the intestate. Plaintiffs, having proved that the papers in the proceeding for the sale of the land, entitled "John Chamblee, Adm'r, v. Heirs of Sherrod Denton," had been lost, introduced in evidence the entries in the case on the minutes of the court, as follows: December term, 1859: "John Chamblee is appointed administrator of Sherrod Denton, and he enters into bond in the sum of \$500, with James Baker and Henry Baker as sureties, which is accepted by the court, and he qualifies accordingly." March term, 1860: "John Chamblee makes his return of account of sale of Sherrod Denton, which is received by the court and ordered to be recorded." In his final account, he charged himself with \$131.25, proceeds of

sale of land, May 16, 1860. March term, 1860: "Petition to sell land to pay debts. Service admitted. Prayer granted and decree filed." June term, 1860: "Petition to sell land to pay debts. Prayer granted. Decree filed. Report of sale returned and confirmed." They then introduced a deed from John Chamblee, administrator of Sherrod Denton, to T. H. Mann, reciting a consideration of \$131.25, paid by Mann, and conveying to him a tract of land in said county containing, by estimate, 87½ acres, 30 of which had been allotted to Mary Denton, the widow of Sherrod Denton, as her dower. They next offered a deed from T. H. Mann to John Chamblee, executed six years after the first deed. The land in controversy is the part of the entire tract which was allotted as dower to Mary Denton; she having died before this suit was commenced. Plaintiffs then introduced the record of the dower proceedings, which showed that the petition was filed, copy of petition issued, N. S. Patterson appointed guardian ad litem for infants, service admitted, prayer granted, writ of dower ordered to be issued, jury ordered, and report returned and confirmed. The acceptance of service for the infant defendants by N. S. Patterson, their guardian, was also indorsed on the petition for the assignment of dower. A survey of the land was ordered in the dower proceedings, and the report of the surveyors showed that the tract contained 87 acres, which was described by metes and bounds, and the dower land, taken therefrom, contained 29 acres, also described by metes and bounds. The defendants agreed that if parol evidence was admissible to aid the description in the administrator's deed and locate the land, and the records sufficient to authorize a sale of the land to pay debts, the judge should charge the jury to answer the issue in favor of the plaintiffs; it being admitted that the deed to Mann covered the locus in quo. The judge, being of opinion with the plaintiffs upon the points reserved, instructed the jury to answer the issue accordingly, and, judgment having been entered for the plaintiffs upon the verdict, the defendants appealed.

Thos. B. Wilder and T. T. Hicks, for appellants. W. M. Person and W. H. Yarbrough, Jr., for appellees.

WALKER, J. (after stating the facts as above). [1] There is no suggestion of any fraud in this case; nor is it alleged that John Chamblee bought the land at his own sale through T. H. Mann, who acted for him. It appears that the proceeding to sell the land was brought against the widow, who is now dead, and the children of Sherrod Denton, who were then minors and represented by their guardian ad litem. There is enough in the fragments of the record that remain

to indicate that the proceeding was conducted with regularity. The original papers have been lost, and we will not presume, in their absence, that the court disregarded the rules of procedure and gave its decree without properly guarding the rights of the defendants. It affirmatively appears that they were represented by a guardian, and the presumption is that the court proceeded in the case according to its usual course and practice. We cannot, in this suit, permit a collateral attack upon the judgment in that case. The subject was fully considered by us in *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975, and we do not see any substantial difference in the facts of the two cases. If there is any, it is in favor of the validity of the proceedings in *Chamblee v. Denton*, which the defendants now assail; for there is no allegation of fraud or collusion in the sale of the land, as there was in the case cited.

In *Rackley v. Roberts*, *supra*, we relied much upon the authority of *Sumner v. Sessions*, 94 N. C. 376, in which Chief Justice Smith thus stated the law governing such cases: "A guardian ad litem was appointed for the infant defendant, whose acceptance and presence in court must be assumed, in the absence of any indication in the record to the contrary, from the fact that the court took jurisdiction of the cause and rendered judgment. It is true the record produced does not show that notice was served on the infant or upon her guardian ad litem; nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand, and cannot be treated as a nullity until so declared in some impeaching proceeding instituted and directed to that end. The irregularity, if such there be, may in this mode be such as to warrant a judgment declaring it null; but it remains in force until this is done. The voluntary appearance of counsel in a cause dispenses with the service of process upon his adult client. The presence of a next friend or guardian ad litem to represent an infant party, as the case may be, and his recognition by the court in proceeding with the cause, preclude an inquiry into his authority in a collateral proceeding, and require remedial relief to be sought in the manner suggested, wherein the true facts may be ascertained. This method of procedure, so essential to the security of titles dependent upon a trust in the integrity and force of judicial action, taken within the sphere of its jurisdiction, is recognized in *White v. Alberson*, 14 N. C. 241 [22 Am. Dec. 719], *Skinner v. Moore*, 19 N. C. 138 [30 Am. Dec. 155], *Keaton v. Banks*, 32 N. C. 384 [51 Am. Dec. 393], and numerous other cases, some of which are referred to in *Hare v. Holomon* [94 N. C. 14], *supra*, and all of which recognize the imputed errors and imperfec-

tions as affecting the regularity and not the efficacy of the judicial action taken." The proceeding alleged in that case to have been irregular was commenced in 1870, after the adoption of the new procedure. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. We further said in *Rackley v. Roberts*: "While it may not be necessary to the decision of this appeal, as we view it, to consider what may be the rights of Mrs. Roberts as an innocent purchaser, for all the facts in regard to that question are not now before us, it may be well to refer again to the general doctrine settled by this court, to the effect that, when there is a purchase under a judgment, the purchaser need only inquire if, upon the face of the record, the court apparently has jurisdiction of the parties and the subject-matter, in order to be protected, provided he buys in good faith and without notice of any actual defect"—citing numerous cases. See *Glisson v. Glisson*, 153 N. C. 185, 69 S. E. 55, which was a motion to set aside the judgment attacked in *Rackley v. Roberts*. The question is there fully discussed by Justice Brown. His honor was correct in holding that the proceeding in *Chamblee v. Denton* supported the judgment in that case and the sale and deed made by the administrator. *Coffin v. Cook*, 106 N. C. 376, 11 S. E. 371.

[2] The description in the deed from Chamblee to Mann was sufficient. In the first place, so far as appears, the intestate of John Chamblee owned but one tract of land, and it was his land which was sold to pay his debts. In order to make a valid sale of the whole of it, the allotment of the widow's dower was first made, and then the entire tract sold, subject to this dower. This appears from the language of the deed. The description is of the land from which the dower tract was taken, and this is sufficient reference to the allotment of the dower to permit an examination of it for the purpose of ascertaining what land was intended to be conveyed. When we look into the record of this allotment, we find that the entire tract is described by its metes and bounds, and also the dower tract, and this makes clear and definite the description in the deed. In other words, it appears on the face of the deed that it was the purpose of the parties to convey all the land of Sherrod Denton, except the dower interest, or the life estate of the widow, in the land set off to her in the larger tract; both being described in the proceedings by metes and bounds. The tract conveyed by the deed necessarily adjoined the dower land; the latter having been a part of it. It would not be difficult to locate the land of Sherrod Denton adjoining the dower tract, as he had only one tract of land, even if we disregarded the additional description, "adjoining the land of Rebecca Denton's old tract, and others," which increases the certainty of a true location. In the latter view of the description,

the ruling of the court is sustained by *Perry v. Scott*, 109 N. C. 374, 14 S. E. 294.

[3] The defendants further contend that the deed of Chamblee, administrator, to Mann does not convey the land, because it fails to recite the power under and by virtue of which it was executed, or to refer to the order of the court directing a conveyance of the land to the purchaser. The same objection was made to the executor's deed in *Cook v. Coffin*, supra, and held to be untenable. It was there said that, where the executor actually exercised the power given by an order of the court in the execution of the deed, but failed to recite the order, the implication of the law is that he was acting under authority conferred by the order. This disposes of all the exceptions which require any special attention.

No error.

(158 N. C. 307)

HERRICK v. NORFOLK-SOUTHERN R. CO.

(Supreme Court of North Carolina. March 6, 1912.)

REMOVAL OF CAUSES (§ 89*)—PROCEEDINGS TO REMOVE—PETITION—TRIAL OF ISSUES.

While a state court is not bound to surrender its jurisdiction on a petition for removal to a United States court until it has determined that the petition shows a proper case for transfer, and that the petitioner has a prima facie right to removal, the determination extends only to matters apparent, and, where such a showing was made and the necessary security furnished, issues of fact raised, even though the allegations of the petition of removal were denied, were to be determined only in the federal court.

[Ed. Note.—For other cases, see *Removal of Causes*, Dec. Dig. § 89.*]

Appeal from Superior Court, Martin County; Ferguson, Judge.

Action by Howard Herrick, Jr., by his next friend, John C. Lamb, against the Norfolk-Southern Railroad Company. From an order of removal to the Circuit Court of the United States, plaintiff appeals. Affirmed.

H. W. Stubbs, for appellant. W. B. Rodman, for appellee.

WALKER, J. This action was brought by the plaintiff, Howard Herrick, who sues by his next friend, John C. Lamb, to recover damages for injuries to the infant plaintiff, alleged to have been caused by the negligence of the defendant on its electric railway in Virginia Beach, state of Virginia. The damages are laid at \$25,000. Before the plea or answer was due, or the time allowed by law for filing the same had expired, the defendant presented its verified petition to the court, alleging that it is a corporation chartered under the laws of the state of Virginia, and a citizen and resident of that state, the plaintiff and his next friend being citizens

of this state, and in other respects containing all the essential averments required by the removal act of Congress. It tendered a bond with sufficient surety for entering the case in the Circuit Court of the United States for the Eastern District of this state, and upon the papers thus filed in the state court it prayed that the cause be removed to the said Circuit Court for trial. Judge Ferguson, then presiding in the state court, ordered the case to be removed according to the prayer of the petition, and the plaintiff excepted and appealed.

The contention of the plaintiff is that the defendant is not a corporation and resident of the state of Virginia, but a corporation of North Carolina and Virginia, and he so alleges in his complaint. He also files certain papers, duly certified by the Secretary of State, for the purpose of sustaining his allegation. Even if the certificates do tend to establish the fact, which we gravely doubt, this issue cannot be tried in the state court. The law upon this question is well settled. It is true that a state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer, and in order to accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal, which being made to appear in the record, and the necessary security having been given, the power of the state court in the case ends, and that of the federal court begins. The state court, of course, may decide, on the face of the record, whether the case is a removable one. The law upon this subject has been so fully and conclusively stated by the court having the jurisdiction under the Constitution to declare finally what it shall be that we will content ourselves by referring to one of its latest decisions dealing with the question.

In *B. & N. Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, it has stated the true rule explicitly, as follows: "The assignment of errors presents but a single question, and that is whether, as after the petition for removal had been filed the record showed on its face that the state court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit, because on that issue the railway company had not shown by testimony that the plaintiff was actually a citizen of Minnesota. It must be confessed that previous to the cases of *Stone v. South Carolina*, 117 U. S. 432 [6 Sup. Ct. 799, 29 L. Ed. 962], and *Carson v. Hyatt*, 118 U. S. 279 [6 Sup. Ct. 1050, 30 L. Ed. 167], decided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

at the last term, the utterances of this court on that question had not always been as clear and distinct as they might have been. Thus, in *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900, in speaking of removals under section 12 of the judiciary act of 1789 [Act Sept. 24, 1789, c. 20, 1 Stat. 79], it was said [16 Pet. 104, 10 L. Ed. 902], 'It must be made to appear to the satisfaction of the state court that the defendant is an alien, or a citizen of some other state than that in which the suit was brought;' and in *Railway Co. v. Ramsey*, 22 Wall. 328, 22 L. Ed. 824, that, 'If, upon the hearing of the petition, it is sustained by the proof, the state court can proceed no further.' In other cases, expressions of a similar character are found, which seem to imply that the state courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term, it was found that this question had become a practical one, about which there was a difference of opinion in the state courts, and to some extent in the Circuit Courts; and so, in deciding *Stone v. South Carolina*, we took occasion to say: 'All issues of fact made upon the petition for removal must be tried in the Circuit Court; but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected.' It is true, as was remarked by the Supreme Judicial Court of Massachusetts, in *Amy v. Manning*, 144 Mass. 153 [10 N. E. 737], that this was not necessary to the decision in that case; but it was said on full consideration, and with the view of announcing the opinion of the court on that subject. Only two weeks after that case was decided *Carson v. Hyatt* came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone v. South Carolina*, and decided that it was error in the state court to proceed further with the suit after the petition for removal was filed, because the Circuit Court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson v. Dunham*, 121 U. S. 421 [7 Sup. Ct. 1080, 30 L. Ed. 992], and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds, it is the true rule, and calculated to produce less inconvenience than any other. The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary securi-

ty furnished. It presents, then, to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case, and the highest court of the state affirms its decision, this court has jurisdiction to correct the error, considering for that purpose only the part of the record which ends with the petition for removal. *Stone v. South Carolina*, 117 U. S. 482 [6 Sup. Ct. 799, 29 L. Ed. 962], *supra* and cases there cited." *Crehore v. O. & M. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Railroad v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963.

The rule, as thus formulated, has been recognized by this court as the authoritative and controlling one in *Springs v. Railroad*, 130 N. C. 186. The cases to the same effect are collected in 5 Digest U. S. Supreme Court Reports (L. Ed. 1908) pp. 5100 and 5101. In the case of *Railroad v. Daughtry*, *supra*, the very question now before us was involved, and the court held it to be "thoroughly settled" by the decisions that issues of fact raised upon petitions for removal must be tried in the federal court. The issue in that case was one of diverse citizenship. The matter was fully discussed at the last term by Justice Hoke in *Rea v. Mirror Co.*, 73 S. E. 116, and we then reached the same conclusion as herein stated.

It therefore follows that the superior court, to which the petition for removal was presented, did not have the power to pass upon the issue of fact as to the diverse citizenship of the parties, and properly left that issue, if it has been sufficiently raised in the record, to the determination of the United States court. The ruling of the court was correct.

Affirmed.

(158 N. C. 230)

EUBANKS v. BECTON et al.

(Supreme Court of North Carolina. March 6, 1912.)

1. MORTGAGES (§ 335*)—POWER OF SALE—RIGHT TO EXERCISE—DEFAULT.

Under a mortgage authorizing a sale on the mortgagor's failure to pay one of a series of notes, and requiring the proceeds to be applied to the principal and interest then due on the notes, on failure to pay the first note, the mortgagee could exercise the power of sale without waiting until maturity of the last.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1019; Dec. Dig. § 335.*]

2. MORTGAGES (§ 335*)—MATURITY—DEFAULT UNDER SERIAL NOTE.

A provision in a mortgage that the whole debt shall become due on failure to pay any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

part is valid, but not essential to exercise of a power of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1019; Dec. Dig. § 335.*]

3. MORTGAGES (§ 335*)—POWER OF SALE—PREREQUISITES.

Conditions specified in a mortgage precedent to the mortgagee's right to exercise power of sale must be strictly followed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1022; Dec. Dig. § 335.*]

4. MORTGAGES (§ 356*)—POWER OF SALE—PRECEDENT CONDITIONS—SUFFICIENCY OF COMPLIANCE.

Under a provision in a mortgage requiring notice of sale by the mortgagee to be posted at the courthouse door and four other public places, sale under notice posted at the courthouse door and three other public places is invalid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1067; Dec. Dig. § 356.*]

5. MORTGAGES (§ 372*)—SALES—REGULARITY—NOTICE TO PURCHASER.

The grantee in a deed executed by a mortgagee under a power of sale, reciting that notice of the sale was posted at four public places, is chargeable with knowledge of insufficiency of such posting, based on a requirement in the mortgage, which is a necessary link in his title, for posting in five public places.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1106; Dec. Dig. § 372.*]

6. MORTGAGES (§ 597*)—SALES—REGULARITY—ESTOPPEL.

While a mortgagor may, by acquiescence in the conduct of a sale under the mortgage, estop himself to assert its irregularity, there can be no acquiescence without knowledge; and hence a mortgagor, by renting from the purchaser at a mortgagee's sale, is not estopped to deny validity of the sale for want of sufficient posting of the notice, where he did not know of such irregularity when he rented.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1744; Dec. Dig. § 597.*]

7. MORTGAGES (§ 597*)—REDEMPTION—ESTOPPEL.

A mortgagor is not estopped to exercise his right to redeem through having rented the land from the purchaser at the mortgagee's sale, where, when he procured the lease, he did not know that he could redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1744; Dec. Dig. § 597.*]

8. MORTGAGES (§ 193*)—MORTGAGOR IN POSSESSION—RIGHTS—NATURE.

The rights of a mortgagor in possession are almost identical with those of the purchaser under a bond for title.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 193.*]

Appeal from Superior Court, Jones County; Carter, Judge.

Action by E. E. Eubanks against A. F. Becton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action by the plaintiff as mortgagor for an accounting and to redeem. The issues raised by the pleadings were by consent referred to Hon. F. A. Daniels, and the following facts are found by him, to which no exception is taken: On the 3d day of April, 1900, the defendant Amos F. Becton, conveyed to the plaintiff, E. E. Eubanks, the

tract of land described in the complaint for the consideration of \$1,000. On the same day, the plaintiff and his wife executed and delivered to said Becton their 10 bonds for the purchase money, in different amounts, and payable the 1st day of January, 1901, and annually thereafter up to and including January 1, 1910, and to secure the payment of the same they also executed and delivered to said defendant a mortgage upon the said land, which was duly proven and registered in said county, and in which it is provided "that if default should be made in the payment of either of said sums of money, or any part thereof, the said parties of the first part in such case do hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators and assigns, to sell the said hereby granted premises at public outcry at the courthouse door in Trenton, Jones county, after first advertising the same for thirty days at the courthouse door and four other public places in Jones county, and convey the same to the purchaser in fee simple, and out of the moneys arising from said sale to retain the principal and interest which shall then be due on the said bonds." On the 30th day of December, 1901, the first note not being paid, the defendant, purporting to act under the power of sale contained in the mortgage, offered for sale at the courthouse door in Trenton, N. C., the lands described in the said mortgages, after advertising the said sale by posting notices for 30 days at the courthouse door and three other public places in Jones county, when and where one J. A. Smith, being the highest bidder, was declared the purchaser at the price of \$1,000; that the said Smith transferred his bid to the defendant Heath, who rented said land to the plaintiff, Eubanks, for the years 1902, 1903, and 1904, and received the rent therefor; that at the time of such renting the plaintiff did not know of any irregularity in the sale; that on November 7, 1902, the said Becton executed a deed to said Heath, purporting to convey said lands in consideration of \$1,000, in which deed there is no reference to the said mortgage or the power contained therein; that about February, 1904, the said Becton executed another deed to the said Heath, purporting to convey said land, in which it is recited that the sale was made after advertisement at the courthouse door and three other public places; and that the deed is made pursuant to the execution of the power in said mortgage. The referee stated the account between the parties, to which there is no exception. The report of the referee was confirmed. and from a judgment in accordance therewith the defendants appeal.

T. D. Warren, Loftin & Dawson, and A. D. Ward, for appellants. Rouse & Land and Shaw & Powers, for appellee.

ALLEN, J. The right of the plaintiff to redeem depends upon the validity of the sale made under the power contained in the mortgage, executed by him. If the sale can be upheld, the defendant Heath is the owner of the land, and, if not, the deed to him is operative only as an equitable assignment of the notes and mortgage, and the plaintiff, nothing else appearing, is entitled to an accounting.

[1, 2] The sale is attacked by the plaintiff upon two grounds: (1) That the mortgage, although containing a provision that the land may be sold upon failure to pay *either* note, does not provide that upon such failure the whole indebtedness shall become due, and that therefore no sale could be made until the maturity of the last note; (2) that the mortgage requires the notice of sale to be posted at the courthouse door and *four* other public places, and it was in fact posted at the courthouse door and *three* other public places.

(1) The mortgage contains the express stipulation that the land may be sold upon failure to pay *either* note, and requires the proceeds of sale to be applied to "the principal and interest which shall be then due on the said bonds." The language is clear, and the intention of the parties easily ascertained, and we must give effect to it. It is permissible to provide that the whole debt shall become due upon failure to pay any part, but not essential to the exercise of the power of sale. *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554.

[3, 4] (2) The second question is more serious. Powers of sale in a mortgage are contractual, and as there are many opportunities for oppression in their enforcement courts of equity are disposed to scrutinize them, and to hold the mortgagee to the letter of the contract. If a different view should prevail, and we could dispense with some stipulation in the power because we could not see that injury had ensued from failure to observe it, we could practically destroy the contract of the parties.

The view taken by the courts of such powers is illustrated by what is said in *Kornegay v. Spicer*, 76 N. C. 97: "The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground that, in a plain case, when the mortgage debt was agreed on and nothing else was to be done, except to sell the land, it would be a useless expense to force the parties to come into equity, when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default. But this power of sale has always been watched with great jealousy." And in *Shew v. Call*, 119 N. C. 453, 26 S. E. 34, 56 Am. St. Rep. 678: "Mortgages with power

of sale are not looked upon with disfavor as they once were. But courts of equity, or of equitable jurisdiction, will still guard the rights of the mortgagor with jealous care." And in *Fleming v. Barden*, 127 N. C. 217, 37 S. E. 220, 53 L. R. A. 316: "The practice of inserting powers of sale in mortgages was recognized by this court with great reluctance, and has always been regarded with extreme jealousy, but not now with the same disfavor."

In the case of *Brett v. Davenport*, 151 N. C. 59, 65 S. E. 612, the effect of failure to advertise according to the terms of the mortgage was directly involved, and Justice Hoke, speaking to that question, says: "Again, it appears that at the time of the first sale, or attempted sale, the property had not been advertised 'according to law or as required by the terms of the deed of trust under which he had sold,' and on such facts it is very generally held, uniformly, so far as we have examined, that a sale would have been invalid. In an instrument of this kind, the law is that a statutory requirement or contract stipulation in regard to notice is of the substance, and, unless complied with, a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title, subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith."

The decisions in other states seem, also, to be practically uniform that there must be a strict compliance with the terms of the mortgage before the power can be exercised.

In 27 Cyc. 1466, the rule is stated that "a power of sale contained in a mortgage or deed of trust must be strictly pursued, and all its terms and conditions complied with, in order to render the sale valid." And, again, on page 1466: "It is essential to the validity of a sale under a power in a mortgage or deed of trust to comply fully with its requirements as to giving notice of the sale." And on page 1472: "Directions of the statute or of the mortgage as to the length of time the notice must be published, or the number of times it must appear, are imperative, and a sale made without strict compliance therewith is invalid and passes no title," and the text is supported by the cases cited in the notes. *Thornton v. Boyden*, 31 Ill. 210; *Bigler v. Waller*, 81 U. S. 304, 20 L. Ed. 891; *Hall v. Towne*, 45 Ill. 495; *Shillaber v. Robinson*, 97 U. S. 77, 24 L. Ed. 967; *Sears v. Livermore*, 17 Iowa, 297, 85 Am. Dec. 564; *Preston v. Johnson*, 105 Va. 240, 53 S. E. 1.

In *Sears v. Livermore*, *supra*, it was held that a sale under the power in a mortgage was invalid, when the mortgage required the notice to be posted on the door of a hotel, and it was posted near by, because of the refusal of the proprietor of the hotel to

permit it to be placed on the door; and this was approved in *Preston v. Johnson*, supra, in which the court quotes with approval what is said by Mr. Freeman in a note to *Tyler v. Herring*, 19 Am. St. Rep. 263, as follows: "Where the instrument creating the trust has given directions concerning the mode of sale, they must be substantially pursued. Any direction regarding the notice of sale is material, and the trustee is not at liberty to disobey it. His sale, made without complying with it, will, in most jurisdictions, be regarded as either absolutely void, or as liable to be vacated upon complaint of any person interested in the execution of the trust."

In *Moore v. Dick*, 187 Mass. 208, 72 N. E. 967, a sale was declared void when the notice of sale, instead of being published in a certain weekly newspaper named in the power of sale, was published in a daily newspaper of another name, printed by the same proprietor and issued from the same office; and the court says: "It is familiar law that one who sues under a power must follow strictly its terms. If he fails to do so, there is no valid execution of the power, and the sale is void."

This case was approved in *Chace v. Morse*, 189 Mass. 581, 76 N. E. 142, and the court there distinguishes between irregularities which avoid the sale and those that do not. The court says: "The distinction between the two classes of cases has not been very clearly defined, and the decisions in the different jurisdictions do not entirely agree. It has repeatedly been said that, in order to make a valid sale under a power in a mortgage, the terms of the power must be strictly complied with. *Roarty v. Mitchell*, 7 Gray (Mass.) 243; *Smith v. Provin*, 4 Allen (Mass.) 516; *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967. Where the sale is to foreclose a mortgage for a breach of the condition, there is no authority to sell, unless there is a breach, and an attempted sale would be without effect upon the right of redemption. So, where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure. *Moore v. Dick*, 187 Mass. 207, 72 N. E. 967. But if everything is done upon which jurisdiction and authority to make a sale depend, irregularities in the manner of doing it, or in the subsequent proceedings, which may affect injuriously the rights of the mortgagor do not necessarily render the sale a nullity."

Perry on Trusts (sections 602p and 602q) declares the same principle. It says: "It must be constantly borne in mind that the power of sale given in the deed or mortgage must be strictly followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally, and precisely. Such a power ad-

mits of no substitution and of no equivalent, even in unimportant details. If the power contains the details, the parties have made them important; and no change can be made, even if the mortgagor would be benefited thereby, nor if a statute provides a different manner. If the power is not executed as it is given in all particulars, it is not executed at all, and the mortgagor still has his equity of redemption." "If the form of notice, and the manner of giving it, whether by posting in public places or by advertising in a newspaper, are prescribed in the power, they must be strictly followed, and if the particular place of notice is named notice must be posted in that place; if the newspaper is named, publication of notice must be made in that paper. It is not necessary to give other notice of the sale than that prescribed in the power; but it is necessary to follow the power in good faith. If the notice named in power cannot be given, as if the newspaper named has ceased to be published, the mortgagees cannot sell without recourse to a court of equity."

It will be noted that the mortgage before us and the sale thereunder antedate the act of 1905, which is now a part of section 641 of the Revisal, providing that no sale shall be made under a mortgage, etc., thereafter executed until notice of such sale shall be posted at the courthouse door and three other public places, and the effect of that statute is not before us. We conclude, therefore, that we cannot disregard the requirements of the mortgage, and that the sale is invalid, because notice thereof was not given in accordance with its terms.

[5] If the sale is invalid, the purchaser, Heath, had notice thereof, because it is recited in his deed that notice of sale was posted at the courthouse door and three other public places, and, as the mortgage is a necessary link in his chain of title, he is charged with notice that it required a publication at four other public places. *Thompson v. Blair*, 7 N. C. 591; *Holmes v. Holmes*, 86 N. C. 209.

[6] The defendants contend, however, that if it is held that it was necessary to publish the notice of sale at four other public places the failure to do so is an irregularity; that the sale was not absolutely void; and that the plaintiff, by acquiescence, has ratified the sale, or by renting from the purchaser is estopped to deny its validity. It is true that the mortgagor may, by acquiescence in the conduct of the sale, be precluded from questioning its irregularity (*Lunsford v. Spears*, 112 N. C. 612, 17 S. E. 430); but there can be no acquiescence without knowledge, and it is a fact established in this case that the plaintiff did not know of the irregularity in the sale at the time he rented from the purchaser, nor until a short time before this action was commenced. In *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420, it is said: "Acquiescence and waiver are always questions

of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do." And the plaintiff cannot be held to be negligent in assuming the sale to be regular, when the presumption is that it was advertised according to law. *Lunsford v. Spears*, 112 N. C. 612, 17 S. E. 430; *Cawfield v. Owens*, 129 N. C. 288, 40 S. E. 62.

[7] Nor does the rental of the land estop the plaintiff from asserting his equity to redeem. At the time he rented, he thought the sale was regular, and he entered into the contract of rental in ignorance of the fact that he had the right to redeem; but, aside from this, the relation of mortgagor and mortgagee being established, a court of equity would give effect to such an agreement only so far as is necessary to protect the rights of the mortgagee.

[8] The rights of the mortgagor in possession are almost identical with those of a vendee in a bond for title; and it has been held repeatedly that, while the vendee may, under some circumstances, rent from the vendor, and thereby confer the right to enforce payment of the rent under the landlord and tenant act, this alone does not impair the equity in the vendee, and that the rents collected must be applied to the debt. *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924; *Crinkley v. Edgerton*, 113 N. C. 444, 18 S. E. 609; *Jones v. Jones*, 117 N. C. 257, 23 S. E. 214.

We conclude, therefore, that there is no error, and the judgment must be affirmed. This result does not seem to be unjust to the purchaser, as he has received more from the plaintiff and the land than he agreed to pay the mortgagee.

Affirmed.

(153 N. C. 215)

JEFFRESS v. NORFOLK-SOUTHERN R. CO.

(Supreme Court of North Carolina. March 6, 1912.)

1. RAILROADS (§ 460*) — FIRES — CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence, precluding recovery for a fire set by negligence of a railroad, that the owner of premises permitted grass to remain on his premises near the road.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1681; Dec. Dig. § 460.*]

2. NEGLIGENCE (§ 117*) — CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

That contributory negligence may be availed of, the pleadings must tender an issue thereof.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

3. RAILROADS (§ 453*) — FIRES—LIABILITY—PRIOR RECOVERY OF DAMAGES FROM CONSTRUCTION.

Recovery of damages to a lot, including the hazard from fire, from construction of a railroad in a street, includes only ordinary risks where there is no negligence, and so does not prevent recovery for a fire from negligent operation of an engine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1667; Dec. Dig. § 453.*]

4. TRIAL (§ 295*) — INSTRUCTIONS—CONSIDERATION AS A WHOLE.

A charge is to be considered as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. RAILROADS (§ 485*) — FIRES — SPARK ARRESTERS—INSTRUCTIONS—"MODERN."

A charge in an action for fire set by a locomotive, stating that it was defendant's duty to have its engines properly equipped with such appliances for arresting sparks as are in general and approved use, not, however, such as will prevent any spark from escaping, but such as are in general and common use, and that if the fire was caused by its failure to properly equip its engine with a spark arrester that was modern and in common use, or by failure to properly operate it, it was negligent, does not, by use of the word "modern," necessarily require the latest and best appliances.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1747-1756; Dec. Dig. § 485.*]

6. TRIAL (§ 284*) — INSTRUCTIONS—DUTY TO CALL ATTENTION TO MISTAKES.

If the charge states a certain condition of affairs as being contended for by a party, when there is no evidence to support the contention, it is the duty of counsel to call the court's attention thereto.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 688-685; Dec. Dig. § 284.*]

7. RAILROADS (§ 484*) — FIRES—EVIDENCE.

Evidence in an action for fire set by a locomotive held sufficient to submit to the jury the question of the quantity of sparks from the engine having been unusual.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 484.*]

8. APPEAL AND ERROR (§ 1033*) — HARMLESS ERROR—INSTRUCTIONS.

A charge in an action for fire set by a locomotive, in effect, requiring the issue of whether plaintiff's property was injured by defendant's negligence to be answered in the negative, though sparks fell on the premises from the engine, because of its not being equipped with a proper spark arrester or not being properly operated, if the premises were in a foul condition, in so far as it made defendant's liability to depend on such foul condition, was merely more favorable to it than it was entitled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4056, 4057; Dec. Dig. § 1033.*]

9. DAMAGES (§ 111*) — FIRES — BURNING HOUSE—MEASURE OF DAMAGES.

The measure of damages for the burning of a house by sparks from a locomotive is the depreciation in value of the land from the fire; that is, the difference in its value before and after the fire.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 274-278; Dec. Dig. § 111.*]

10. EVIDENCE (§ 155*) — ADMISSIBILITY—SIMILAR EVIDENCE OF ADVERSE PARTY.

While prior negligence of the owner of premises in not removing trash from his side-

walk would not prevent his recovery of a railroad for fire set by its locomotive through its failure to provide a proper spark arrester, or to operate its train prudently, yet defendant having been allowed to introduce an ordinance, requiring such owner to remove such trash, it was not improper to allow plaintiff to prove that the notice to remove required by the ordinance to be given under certain conditions was not given.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. § 155.*]

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Action by R. O. Jeffress against the Norfolk-Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for the recovery of damages in the sum of \$4,315.95 for the alleged negligent burning by the defendant of plaintiff's prize house, or tobacco stemmery, in Greenville, N. C., on January 31, 1910. The fire is alleged to have been caused by sparks from one of the defendant's engines while being operated on Pitt street. The defendants deny liability. It was admitted, for the purposes of the trial, that the Norfolk-Southern Railroad was liable to the plaintiff if the Norfolk & Southern Railroad Company and its receiver were liable.

The plaintiff owns a lot in Greenville, on Pitt and Tenth streets, fronting 333 feet on Pitt street and 110 on Tenth street. Pitt street runs north and south. The lot is about two blocks from the Norfolk-Southern Depot, and 100 to 150 feet from the cotton platform. The Norfolk-Southern Railroad track runs down the middle of Pitt street, which is 49 feet wide. It is 20 feet from the railroad to the Jeffress property line, but this distance includes the sidewalk. The prize house of plaintiff was built in 1901. It is approximately 60 feet wide and 108.6 feet long, with an ell added, which is 40 feet by 40 feet. The nearest point of the building is about 45 feet from the railroad. The boiler room is 25 feet. The railroad, including track and cross-ties, is 8 feet wide. The building caught fire about 12 o'clock noon, and was totally destroyed. The building had been leased for several years to Skinner & House. The rest of the lot had been rented out the year before. At the time of the fire, the vacant part of the lot was covered with cornstalks and grass. The fire was first discovered burning in the grass on the lot, and in this way reached the building. There was a city ordinance in force at the time, and had been in force for several years, providing that "every occupant of a lot on any street shall keep the sidewalk clean and clear of weeds, grass and other rank vegetation as far as such lot extends. If any rubbish, dirt, ashes or other thing be placed or left without lawful authority upon such sidewalk or in the gutters or streets adjacent

thereto, the occupant of such lot shall remove same. If, after written notice by the chief of police, or street commissioners, requiring him to remove the things prohibited by this ordinance, he shall fail for twenty-four hours to remove the same, he shall be fined five dollars for each day thereafter it may so remain."

In August, 1907, the plaintiff instituted another action against the Norfolk & Southern Railroad Company for recovery of damages in the sum of \$3,000 to this same lot, alleged to have been caused by the construction of this same railroad track down Pitt street, alleging, among other elements of damage, "by reason of the frequent passing of the defendant's trains in such close proximity to plaintiff's property, plaintiff's property has become endangered from loss by fire arising from the constant issuing of smoke and sparks from defendant's engines, and has become annoying to the plaintiff and materially interferes with the operation of plaintiff's factory." This action was tried at March term, 1911, resulting in a judgment of \$50 for the plaintiff, and this judgment was affirmed on appeal by plaintiff to Supreme Court at fall term, 1911.

There was evidence for the plaintiff tending to show that the defendant's freight train was passing along Pitt street about 11:30 o'clock, and did some shifting on this street, that the engine was emitting sparks, and that some of the sparks fell upon the vacant part of the Jeffress lot, or sidewalk, and that shortly thereafter the grass was burning in two places. The grass burned up near to the boiler room, which was the nearest point to the street, when it was discovered by Archie Lockland, who had charge of the building, and had the key to the same. He testified that he put the fire out and went home. In about 20 minutes the building was on fire. The building burned about 12 o'clock noon. There was also evidence for the plaintiff that the grass caught again from a spark from the engine, after Lockland had put it out, and that this was the fire that eventually burned the factory. The plaintiff's evidence showed that the grass caught on the plaintiff's lot or sidewalk, and that the fire was communicated to the building by burning grass; the plaintiff himself testifying that the nearest burnt grass to the railroad track was within 20 or 15 feet of the track. All of the evidence tended to show that the fire was communicated to the building by the burning grass, and there was no evidence that it caught directly from a spark. The plaintiff's evidence tended to show that the building and its contents were worth between \$8,500 and \$9,000. He collected \$4,225 insurance on the building and contents.

The evidence of the defendant was that the freight train No. 30, pulled by engine No.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

115, came into Greenville about 11 o'clock a. m., and left about 11:40; that the engine was properly equipped with a spark arrester in general and approved use, and that the netting of the spark arrester was in fact smaller and finer than the standard, it being 3 holes to 1 inch of space instead of 2¾ holes to the inch; that this rendered the danger of sparks escaping much less, on account of the fact that the netting would stop smaller sparks; that it stopped practically all sparks, and would choke with sparks, and cause the engineer to stop at stations and knock them out; that the spark arrester was in good condition on that date. There was evidence of the good condition of the spark arrester for a number of days both prior and subsequent to the fire, and that the engine was being run carefully and properly by a competent engineer. There was evidence for the defendant that the building and personal property was worth less than the amounts claimed by the plaintiff. There was other evidence for the plaintiff.

The defendant does not plead contributory negligence, and the issues and the responses thereto are as follows:

"(1) Was the property of the plaintiff injured by the negligence of the defendant as alleged in the complaint?" Answer: "Yes."

"(2) If so, what damage, if any, in excess of the \$4,225 fire insurance collected by the plaintiff, is plaintiff entitled to recover of defendant?" Answer: "\$3,275."

There was a judgment in accordance with the verdict, and the defendant appealed.

Rouse & Land, for appellant. F. G. James & Son and Harry Skinner, for appellee.

ALLEN, J. The exceptions appearing in the record present for our consideration the following contentions made by the defendant:

(1) That the plaintiff was negligent in permitting combustible matter to remain on his lot near the track of the defendant, and that this was the proximate cause of the injury to his property.

(2) That, if ordinarily it would not be negligence in the plaintiff to permit combustible matter to remain on his lot, a higher duty should be imposed on him in this case, because he had recovered judgment against the defendant in another action on account of hazard to this property by the operation of defendant's trains, and had been thereby compensated for ordinary risks.

(3) That it being in evidence that the fire, after its origin, was under the control of an employé of the plaintiff, the defendant, although negligent in setting out the fire, would not be liable for the consequences which followed.

(4) That his honor erroneously imposed the duty on the defendant of equipping its engine with a modern spark arrester.

(5) That his honor stated as a contention

of the plaintiff that the engine emitted an unusual quantity of sparks, when there was no evidence to support the contention.

(6) That his honor in a part of his charge made the liability of the defendant depend upon whether the plaintiff was negligent in permitting his lot to become and remain in a foul condition.

(7) That his honor erroneously charged the jury that the measure of damage for burning the building was the difference in the value of the land before and after the fire.

(8) That his honor erroneously permitted the tenant of the plaintiff to testify that he had received no notice, under the ordinance in evidence, to remove trash, etc., from the sidewalk.

[1, 2] 1. This contention of the defendant seems to be fully met by the decision in *Wyatt v. Railroad*, 156 N. C. 314, 72 S. E. 383, in which it was held that "an owner of land has a right to use it in the ordinary and usual way, and is not bound to remove dry grass, weeds, leaves, or other combustible material from his land adjoining a railroad right of way, in anticipation of probable negligence on the part of the railroad company, and a failure to perform such acts will not make him guilty of contributory negligence so as to preclude a recovery for damages caused by a fire originating through the railroad company's negligence." If the rule was otherwise, the defendant has not pleaded contributory negligence, and no issue was tendered presenting this question, and this objection would also be applicable to the next contention of the defendant.

[3] 2. The second proposition insisted upon may be admitted, and the liability of the defendant would not be affected, because negligence is not an ordinary risk, and his honor told the jury in clear and direct terms that the plaintiff could not recover if the engine was properly equipped with a spark arrester, and was prudently operated by a competent engineer. He imposed the burden on the plaintiff of proving negligence, and instructed the jury that they were confined to the consideration of the two acts of negligence alleged—the defective spark arrester and the negligent operation of the train—and, if the defendant was negligent in these respects, as the jury has found, the prior negligent conduct of the plaintiff, if any, would not prevent a recovery. The question is analogous to one considered in *Arthur v. Henry*, 157 N. C. —, 73 S. E. 206, where it was held that consent given by the plaintiff to the defendant to blast for rock near his home would not prevent a recovery for injuries resulting from negligence in the operations.

3. This position finds support in *Doggett v. Railroad*, 78 N. C. 311, but it is not necessary for us to consider the facts and the reasoning in that case, because it appears from the evidence in this that two fires were

set out by the engine of the defendant, and that it was the first fire which was under the control of an employé of the plaintiff, and that, after he extinguished it and left the premises, the property of the plaintiff was destroyed by the second fire.

[4, 5] 4. When the charge of his honor is considered as a whole which it is our duty to do, the criticism of it, as presented by the fourth, fifth, and sixth contentions of the defendant, is not in our opinion sustained by the record. It is true that the word "modern" is used in connection with the appliances which the defendant was required to furnish, but "modern appliances" do not necessarily mean "the latest and best appliances," which the defendant insists was the effect of the charge, and could not have been so understood by the jury. The Century Dictionary defines "modern" as "pertaining to the present era, or to a period extending from a not very remote past to the passing time; not ancient or remote in time; not antiquated or obsolete"—and says by way of illustration that modern history comprises the history of the world since the fall of the Roman Empire or the close of the Middle Ages, and that modern fashions, tastes, inventions, and science generally refer to the comparatively brief period of from one to three or four generations. His honor told the jury that it was the duty of the defendant "to have its engines properly equipped with such appliances for the arresting of sparks as are in general and approved use, not such as will prevent any spark from escaping, but such appliances as are in general and common use, and that will subserve the purpose intended." And again: "If you find by the greater weight of the evidence the spark which set fire to the grass, and which fire was communicated to and destroyed the building, was caused by the failure of the defendant to properly equip its engine with a spark arrester that was modern and in common use, or they failed to properly operate or manage it, it would be negligence on the part of the defendant company."

[6, 7] If his honor stated a contention of the parties not supported by evidence, it was the duty of counsel to call it to his attention, but one of the witnesses testified that a shirt hanging in her garden was set on fire from the train; that, as she approached the railroad crossing, she had to put her apron over her head to keep the cinders from burning her; and that about that time sparks from the train set fire to the grass on the plaintiff's lot, which is, we think, some evidence that the quantity of sparks was unusual, and particularly so when considered in connection with the evidence of the conductor of the defendant that the spark arrester was in good condition, and that the engine did not throw any sparks.

[8] The part of the charge which the de-

fendant thinks made the liability of the defendant depend upon the negligence of the plaintiff in permitting his lot to remain in a foul condition is where his honor says: "There is another aspect to this case which you will take into consideration. It is for you to say what the proximate cause was. If you find as a fact that the engine was properly equipped, properly managed and operated, and sparks were emitted that set fire to property off the right of way—that is to say, if sparks were emitted from the engine that was properly equipped, managed and operated, and fell upon the land of the plaintiff off the right of way—there would not be any breach of duty on the part of the defendant because his property was burned, and the defendant would not be responsible. If you should also find that the plaintiff allowed his premises to become so foul with combustible matter that no reasonably prudent man would allow it to stay in that condition near a railroad, and that the cause of the injury was not the negligence of the defendant, but the proximate cause was the negligent act of the plaintiff in allowing his lot to remain in a foul condition, and if you shall find from all the facts and circumstances and by the greater weight of the evidence that it was not the act of a reasonably prudent man having regard to the rights of others to permit the condition in his lot, and that it was a case of negligence on his part, then that would be a bar to recovery, and you would answer the first issue, 'No.' If, however, you find that the engine was not equipped with modern proper spark arrester, and that it was not properly managed and operated, and that the proximate cause of the injury to the plaintiff's property was the negligence of the defendant to provide proper appliances and equipment to the engine, then it is your duty to answer that first issue, 'Yes.'" This was, in effect, instructing the jury to answer the first issue "No" if the spark arrester was in good condition and the train prudently operated, or if the foul condition of the lot of the plaintiff was the proximate cause of his loss, and that the issue could not be answered in favor of the plaintiff unless the jury found that the engine was not properly equipped with a spark arrester and was not properly managed and operated, and that this was the proximate cause, which was more favorable to the defendant than it was entitled to.

[9] 7. The measure of damage was stated correctly in the charge. *Williams v. L. Co.*, 154 N. C. 310, 70 S. E. 631. The house destroyed by the fire was a part of the land, and the injury was to the freehold. The inquiry, therefore, for the jury was, "How much has the land been depreciated in value by the fire?" which is but another way of ascertaining the difference in the value of the land before and after the fire. It was, of

course, competent to introduce evidence as to the size of the house, the quality and cost of the material used in its construction, the workmanship and other relevant facts, as bearing on the question of the decrease in value of the land.

[10] 8. As the liability of the defendant was made to depend solely upon failure to provide a proper spark arrester, or to operate its train prudently, if these facts were found to exist, the prior negligence of the plaintiff, if any, would not have prevented a recovery, and, in this view, the ordinance introduced by the defendant, and the evidence of the tenant of the plaintiff that he had not been notified to remove trash from the sidewalk, would be irrelevant and harmless, but, as the ordinance was admitted requiring notice to be given under certain conditions, it was not improper to permit the plaintiff to prove that the notice had not been given.

Upon a review of the whole record, we find no error.

No error.

FISHER v. CHAMPION FIBRE CO.

(Supreme Court of North Carolina. Dec. 20, 1911.)

Appeal from Superior Court, Buncombe County; Frank Carter, Judge.

Action by A. N. Fisher against the Champion Fibre Company. Judgment for plaintiff. Defendant appeals. Affirmed.

These issues were submitted: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Was the plaintiff guilty of negligence which contributed to his said injury? (3) Did the plaintiff assume the risks of being injured at the time mentioned, as alleged in the answer? (4) What damages, if any, has the plaintiff sustained?" The jury answered the first issue "Yes," the second issue "No," the third issue "No," and the fourth issue "\$1,150."

Martin & Wright, for appellant. Craig, Martin & Thomason, for appellee.

PER CURIAM. We have examined the 20 assignments of error set out in the record, all of which, except the motion to nonsuit, relate to the charge of the court. The majority of the court are of opinion that the motion to nonsuit was properly overruled, and that the charge follows the well-settled decisions of this court. No error.

(91 S. C. 5)

STATE v. POWELL.

(Supreme Court of South Carolina. March 12, 1912.)

CRIMINAL LAW (§ 1179*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding of fact by a magistrate in a misdemeanor prosecution, affirmed by the circuit judge, cannot be reviewed by the Supreme Court, if supported by any evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. § 1179.*]

Appeal from General Sessions Circuit Court of Clarendon County; J. W. De Vore, Judge.

S. D. Powell was convicted before a magistrate of failing to perform road duty, and he appeals from a judgment of the general sessions circuit court affirming the conviction. Affirmed and remanded.

Charlton Du Rant, for appellant. P. H. Stoll, Sol., for the State.

WATTS, J. This case was heard before Magistrate Bradham on a warrant charging the defendant with failure to perform road duty, under section 460 of Criminal Code. The defendant was found guilty and sentenced. An appeal was taken to the court of general sessions, and was heard by his honor, Judge De Vore. The judgment of magistrate's court was affirmed. From this order an appeal was taken to this court.

All of the exceptions relate to the testimony, and are to the effect that the state failed to make out its case, and that there was not sufficient testimony on which to base a verdict of guilty. This court has repeatedly held that a finding of fact by the magistrate, affirmed by the circuit judge, cannot be reviewed by this court, if there is any evidence to support it. *Seegers Bros. v. Seaboard Air Line Ry.*, 73 S. C. 83, 52 S. E. 797, 121 Am. St. Rep. 921; *Lewis v. Railroad Co.*, 78 S. C. 35, 58 S. E. 989. There is such evidence here.

The judgment of the circuit court is affirmed, and case remanded for the purpose of executing sentence.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur in the result.

(90 S. C. 507)

HUNTER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 6, 1912.)

1. CARRIERS (§ 262*)—CARRIERS OF PASSENGERS—DUTIES OF TICKET AGENT.

It is the duty of a carrier, through its ticket agents, to give its passengers such information as may be necessary for them to travel in comfort and safety, including information whether they can make a through trip on a certain train, and a passenger may rely on the information given by such agents acting within the scope, or apparent scope, of their authority.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 262.*]

2. CARRIERS (§ 277*)—CARRIERS OF PASSENGERS—ACTION FOR BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE—PUNITIVE DAMAGES.

Evidence, in an action against a carrier for alleged breach of its contract of transportation, held insufficient to show willful or wanton acts so as to warrant a verdict for punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1083; Dec. Dig. § 277.*]

3. CARRIERS (§ 276*)—CARRIERS OF PASSENGERS—ACTION FOR BREACH OF CONTRACT—PRESUMPTION AND BURDEN OF PROOF.

The law will not presume willful violations of duty, and one alleging that his rights have been willfully invaded has the burden of proving it, and to sustain such a charge something more is required than mere surmise or conjecture.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1078; Dec. Dig. § 276.*]

4. DAMAGES (§ 62*)—REDUCTION OF DAMAGES—BREACH OF CONTRACT.

One injured by the breach of a contract is bound to reasonably exert himself to avoid and lessen the damages therefrom, the effort to be made being governed by the rules of common sense and including a reasonable expenditure of money, and such damages as may be so avoided are not the proximate result of the other's breach, and cannot be recovered; but the rule does not apply when a person bound to make such effort shows reasonable grounds for his failure to do so.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 128; Dec. Dig. § 62.*]

5. CARRIERS (§ 277*)—CONTRACT OF TRANSPORTATION—BREACH—DAMAGES.

A passenger, who purchased a through ticket, but who, through inadvertence of the ticket agent, was not informed as to a necessary change, or that the train for a part of the route was a train carrying only sleeping cars for which there would be an extra fare, but whose damages and inconveniences in waiting overnight in a station might have been averted by the payment of \$5 for sleeping car accommodation, and who shows no reason why he did not do so, is entitled to recover no more than \$5.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

Action by John P. Hunter against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff remit all of the verdict above a certain amount.

B. L. Abney and McDonald & McDonald, for appellant. J. Harry Foster, for respondent.

HYDRICK, J. The plaintiff, who is sheriff of Lancaster county, went to Chester, Pa., to get a prisoner and bring him to this state. He carried a guard with him. On arriving at Chester, he went to the office of the Pennsylvania Railroad Company, and told the ticket agent who he was, where he was from, and what his business was, and that he wanted to go back on the first train that would carry him through to Charlotte; that he felt satisfied that (in getting back to Lancaster) he would have to change at Charlotte, and knew he would have to change at Rock Hill; but that he wanted tickets through to Lancaster, if possible; that he did not want to lay over anywhere; that, if he had to lay over, he would rather stay in Chester, until he could get a through train. The agent looked over his time-tables, and

told plaintiff he could sell him tickets to Lancaster, and that he could take a train at 6.03 that afternoon, and go right through. Plaintiff bought the tickets, and the agent said to him: "Be on time. The train flies. Come here and I will tell you how to go out to the train." And he did so. By mistake, plaintiff took a train that stopped at Wilmington, Del. The train which he should have taken was following, and he got on it at Wilmington and was carried to Washington without further trouble. He arrived at Washington at 9:25 p. m., and was informed that that train did not go further south, and that he would have to change and take a train on the Southern Railway for Charlotte. The Southern train was then standing in the station, and was due to leave for Charlotte at 10:45 p. m.; but this train was composed entirely of Pullman cars. Plaintiff went into the station for some purpose, and, on attempting to pass through the gates to go to the train, the gatekeeper, on examining his tickets, informed him that he would have to get Pullman reservations. Plaintiff informed him that the agent at Chester had told him that his tickets would carry him straight through, and that he was entitled to be carried on that train. The gatekeeper, however, refused him admittance, without Pullman tickets, telling him that he could get tickets for two berths at a cost of \$5, which would entitle the whole party, consisting of plaintiff, his assistant, and prisoner, to be carried on the Pullman train. Plaintiff refused to pay the extra charge, and returned to the waiting room, where he sat up all night, and until 9 o'clock the next morning, when he took the next train for Charlotte. Plaintiff actually lost no time in his arrival at Lancaster on account of the delay in Washington. In other words, he arrived at Lancaster on the same train he would have gotten there on, if he had been allowed to get aboard the Pullman train in Washington. Therefore the damage and inconvenience of which he complains consisted in his having to sit up all night in the waiting room at Washington. He brought this action to recover damages—actual and punitive—for the alleged negligent and willful conduct of defendant, through its agents and servants, in failing to give him correct information as to his journey and in refusing to allow him to enter the Pullman train and be carried thereon, without the payment of extra fare. Under the rulings and charge, plaintiff recovered judgment for \$500, actual and punitive damages.

[1] The exceptions questioning the rulings of the court below in admitting evidence of the conduct and statements of the agent at Chester, Pa., who sold plaintiff the tickets, cannot be sustained. It was admitted by defendant that the agent at Chester was its agent for the purpose of selling the tickets;

but it denied that he had any authority to do more, and contended that any statements or declarations made by him to plaintiff as to his making a through trip were incompetent, because he had no authority to make them.

It is the duty of a carrier, through those whom it has authorized to sell tickets over its lines, to give its passengers such instructions and information as may be necessary for them to pursue their journey in comfort and safety and with dispatch, and the passenger has the right to rely upon the instructions and information given by such agents, acting within the scope or apparent scope of their authority. *Smith v. Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708; *Gillman v. Railroad*, 53 S. C. 210, 31 S. E. 224.

[2] The exceptions which impute error in submitting the issue of punitive damages to the jury must be sustained. We have examined the record with care, and we find no testimony which warrants a verdict for punitive damages. No reasonable inference can be drawn from the testimony that the agent at Chester acted recklessly, willfully, or wantonly. On the contrary, he was courteous and polite to plaintiff, and volunteered to give him information and to show him how to get out to his train. From what took place between them, as detailed by plaintiff, it might be inferred that the agent inadvertently failed to find out that plaintiff would have to change cars at Washington, and also that he inadvertently neglected to inform plaintiff that the train from Washington to Charlotte was composed entirely of Pullman cars, and that he would have to pay extra fare thereon for Pullman accommodations. But the failure to give this information warrants no more than an inference of negligence; and, even as to that, there is room for serious difference of opinion, because plaintiff himself said that nothing was said about Pullman cars or Pullman reservations. The agent might very naturally have supposed that plaintiff knew, as every one who has had any experience in travel does, and as plaintiff admitted he did know, that the accommodations and conveniences of Pullman cars cannot be had without the payment of extra fare. Nothing was more natural than for him to have supposed that plaintiff, occupying the position which he did, not only knew this, but that he would also want such accommodations on such a long journey—especially as he had expressed the desire to go straight through. So that it is not surprising that the agent did not mention to plaintiff the fact that the train from Washington to Charlotte was made up entirely of Pullman cars. In fact, the agent testified that, if plaintiff had asked him, he would have told him that the train from Washington to Charlotte was a solid Pullman train, and that he would have to pay extra or Pullman fare thereon; but that he

took it for granted that, traveling at night, plaintiff wanted to use the Pullman cars. The tickets were—what the agent represented them to be—good for through railroad fare from Chester to Lancaster, and they were good for his railroad fare on the Pullman train which plaintiff wanted to take. There was nothing in the conduct of the gatekeeper at Washington which indicates indifference to plaintiff's rights. On the contrary, the gatekeeper, in order to save him the trouble and inconvenience of having to wait for another train, suggested the very course which reasonable prudence would have dictated to avoid the same, to wit, to pay the extra fare and proceed on his journey. In refusing plaintiff admittance to the train, he did no more than his duty in carrying out a reasonable rule of the company.

[3] This court has frequently said that the law will not presume willful violations of duty. The rule of conduct between men, in their dealings, is that of courtesy and due consideration for the rights of each other. Therefore, when one alleges that his rights have been willfully invaded, the burden is upon him to prove it. To sustain such a charge, reason and justice demand something more than mere surmise, conjecture, or caprice. *Taylor v. Railroad Co.*, 78 S. C. 552, 59 S. E. 641; *Crosby v. Railroad Co.*, 81 S. C. 24, 61 S. E. 1064; *Baker v. Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848.

[4] We next consider what damages the plaintiff is entitled to recover. The rule is well settled, and it is supported by reason and the great weight of authority, that the duty rests upon one who is injured by the breach of a contract or the mere negligence of another to reasonably exert himself to avoid and to lessen the damages resulting therefrom; and such damages as may be avoided by the exercise of reasonable efforts, care, and prudence on his part cannot be said to be the proximate result of the other's delict. Therefore there can be no recovery for damages which might have been so avoided. The efforts required of the injured party must be determined by the rules of common sense and fair dealing, and they include a reasonable expenditure of money. Of course, if the person whose duty it is to make such effort shows reasonable grounds for his failure to do so, the rule must not apply. 8 A. & E. Enc. L. (2d Ed.) 605; *Willis v. Tel. Co.*, 69 S. C. 539, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *Carter v. Railway*, 75 S. C. 355, 55 S. E. 771; *Campbell v. Railway*, 83 S. C. 451, 65 S. E. 628, 23 L. R. A. (N. S.) 1056, 137 Am. St. Rep. 824, and cases cited.

[5] It appears from the undisputed evidence that plaintiff could have averted all the damages and inconvenience which he alleges that he sustained by the payment of \$5 for the Pullman accommodations, and the fact that he could do so was called to

his attention by the gatekeeper at Washington. He presents no reason whatever why he did not do so, except that he preferred to stand upon his rights under the law. Therefore the plaintiff was entitled to recover no more than the sum of \$5.

The judgment of this court is that the judgment of the circuit court be reversed, unless the plaintiff remit all of the verdict in excess of \$5 within 20 days after notice of the filing of the remittitur herein in the circuit court.

GARY, C. J., and WOODS, J., concur.

(30 S. C. 475)

HARDAWAY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 2, 1912.)

1. CARRIERS (§ 35*)—INTERSTATE REGULATIONS—FREIGHT—RATES.

Where a railroad company files and publishes a schedule of rates pursuant to the interstate commerce act, it is bound under penalty to collect as freight the rate applicable according to the classification of that act without regard to any agreement between the shipper and carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

2. CARRIERS (§ 200*)—FREIGHT—OVERCHARGE—RECOVERY.

A shipper could recover a freight charge which was in excess of the rate fixed by the schedule filed and of the rate agreed upon in the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-905; Dec. Dig. § 200.*]

3. CARRIERS (§ 193*)—FREIGHT—RATES—AGREEMENT WITH INITIAL CARRIER—EFFECT ON CONNECTING CARRIER.

Unless a connecting carrier gave the initial carrier authority to fix the rate at which it would carry, it would not be bound by a rate quoted to a shipper by the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 868; Dec. Dig. § 193.*]

4. COURTS (§ 489*)—EXCLUSIVE AND CONCURRENT JURISDICTION—ACTIONS FOR OVERCHARGE BY CARRIER.

The complaint, in an action against a connecting carrier, alleged that plaintiff delivered lumber to the initial carrier, which was accepted by it as lumber, subject to tariff rates applicable to lumber, and that it issued a through bill of lading and agreed therein to transport the freight as lumber; that the rate and classification were expressly agreed upon before issuance of the bill of lading and delivery; that the regular rate on lumber was a certain sum, but that defendant refused to deliver the freight unless plaintiff paid a certain sum in excess of the rate and classification expressed in the bill of lading, and compelled plaintiff to pay such sum before delivering, though the classification and rate fixed were in conformity with the classification and rates filed with the Interstate Commerce Commission. *Held*, that the action was at common law to recover an overcharge, and not under the interstate commerce act, so that, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3170), providing that the act shall not abridge or alter the remedies now existing at common law, or by statute, but shall be in

addition thereto, the federal courts did not have exclusive jurisdiction of the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1324; Dec. Dig. § 489.*]

5. COURTS (§ 489*)—STATE AND FEDERAL COURTS—JURISDICTION—INTERSTATE COMMERCE.

The federal courts and Interstate Commerce Commission have exclusive jurisdiction of actions based upon the interstate commerce act.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

6. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE ON OFFICIAL DUTY.

The Interstate Commerce Commission will be presumed to have directed the time, place, and manner of publication of rates as required by law; the burden being upon a carrier to show the contrary in an action involving an interstate shipment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

7. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against the terminal carrier to recover overcharges paid to obtain the goods, any error in admitting in evidence letters written to the shipper by the initial carrier quoting rates, and also a letter written after the controversy between plaintiff and defendant concerning the alleged overcharge, was harmless, where the same facts were conclusively shown by the schedule of rates, bill of lading, etc., especially where the court charged that the parties could not by agreement depart from the schedule of rates filed with the Interstate Commerce Commission, and that, if plaintiff by fraud or mistake shipped a contractor's outfit as lumber, defendant properly collected the rate on the contractor's outfit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

8. CARRIERS (§ 202*)—FREIGHT—RECOVERY OF OVERCHARGE—ADMISSION OF EVIDENCE.

Where, in an action to recover the difference between the rate charged on a contractor's outfit and ordinary lumber, on the ground that the freight was really of the latter class, defendant's witnesses testified that the shipment should have been classified as a contractor's outfit, evidence was properly admitted that defendant had for a number of years carried similar timbers as lumber, especially where the jury were instructed that no agreement between the parties could make the shipment other than what it was.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 912; Dec. Dig. § 202.*]

9. CARRIERS (§ 189*)—FREIGHT—RATES—"STRUCTURE."

Raw material used to construct a machine or other structure, if resolved into its original elements as lumber, etc., could be shipped as such; but the machine or structure would be classified as a "structure."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 189.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6700-6702; vol. 8, p. 7806.]

10. PAYMENT (§ 82*)—RECOVERY—VOLUNTARY PAYMENT.

An action will not lie to recover money voluntarily paid with full knowledge of all the facts.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.*]

11. CARRIERS (§ 202*)—ACTION FOR OVERCHARGE—VARIANCE.

Where, in an action against a carrier to recover an overcharge, made by placing the freight in a higher classification than it properly took, the complaint alleged that defendant coerced payment of the higher rate by refusing to deliver the goods until it was paid, plaintiff cannot recover upon showing that the payment was made after delivery of the freight, but under a mistake as to the rate, or that the proper rate was intentionally concealed from him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 910; Dec. Dig. § 202.*]

Appeal from Common Pleas Circuit Court of Cherokee County; Robt. Aldrich, Judge.

"To be officially reported."

Action by B. H. Hardaway against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint alleged that plaintiff delivered a lot of lumber to an initial carrier, which was accepted by it as lumber subject to the tariff rates applicable to lumber; that it issued a through bill of lading consigned to plaintiff, and thereby undertook to transport the freight as lumber; that, before the issuance of the bill of lading, the rate and classification of the freight were expressly agreed upon between the shipper, consignee, and carrier; that the regular rate for which plaintiff was liable was a certain sum; but that defendant compelled plaintiff to pay a greater sum before it would deliver the consignment to plaintiff, notwithstanding that the classification and rate were in conformity with the classification and rates filed by the Interstate Commerce Commission with the Railroad Commission of the state.

Sanders & De Pass, for appellant. Butler & Hall, for respondent.

HYDRICK, J. The facts out of which this action arose, briefly stated, are as follows: On December 5, 1908, plaintiff delivered to the Chattahoochee Valley Railway Company, at Langdale, Ala., two car loads of extra large and long timbers for transportation to Kings Creek, S. C. The shipment passed over the line of an intermediate carrier, and was delivered to defendant at Atlanta, Ga., and was carried by defendant to destination. The initial carrier issued a through bill of lading, in which the shipment was classed as lumber, and, according to plaintiff's testimony, the general manager of that road quoted plaintiff the rate on lumber from Langdale to Kings Creek before the shipment was delivered to it. For the service, defendant demanded at destination, and plaintiff paid, the rate on a contractor's outfit, which amounted to \$143.92 more than the rate on lumber, and this action was brought to recover that amount. The defendant demurred to the jurisdiction of the court on the ground that the interstate commerce act

vests in the Interstate Commerce Commission and the federal courts exclusive jurisdiction of actions to recover overcharges on interstate shipments. The court overruled the demurrer. The exceptions assigning error in doing so will be disposed of first.

There was no contention as to the reasonableness of the rate either on lumber or on a contractor's outfit. Nor did the plaintiff contend that defendant was bound by the classification of the shipment made in the bill of lading. But his contention was that he was made to pay the rate on a contractor's outfit, when the shipment actually consisted of lumber. The timbers had been parts of a derrick which plaintiff had used in his business, and holes had been bored in them for the insertion of iron pins and bolts in the construction of the derrick, and the ends of some of them had been rounded and banded with iron. But, according to plaintiff's testimony, he had been shipping such timbers for years as lumber, by agreement with the railroad companies—the defendant among them—the only condition being that all irons should be removed from them, which his testimony tended to show had been done in this instance, though it was contradicted by some of defendant's witnesses. Plaintiff's testimony also tended to show that when the irons were removed from the timbers, they were worth no more than so much new timber or raw material; that, whenever they were used again, they were reworked, and the old holes were not utilized; and that he would not have shipped them at the rate on a contractor's outfit, because it would have been cheaper for him to buy new timbers.

[1] There can be no doubt that, if the shipment was properly classed as a contractor's outfit, defendant was not only entitled to charge and collect the established rate on that class of freight, if it had proved the filing and publication of the schedule of rates in compliance with the interstate commerce act, but it was bound, under heavy penalty, to do so, and that without regard to any agreement between the shipper and the carrier as to the rate or classification whether stipulated in the bill of lading or not. *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 89 L. Ed. 910; *Texas, etc., R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011.

[2] On the contrary, if it was lumber, the defendant had no right to demand more than the schedule rate on lumber, and anything which plaintiff was required to pay in excess of that rate was an illegal and unwarranted exaction, which plaintiff had the right to recover, because such exaction was not only in violation of the law, but also of the contract alleged to have been made with plaintiff.

[3] There was testimony tending to show that the rate quoted plaintiff on lumber

was the rate agreed upon between defendant and its connecting carriers in a joint schedule of rates filed with the Interstate Commerce Commission, and therefore that the initial carrier had authority under the common law to bind defendant in quoting the rate. Without proof of some authority given the initial carrier, the defendant would not have been bound even under the common law by the rate quoted the plaintiff by the initial carrier. *Smith v. Southern Ry. Co.*, 89 S. C. 415, 71 S. E. 989. But there was no contention as to the correctness of the rate quoted on lumber or the rate collected on a contractor's outfit. The issue was: To which class did the shipment belong?

[4] Upon these facts and circumstances alleged in the complaint, and established prima facie, at least, by the testimony, it cannot be denied that plaintiff had a cause of action against defendant at common law; and the action is, in fact, brought under the common law, and not under the interstate commerce act, either for damages for violation of that act, or upon any right or cause of action created thereby. Therefore, by the express terms of that act, the jurisdiction therein conferred upon the commission and the federal courts is cumulative and not exclusive, for in section 22 we read: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." In *M., K. & T. Ry. Co. v. New Era Milling Co.*, 79 Kan. 435, 100 Pac. 273, the Supreme Court of Kansas held that the state court had jurisdiction of an action to recover excessive charges on an interstate shipment when the plaintiff did not rely upon the interstate commerce act, but based his claims upon the principles of the common law. The same principle is held in *Gulf, etc., R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770. In *Judson on Interstate Commerce*, § 44, the author says: "In suits brought for the enforcement of rights in interstate commerce, and not for the specific enforcement of the provisions of the interstate commerce act, or the anti-trust act, the state courts have concurrent jurisdiction with the federal courts. * * * The fact that interstate commerce is beyond state legislative control does not ipso facto prevent the courts of the state from exercising jurisdiction over cases growing out of that commerce." Again, at section 248, he says: "The exclusiveness of the jurisdiction over suits brought under these remedial sections of the act to enforce its provisions must be distinguished from the concurrent jurisdiction of the state court over the questions in interstate commerce not arising or based upon the act."

The allegation in the complaint in this action that the classification and rate agreed upon and stipulated in the bill of lading were in conformity with the classification and rate filed with the Interstate Commerce Commis-

sion was not made to bring the action under the interstate commerce act, but to lay the foundation to recover the penalty provided by the statute of this state against carriers for failing to settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated is in conformity with the classification and rate filed with the Interstate Commerce Commission (24 Stat. 81); and therein lies the difference between our statute and the statute of Texas, which was held in the *Hefley Case*, supra, to be in conflict with the state commerce act, because it undertook to compel the carrier to settle according to the rate stipulated in the bill of lading, regardless of whether it was the rate filed with the commission or not.

In *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, the oil company sued the railroad company in the state court to recover an amount alleged to have been charged and collected on interstate shipments in excess of a reasonable rate. The rate collected by the carrier was that stated in the schedule of rates filed with the Interstate Commerce Commission and published according to the requirements of the interstate commerce act. The question was whether the state had jurisdiction to grant relief upon the finding that the rate charged was unreasonable. The Supreme Court of the United States held that it did not, and rested its conclusion upon the ground that, if jurisdiction were conceded to the state courts in such cases, it might prove destructive of the act, the main object of which was to establish just and reasonable rates and to prevent unjust preferences and discriminations, because, said the court, the diversity of decision in the courts as to what rates are reasonable might result in establishing the very preferences and discriminations which the act was designed to prevent. Therefore the only reasonable and logical conclusion was, as is clearly and cogently pointed out in the opinion, that the courts had no jurisdiction to determine the reasonableness of a rate, in anticipation of the action of the commission. We see nothing in the *Abilene Case* which is inconsistent with the jurisdiction of the state court in this case, for clearly there is not in this case any question as to the reasonableness of any rate. On the contrary, we find in that case a clear intimation in support of the jurisdiction of the state court in a case like this. In discussing the provisions of section 22 of the interstate commerce act, hereinbefore quoted, after having pointed out that the concessions of jurisdiction in the courts to determine the reasonableness of a rate would be destructive of the act, the court said: "This clause (i. e., section 22), however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be ab-

solutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act. Having concluded that the commission alone had power originally to entertain proceedings to alter an established rate, the court said: "It is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief, if the right asserted had not been repugnant to the provisions of the act to regulate commerce." So the question involved in this case was neither involved nor decided in that case.

In the *Hefley* Case the facts were these: The rate fixed by the carrier in the bill of lading for an interstate shipment was less than the rate established, filed with the Interstate Commission, and published, as required by the act of Congress. The carrier demanded and collected the established rate. The shipper sued in the state court and recovered judgment against the carrier for a penalty provided by the statute of the state of Texas against the carrier for charging more than the rate fixed in the bill of lading. The Supreme Court of the United States reversed the judgment of the state court, holding that the state statute was in conflict with the interstate commerce law, which penalized the carrier if it failed to collect the schedule rate, and, as the two statutes were in conflict, the state law must yield. In the *Mugg* Case, the carrier quoted the shipper, at the point of shipment, a rate on an interstate shipment, which was less than the schedule rate. At destination, the carrier exacted the schedule rate. The shipper sued in the state court and recovered judgment against the carrier for the excess of the schedule rate over the rate quoted. Following the *Hefley* Case, the Supreme Court of the United States reversed the judgment of the state court, holding that the carrier was bound, under the interstate law, to collect the schedule rate, which was binding on both carrier and shipper. We fail to see wherein the principle decided in either of these cases militates against our position, because the rate alleged to have been agreed upon in this case was the schedule rate for lumber, and the rate collected was the schedule rate for a contractor's outfit. There was therefore no issue about the rates, but only as to the classification. In neither the *Hefley* Case nor the *Mugg* Case was there any intimation that the state court had no jurisdiction of an action to recover a charge in excess of the schedule rate; but in each it was held that the state court erred in its

decision of the question involved on the merits. While it does not appear that the question of jurisdiction was raised in either of those cases, yet it can hardly be supposed that both the state court and the Supreme Court of the United States would have overlooked so important a question and have decided the cases on the merits, unless it had been supposed that the state courts had jurisdiction. A case involving a right similar to the one involved in this case was decided on the merits by the Supreme Court of Alabama (*Sou. Ry. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936), and the opinion of the Alabama court was adopted by the Supreme Court of the United States in the *Mugg* Case. Jurisdiction of similar cases has been assumed by the courts of Texas. *Railway Co. v. Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290; *Railway Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020. These cases afford an argument by implication at least in favor of our conclusion.

[5] Numerous cases hold, we think correctly, that the federal courts and the Interstate Commerce Commission have exclusive jurisdiction of actions based upon the interstate commerce act, or brought to enforce a right created by that act. *Van Patten v. Chicago, etc., R. Co.* (C. C.) 74 Fed. 981; *Edmunds v. Illinois Central R. Co.* (C. C.) 80 Fed. 78; *Carlisle v. Missouri, etc., R. Co.*, 168 Mo. 652, 68 S. W. 898; *Copp v. L. & N. R. Co.*, 43 La. Ann. 511, 9 South. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198. In some of the cases the broad statement is made that the state courts have no jurisdiction of actions to recover overcharges in the rates on interstate shipments; but an examination of these cases discloses the fact that the cause of action was created by or the action was based upon the interstate commerce act, or the word "overcharge" was used in the sense of an unreasonable charge. And whatever doubts may have existed as to the lack of jurisdiction in the state courts to determine whether an interstate rate is unreasonable, they were dispelled by the decision in the *Abilene Cotton Oil Company's Case*. But the word "overcharge" is also used in some of the cases to mean a charge in excess of "that which is established in the schedule rates filed with the Interstate Commerce Commission, and published as required by the interstate commerce act." We see no reason why the state court should not have jurisdiction of an action to recover such an overcharge, because the exaction of it is a violation not only of the interstate law, but of the contract of the carrier with the shipper, and it is a wrong for which the common law affords a remedy, and such remedy is, as we have seen, expressly preserved by the terms of the interstate commerce act. Moreover, the enforcement of the rights of the shipper and of the carrier in regard to such an overcharge does not in any manner

conflict with the interstate law. In *Banner v. Wabash R. Co.*, 131 Iowa, 405, 108 N. W. 759, the plaintiff was required to pay an arbitrary charge made by the carrier, because he shipped 16 head of cattle in an emigrant car, when the rules of the carrier fixing the rate limited the number to be shipped in such car to 10, and provided that the freight on animals in excess of that number should be at a certain rate, and established an arbitrary weight on which the computation should be made. There was nothing in the schedule of rates or classification filed with the Interstate Commerce Commission authorizing a charge for such arbitrary weight. The Supreme Court of Iowa held that the state court had jurisdiction of an action to recover the amount so paid by plaintiff; the suit not being one to recover an overcharge under the interstate commerce act, but to recover a wholly unjust and unauthorized exaction demanded and collected not only in violation of the act itself, but in violation of the contract made with the plaintiff, and therefore in violation of the common law.

In *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607, the Supreme Court of Missouri held that the state court had jurisdiction of an action by a shipper to recover an amount collected by a carrier on an interstate shipment in excess of the rate agreed upon between the carrier and the shipper, notwithstanding the carrier had filed its schedule of rates with the Interstate Commerce Commission, and notwithstanding the rate collected was the schedule rate. The ground upon which the court based its decision was that the carrier did not prove that it had published the schedule of rates as required by the interstate law. The court held that the carrier was bound to show that it had brought itself within the purview of the act by compliance therewith before it would be allowed to base any defense upon its provisions. The same ruling was made in *Railroad v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 121, and in *Railroad v. Horne*, 108 Tenn. 73, 59 S. W. 134. The principle upon which these cases were decided, if applied in this case, would be decisive in favor of the jurisdiction of the state court, because the defendant failed to prove that its schedule of rates was published in accordance with the requirements of the interstate commerce act. This being a case of a joint schedule of rates between connecting carriers engaged in interstate transportation, the act required its publication at such time and place and in such manner as the commission might require. There was no evidence of any direction as to its publication by the commission, and of compliance therewith by the defendant.

[6] The commission will be presumed to have done its duty and directed the time and place and manner of publication, and the burden was on defendant to show compliance therewith. *Wabash R. Co. v. Sloop*,

supra; *Railroad v. Horne*. While the reasoning in favor of the conclusion reached in those cases is not without force, we prefer to rest our conclusion that the circuit court had jurisdiction upon the ground that this action is not brought under or based upon the interstate commerce act, but upon the principles of the common law, and the remedies afforded thereby have been expressly preserved by the interstate commerce law; and because the enforcement of the rights of the parties in such cases by the state courts will in no way conflict with the interstate law, or tend to destroy the uniformity which it was designed to establish, any more than the decision of the same questions by the federal courts.

To hold that the state courts have no jurisdiction of actions like this will result in so much inconvenience and be so injurious in its consequences to the citizens of the states, and will place them so completely at the mercy of interstate carriers with regard to the settlement of such claims, that the argument in favor of that conclusion should be more cogent and convincing than it is to induce its adoption. The practical result of requiring shippers to go before the Interstate Commerce Commission or into the federal courts to collect these small claims will be to compel the abandonment of them altogether. We feel sure that Congress did not contemplate or intend any such result, and, in the absence of such intent, plainly expressed in or necessarily to be inferred from the provisions of the act, we are not inclined to adopt a construction which will lead to that result.

[7] The next assignment of error is in admitting in evidence two letters written to plaintiff by J. A. Avery, the general manager of the Chattahoochee Valley Railway Company, the initial carrier, and in allowing plaintiff's agent, Jamison, to testify as to the rates quoted him by Mr. Avery. The first letter is dated November 26, 1908, and was written before the shipment was delivered to the initial carrier. It quoted rates on lumber and a contractor's outfit from Langdale to Kings Creek. The other is dated September 2, 1909, and was written after the controversy had arisen between plaintiff and defendant about the alleged overcharge. In this letter Mr. Avery states that on November 26, 1909, he quoted plaintiff rates, and gives the rates quoted. He also states that the shipment was billed out by his road as lumber, and at the rate on lumber, and that the rate was raised beyond his line, and the rate on a contractor's outfit used. We deem it unnecessary to consider in detail the numerous grounds upon which the objection to this testimony was made, because it is apparent that there was no dispute about the facts which it tended to prove, and that they were conclusively proved by indisputably competent evidence—the rates by the schedule of rates, filed with the Interstate Com-

merce Commission, and the billing of the initial carrier by its bill of lading and the waybill, all of which were in evidence. Moreover, the court clearly and correctly charged the jury that the parties could not, by any agreement or device, vary or depart from the schedule of rates filed with the Interstate Commerce Commission; and that, if plaintiff, by fraud or mistake, shipped a contractor's outfit as lumber, it was the right and duty of defendant to make the proper correction and collect the rate on a contractor's outfit, but, if the shipment was, in fact, lumber, defendant had no right to collect the higher rate; and hence an important inquiry for them was whether the shipment was lumber or a contractor's outfit. So that, even if we were to concede, which we do not, that the testimony was erroneously admitted, it is clear that the error was harmless.

[8] There was no error in admitting evidence that for some years defendant had been carrying the same and similar timbers as lumber. There was nothing in such testimony which tended to vary the schedule rate, but it merely tended to prove the opinion previously held by defendant's agents and experts as to the real nature of the shipment which was necessarily a subject for opinion; and therefore defendant's experts were allowed to testify that, in their opinion, the shipment should have been classed as a contractor's outfit. Therefore it was clearly competent to prove that for some years past defendant's agents and experts had entertained a different opinion, which was evidenced by the fact that the same and similar timbers had been carried by defendant as lumber; and hence that defendant's present contention was not well founded. There was therefore no error in the instruction that the jury might, in determining the real nature of the shipment, consider how similar shipments had been regarded and dealt with by the parties themselves—especially as the jury were cautioned that no device or agreement or custom of dealing between the parties could avail to make the shipment other than what it really was, and that they must determine its real character.

[9] The court charged, in substance, that if raw materials were used to construct a machine, or other structure, and if such machine or structure were shipped, it would be subject to its proper classification and rate; but, if it were resolved into its original elements, these might be shipped as such, each being subject to its original classification, notwithstanding it had once been a part of a machine or other structure. The idea was illustrated by telling the jury that if raw materials, lumber, etc., were used to construct a house, and if the house were afterwards torn down and resolved into its original elements, that which was lumber might be shipped as lumber. We see no error in

this instruction. Certainly, the fact that materials have at one time been used for a certain purpose or in a particular way does not irrevocably devote them to that purpose or to be used in that way and no other. We see no reason why a cable which has been used in connection with and as part of a derrick, or other machine, should not be classed as a cable for transportation, when it has been disconnected from the derrick or machine.

[10] The defendant asked the court to direct the verdict in its favor on the ground, among others, that the money paid on account of the alleged overcharge could not be recovered, because the payment was voluntary. This request was refused. It is an elementary principle that no action will lie to recover money voluntarily paid with full knowledge of all the facts. *Robinson v. City Council*, 2 Rich. 317, 45 Am. Dec. 739; *Kenneth & Gibson v. S. C. R. Co.*, 15 Rich. 234, 98 Am. Dec. 382. The grounds upon which this principle of law is based are so fully stated and clearly reasoned in the cases cited that we deem it unnecessary to prolong this opinion by any further discussion of them. The general rule is thus succinctly stated in 30 Cyc. 1298: "Except where otherwise provided by statute, a party cannot by direct action, or by way of set-off or counterclaim, recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed."

It follows that, when one undertakes to recover money which he has paid to another, he must allege and prove some fact or facts which will take his case out of the general rule above stated; otherwise his complaint would be subject to demurrer for insufficiency. Plaintiff recognized this, because he alleges in his complaint that defendant coerced the payment of the alleged overcharge by refusing to deliver his goods until it was paid. We have searched the record diligently without being able to find any evidence tending to prove this allegation. On the contrary, it appears that the money was paid after the shipment was delivered to plaintiff. In their argument upon this point, respondent's attorneys make no attempt to point out any evidence tending to support the allegation of the complaint that the payment was made under compulsion. They do attempt to show some testimony from which it might be inferred that the money was paid under the mistaken assumption or belief that the amount charged by defendant was the rate on lumber; or, because it was difficult to figure the correct amount from the data at hand, that the payment was made under mistake or ignorance of all the facts. They also argue that it is inferable from the testimony that the change of the rate was concealed from plaintiff, and hence that there was a fraudulent concealment of facts.

[11] If we concede that such inferences might be drawn, we do not see how this can help the plaintiff, for unfortunately there is no allegation of any such facts or grounds of recovery in the complaint. The purpose of pleading is to advise the parties of the issues which they will be called upon to meet at the trial. It would violate one of the fundamental rules of law and pleading to allow the plaintiff to recover upon a different ground from that alleged. It is elementary that the allegata and probata must correspond. We are constrained to hold that on this ground the verdict should have been directed for defendant, and therefore the judgment below must be reversed.

Judgment reversed.

GARY, C. J., and WOODS, J., concur.

(90 S. C. 517)

LIPMAN v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. March 6, 1912.)

1. COMMERCE (§ 85*)—COURTS (§ 489*)—INTERSTATE COMMERCE—JURISDICTION ON STATE COURTS.

The Interstate Commerce Commission has jurisdiction to determine the number of miles between points in different states and the fare to be charged, and, where the commission makes a mistake in a schedule of rates adopted by it, a state court is without jurisdiction to change the schedule, though it is inconsistent with the statutes of the two states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85; Courts, Dec. Dig. § 489.*]

2. CARRIERS (§ 382*)—EJECTION OF PASSENGERS—PUNITIVE DAMAGES.

A passenger ejected by the conductor without unnecessary force because of the refusal to pay the proper fare demanded was not entitled to punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1489; Dec. Dig. § 382.*]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. E. Prince, Judge.

"To be officially reported."

Action by S. P. Lipman against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. B. De Loach and W. S. Tillinghast, for appellant. Simeon Hyde and James W. Moore, for respondent.

GARY, C. J. This is an action for actual and punitive damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in ejecting him from its train of cars, on account of his refusal to pay the amount of the fare, demanded for his passage. The allegations of the complaint, material to the questions under consideration, are as follows: "That on the 13th day of September, 1906, the plaintiff above named, at Ridgeland, a station on de-

fendant's road, in Hampton county, S. C., boarded one of defendant's passenger trains known as train No. 85, same going from Charleston, S. C., to Savannah, Ga., with the intention and purpose of becoming a passenger upon said train, having the money with which to pay his fare thereon, and plaintiff did become such passenger, and as such passenger he did offer and tender to the said defendant the fare in money, the sum of \$1.05, being 3 cents per mile, the legal rate per mile as published by defendant for his passage and transportation (said tender and offer being made in Hampton county, S. C.) from the said station at Ridgeland to Savannah, Ga., but the said defendant, at the said time and place, not only refused and declined to accept the lawful fare so offered and tendered by plaintiff, but in a rude and threatening manner demanded of plaintiff an unlawful and excessive fare, to wit, the sum of \$1.15, before it would transport him to his destination, which said unlawful fare this plaintiff refused to pay, and upon his refusal the defendant did willfully, unlawfully, and intentionally and with force eject the said plaintiff from the said train, at a place about two miles from Ridgeland, in Hampton county, S. C., and there and then the conductor of the said train by the rough, rude, and angry manner in which he ejected this plaintiff, greatly humiliated plaintiff, and offensively insulted him while forcibly ejecting plaintiff from defendant's said passenger train." The defendant denied the allegations of the complaint, and interposed the following defense: "That at the time named in the complaint, the plaintiff offered himself as a passenger on one of defendant's trains for interstate passage and transportation, that is to say, from Ridgeland, in Hampton county, S. C., to Savannah, Ga., and that the amount of fare or passage money, fixed according to law by the Interstate Commerce Commission of the United States for said carriage and transportation, is the sum of \$1.15, and that this defendant was by law entitled to charge such plaintiff for such carriage and transportation the said sum of \$1.15." At the close of the testimony the defendant's attorney made a motion for the direction of a verdict on the grounds stated in said defense, and upon the further ground that the testimony shows that the ejection was made by the conductor in the line of his duty, and without unnecessary force. The motion was granted, and the plaintiff appealed to this court.

The pivotal question is whether the rate fixed by the Interstate Commerce Commission is applicable to this case.

The plaintiff testified as follows: "Q. Now, Mr. Lipman, do you know, of your own knowledge, what the legal rate charged in Georgia was? A. At that time, three cents

a mile, same as in South Carolina. Q. Was there anything else that you know of that you desire to state? A. I would like to state, for the information of the judge and jury, that the milepost is a quarter of a mile north of Ridgeland, saying to Savannah 38 miles, where they charge for 40 miles. The milepost at Central Junction is 7 miles. From there we go to Union Station a distance of about 4 miles. Still the distance we travel is not 7 miles, as indicated by the milepost at Central Junction. That is the old milepost that was there, at the time when the Atlantic Coast Line ran into the old Bowling Street Station, but now they have changed from the old Bowling Street Station, to the Union Street Station, which is a distance of about $3\frac{1}{4}$ of a mile, 3 or 4 miles. After you leave the Central Junction, there is only one more milepost there. That is the old route that they used to travel. Q. When was it that they changed that route? A. They went into the Savannah Union Station on the 1st day of May, 1902. Q. Was that by what they call the short route? A. That is the short route now."

The defendant's attorney introduced in evidence the following certificate:

"Interstate Commerce Commission, Office of the Secretary, Washington. Edward A. Moseley, Secretary. I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the sheet hereto attached, contains a true and correct extract from Atlantic Coast Line Railroad Company Local Passenger Fares 1 C. C. No. A-86, reading as effective July 1, 1904, in effect on September 13, 1906, filed with the said Interstate Commerce Commission on June 29, 1904. In witness whereof I have hereunto set my hand and affixed the seal of said commission this 28th day of June, A. D. 1909. [Signed] Edw. A. Moseley, Secretary of the Interstate Commerce Commission.

"Extract from Atlantic Coast Line Railroad Company Local Passenger Fares 1 C. C. No. A-86, page 71: Between Ridgeland, S. C. and Savannah, Ga., distance 39.0, 1st-class fare, \$1.15."

[1] Prior to 1902, the distance between the stations at Ridgeland and Savannah was 39 miles; but at that time the station at Savannah was changed, thereby making the distance between Ridgeland and Savannah only 34 miles. Thereafter, to wit, on the 29th of June, 1904, the Atlantic Coast Line Railroad Company filed with the Interstate Commerce Commission its rates for local passenger fares, which was approved by the Interstate Commerce Commission, and became effective on the 1st of July, 1904, and was of force at the time when the plaintiff was refused passage, to wit, the 13th day of September, 1906. In the said schedule of rates, the distance between Ridgeland, S. C., and Savannah, Ga., was stated to be 39

miles, and the fare to be \$1.15. Since the approval of said schedule of rates by the Interstate Commerce Commission, there has been no change either in the distance between Ridgeland and Savannah, or in the amount of the fare. The commission had the right to determine the number of miles, as well as the fare that should be charged. The state courts are without jurisdiction to determine whether the fare charged for the number of miles traveled was unreasonable. *Texas, etc., v. Abilene Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Bilitch Co. v. Railroad*, 87 S. C. 107, 69 S. E. 16; *Hardaway v. Railroad*, 73 S. E. 1020. If the commission made a mistake, the state court is without jurisdiction to change the schedule of rates adopted by the commission. The rate per mile prescribed by the statutes of South Carolina and Georgia is inconsistent with the rate approved by the Interstate Commerce Commission, and therefore is ineffectual in this case. In this respect the case now under consideration is different from *Bilitch Co. v. Railroad*, 87 S. C. 107, 69 S. E. 16, and *Hardaway v. Railroad*, 73 S. E. 1020. The exceptions raising this question are overruled.

[2] The exceptions assigning error on the part of his honor the presiding judge in ruling that there was no testimony tending to show that the plaintiff was entitled to punitive damages are also overruled.

Judgment affirmed.

WOODS and HYDRICK, JJ., concur.

(90 S. C. 513)

JONES v. DEVEREAUX.

(Supreme Court of South Carolina. March 6, 1912.)

1. APPEAL AND ERROR (§ 231*)—EXCEPTIONS TO ADMISSION OF EVIDENCE.

An exception to the admission of evidence over a general objection will be overruled on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. § 231.*]

2. APPEAL AND ERROR (§ 233*)—RULINGS ON EVIDENCE—REVIEW.

Where the court admitted evidence over objection and stated that after the evidence was in the party could make an objection and the court would pass on it, and there was no further objection, the ruling on the evidence was not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 233.*]

3. APPEAL AND ERROR (§ 1078*)—REVIEW—EXCEPTIONS NOT ARGUED.

An exception not argued will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

4. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the attorney for defendant in his argument stated that the difference between

the parties was the location of a corner, and plaintiff's attorney admitted in his argument that the sole issue was over the location of a dividing line, a charge that the question at issue was a question of location was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

5. ADVERSE POSSESSION (§ 44*)—CONTINUITY—ACTS CONSTITUTING.

One asserting title by adverse possession and maintaining open, notorious, and adverse possession for 10 years from the date of his entry into possession under his deed, acquires title by adverse possession, and he need not show that his possession was continuous against one and the same person during such period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226-231; Dec. Dig. § 44.*]

Appeal from Common Pleas Circuit Court of Richland County.

"To be officially reported."

Action by R. O. Jones against J. F. Devereaux. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Walter Green, for appellant. Frank G. Tompkins, for respondent.

GARY, C. J. The plaintiff alleges that he is the owner of the land described in the complaint, upon which the defendant has trespassed, for which he demands damages, and seeks equitable relief by way of injunction to prevent further trespasses. The defendant answered the complaint, setting forth his sources of title, and claiming title by adverse possession. The jury rendered a verdict in favor of the plaintiff with damages, and the defendant appealed upon exceptions, the first of which is as follows: "That his honor erred in admitting the testimony of G. McD. Hampton as to an alleged agreement between the defendant and one Mrs. Williams, the error being that the plaintiff was neither a party nor a privy to said agreement, said agreement not having been against the interest of defendant, and being an attempt to prove title by parol."

[1] When the plaintiff's attorney offered to introduce the agreement in evidence, the defendant's attorney merely said, "I object," but did not interpose the grounds of objection mentioned in the exception. This exception is therefore overruled.

[2] The second exception is as follows: "That his honor erred in admitting in evidence a plat of the lands of Mrs. Williams (Exhibit C), the same being no part of plaintiff's chain of title." The record contains this statement: "Mr. Tompkins: We offer in evidence plat of Chisolm dated June, 1892, marked 'Exhibit D.' Mr. Green: I object; nothing to do with his chain of title. The Court: I cannot tell what papers are relevant, and what are not. When you go to discuss the evidence, after all the papers are in, you can then make your objections,

and I will pass on them." The record fails to show that his honor the presiding judge was thereafter requested to rule upon said objection.

[3] The third exception was not argued, and therefore will not be considered.

[4] The fourth exception is as follows: "That his honor erred in charging the jury that the question at issue 'is what we call in law a question of location,' the error being the issue between plaintiff and defendant was the title to the land in dispute." In his argument the appellant's attorney says: "The paper title of plaintiff to the tract described in his deed was admitted, as was the title of the defendant to the tract described in his deed. * * * The difference between plaintiff and defendant is the location of the Haskell corner." The respondent's attorney also admits in his argument that "the sole question in dispute was over the location of the dividing line." There was therefore no error in said ruling.

[5] The fifth exception is as follows: "That his honor erred in refusing defendant's fourth request to charge, being submitted to his honor as follows: 'If the jury believe from the evidence that the defendant entered into possession of the land in dispute, at the date of his deed (1892), and maintained open, notorious, and adverse possession of the same up to the commencement of this suit (1907), they must find for the defendant.' The error being that the request as submitted was a correct proposition of law applicable to the case. And in charging the jury: 'As written here, it is technically correct, but I am explaining adverse possession; if the plaintiff in this action came into possession less than 10 years, that possession does not apply to him.'" His honor the presiding judge seems to have entertained the opinion that it was not only necessary for the party, asserting title by adverse possession, to show that the possession by him was continuous for 10 years, but that it was also continuous against one and the same person, during that period. We do not deem it necessary to cite authorities to show that the ruling of his honor the presiding judge was erroneous.

The sixth exception is as follows: "That his honor erred in refusing to charge defendant's fifth request to charge, which was submitted to him as follows: 'If the jury believe from the evidence that the defendant was in possession of the land claiming them as his own for more than 10 years prior to the purchase by the plaintiff (1905) and maintained such possession up to the commencement of this suit (1907), they must find for the defendant.' The error being that the request as submitted was a correct proposition of law applicable to the case. And his honor erred in charging he must maintain

adverse possession against the true owner for the whole period of 10 years, the same man." In refusing to charge the request herein, the circuit judge used language similar to that used by him in refusing the request embodied in the fifth exception, and what has just been said disposes of this exception.

Judgment reversed, and case remanded for a new trial

WOODS, HYDRICK, and FRASER, JJ., concur. WATTS, J., disqualified.

(90 S. C. 523)

SURASKY et al. v. WEINTRAUB et al.
(Supreme Court of South Carolina. March 6, 1912.)

1. TRUSTS (§ 72*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

A resulting trust is not dependent upon the agreement of parties, but arises by operation of law when money of one person is used in the purchase of land and title is made to another, whereupon he who is vested with the legal title becomes a trustee and cannot hold the land against the person whose money was used in paying therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.*]

2. TRUSTS (§ 63½*)—RESULTING TRUSTS—NATURE.

The doctrine of resulting trusts has no application when there is an express agreement between the parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 92; Dec. Dig. § 63½.*]

3. MORTGAGES (§ 37*)—ABSOLUTE DEED AS MORTGAGE—PAROL EVIDENCE.

Parol evidence is admissible to show that a deed absolute on its face was intended as security for a loan.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 98; Dec. Dig. § 37.*]

4. TRUSTS (§ 63½*)—RESULTING TRUSTS—TIME OF CREATION.

A resulting trust must be coeval with the deed under which it arises, and cannot arise from subsequent transactions.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92; Dec. Dig. § 63½.*]

5. TRUSTS (§ 80*)—RESULTING TRUSTS—LOAN OF PURCHASE MONEY.

Where one person lends money to another to be used in the purchase of land, no resulting trust arises in favor of the lender in the land purchased, title to which is taken in the borrower's name, though it was agreed that the interest in the land should vest in the lender to the extent of his loans, especially where the borrower and lender are both liable under a mortgage executed by them in favor of the vendor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 114; Dec. Dig. § 80.*]

6. TRUSTS (§ 63½*)—RESULTING TRUSTS—PAROL EVIDENCE—EXPRESS AGREEMENT.

Though a resulting trust may be established by parol evidence, when the proposed testimony shows an agreement beyond what the law would imply it is inconsistent with a resulting trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 91; Dec. Dig. § 63½.*]

7. TRUSTS (§ 86*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER—PRESUMPTION.

Though a resulting trust arises in favor of one who pays the purchase money of an estate and takes title in the name of another because of the presumption that he who pays for a thing intends a beneficial interest therein for himself, this presumption cannot arise when a contrary intent appears.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

8. FRAUDS, STATUTE OF (§ 83*)—LAND—EQUITABLE MORTGAGE—CREATION.

Where plaintiffs and defendant agreed to purchase land, plaintiffs to advance defendant a portion of the purchase money, and defendant agreeing that, though he is to take legal title to his portion, the plaintiffs may hold it as security for their advance, no equitable mortgage on defendant's share is created in view of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 101; Dec. Dig. § 83.*]

9. SUBROGATION (§ 23*)—PAYMENT OF MORTGAGE.

Plaintiffs and defendant having executed a purchase-money mortgage to the vendors, plaintiffs are entitled to be subrogated to the interest of the grantors under the mortgage to the extent of defendant's share of the debt secured by such mortgage.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. § 23.*]

Gary, C. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Aiken County; R. W. Memminger, Judge. "To be officially reported."

Action by Hyman Charles Surasky and others against Charles Weintraub and others. From a judgment for plaintiffs, defendants appeal. Modified.

The complaint alleged for a first cause of action that the four plaintiffs and defendant Charles Weintraub entered into an agreement that they would jointly purchase a tract of land from defendants M. M. Coward and T. F. Coward; each party stipulating to pay one-fifth of the purchase price as his individual share of the indebtedness, and the deed to be taken in the names of all the parties to the agreement. In pursuance of the agreement, the parties purchased the tract for \$5,000, payable \$500 at the time of purchase, and \$500 annually thereafter with interest at 7 per cent., payable annually. Thereupon a deed was executed conveying the land in fee simple. Previous to and at the time of sale, defendant Weintraub had informed his cotenants that he had no funds to pay his portion of the price, but agreed that if they would advance his portion he would pay the same whenever it became due according to the agreement with the grantors, and to secure his cotenants agreed that, while the legal title to the one-fifth part of the premises was to be taken in his name, it should be their property until he fully paid his part of the price, and he would hold it for their benefit and protection in

consideration of their advancing his portion of the price. Plaintiffs, relying upon these representations and agreement, paid to the Cowards the entire portion of the purchase money due by defendant Weintraub, and the deed to the premises was delivered conveying the tract to all the parties as joint tenants, each owning one-fifth part thereof. The parties executed a bond secured by a mortgage of the premises on payment of \$500 in cash for the balance of the purchase money, payable \$500 cash on delivery of the deed and \$500 annually thereafter on the 1st day of January of each year. Defendant Weintraub has paid no part of the debt to his cotenants, but the plaintiffs have from time to time paid the entire portion of the debt due by defendant Weintraub, and there is now due for moneys thus advanced, together with the principal of his debt, the sum of \$298.11. The plaintiffs allege that by reason of these facts and circumstances a trust results in favor of plaintiffs for the full amount and should be so declared by the court, and the defendant directed to convey by deed in fee simple his one-fifth part to the plaintiffs. There appears on the record in the office of the clerk of court a mortgage by the plaintiffs and defendant Weintraub to M. M. and T. F. Coward, such mortgage constituting a lien on the tract referred to, and they are therefore necessary parties to the action.

For a second cause of action, the complaint alleges that the plaintiffs entered into an agreement with defendant Weintraub to employ him as general manager at a salary of \$25 per month; his duties being to control in general the cultivation and harvesting of all crops on the tract mentioned and to keep the place in good order, the machinery in repair, and to oversee labor and perform all other duties to properly cultivate the land. The other parties were to advance all money needed for labor, material, etc., in raising, cultivating, and harvesting the crops; such expenses to be shared equally between the parties, that is, each to pay one-fifth part thereof, and all profits, if any, to be divided equally between them. Pursuant to such agreement, the plaintiffs advanced \$1,130.82; a portion thereof being due by defendant Weintraub as his one-fifth part. The plaintiffs allege that no part of this indebtedness has been paid by defendant except \$125 paid by direction of the defendant, that his salary of \$25 per month be credited thereon, and that there is still due the sum of \$101.15.

J. B. Salley, for appellants. Croft & Croft, for respondents.

GARY, C. J. The complaint sets forth five causes of action. The first seeks to have a resulting trust declared in certain lands, and the second is for an accounting. The others are not involved in this appeal. His honor the circuit judge who heard the case ruled that there was a resulting trust in favor of

the plaintiffs, under the first cause of action, but that under the second cause of action nothing was due the plaintiffs, for the reason that they applied the salary of the defendant Weintraub for superintending the farming operations, in payment of his proportionate part of the expenses. The defendant Weintraub appealed upon exceptions, which will be reported, except the first, which was withdrawn.

The main question in the case is whether his honor the circuit judge erred in ruling that there was a resulting trust in favor of the plaintiffs. In the first place, the facts alleged in the first and second causes of action (which will be reported) show that the money advanced by the plaintiffs to Weintraub was a loan, and that there was error in declaring a resulting trust. In the second place, the testimony of the plaintiffs themselves is to the same effect.

The plaintiff Samuel Surasky testified as follows: "Q. When that day came and you purchased this land, and \$500 was due, what was said about Mr. Charles Weintraub paying his part of the \$500 on the day it was purchased? A. He agreed to give us his one-fifth interest in the place, for us to pay out the money until he could pay it back. * * * Q. Did you or did you not agree to let the title go in the name, in that same agreement? A. At first we agreed to do it, and we had to hold it for the debt, until he paid for it. * * * Q. At the time the place was purchased, when he agreed to let you have his one-fifth interest, until he paid you back, was any time agreed on, when he should pay you for the money advanced? A. Yes, sir; he agreed we shall pay his one-fifth, and he will pay back in January, 1909." On cross-examination he testified: "Q. As I understand you, that agreement was that the title should be made out to all five of you, but with the understanding that his share or one-fifth interest should stand good for whatever moneys you advanced to pay his part? A. It was no understanding; he agreed that we shall keep it, until he pays his one-fifth part. Q. It was to protect you from losing what money you advanced for his share? A. We agreed we should keep that, for the money we paid the Cowards, until he paid us back. Q. And the title was made to him and all of you? A. Yes, the five. * * * Q. You say he was to pay you back that first payment, on the following January, 1909? A. Yes, sir. Q. When was he to pay you back what you advanced for him? A. In January, 1909, his part of the interest then due. Q. In January, 1910? A. No, he said in 1909, when he came to the payment, he said he agreed for us to keep it, he didn't have any money, but we should carry it on. Q. When did he say he would pay you back what you advanced to the Cowards, his part of the interest then due? A. He said he would try to pay it, in January, 1910, but he

did not. Q. In January, 1910, when you made this payment to the Cowards, did you talk with him then about advancing his share? A. We wrote to him to come at once. Q. Did he come? A. No, sir. Q. You advanced the installment in 1910, without his coming or without his writing about it? A. Yes, sir."

Hyman Surasky testified as follows: "Q. What agreement, if any, did you make with Mr. Weintraub about furnishing his money? A. Before we bought the place, we asked him if he had his money to pay his share. He said he had some debts owing him, and some stock of goods, but he had none then, but would have it by January 1st, but could not get it now, but he agreed to let us pay Mr. Coward his fifth, and let us hold his share until he paid." On cross-examination he testified: "Q. As I understand, Mr. Weintraub agreed that his one-fifth interest in the property should be as security for the money you advanced to pay his share? A. We said it should belong to us until he paid it. Q. Why was title made out to him, as well as to you all? A. Well, I believe that the agreement was, we knew that he had money owing to him, and we fully trusted him, that he would pay on January 1, 1909, his part. Q. How much money in goods did he say he had owing to him, with which he could pay you back, on January 1st his part? A. Between \$200 and \$300."

[1] A resulting trust is not dependent upon the agreement of parties, but arises by operation of law whenever the money of one person is used in the purchase of land, and the title is made to another. He who is vested with the legal title becomes a trustee, and cannot hold the land against the person whose money was used in paying for the land.

[2, 3] The doctrine of resulting trusts has no application, when there is an express agreement between the parties; and parol evidence is admissible for the purpose of showing that a deed, though absolute on its face, was intended as security for a loan. *Brownlee v. Martin*, 21 S. C. 392.

[4] The trust must be coeval with the deed, and cannot arise from any subsequent transactions. *Ex parte Trenholm*, 19 S. C. 128.

Therefore, in determining whether there was a resulting trust in this case, we must look to the status of the parties at the time the deed was executed. Weintraub joined in executing the bond and mortgage to the Cowards, for the purchase money of the land, and thereby incurred an equal liability with the other mortgagors; and to declare that there was a resulting trust at that time would take from him his share of the land, but leave him liable to the Cowards for his proportion of the unpaid purchase money. It is true the Cowards in their answer state that "they are perfectly willing,

and hereby waive all and any rights to any judgment, that they might be entitled to, against the defendant Charles Weintraub, by way of a deficiency"; but subsequent transactions cannot give rise to a resulting trust. The testimony of the plaintiffs shows that they do not contend that Weintraub did not have an equal interest with each of them in the land, when the deed and mortgage were executed, but that by failing to pay the amount advanced by them for him he thereby forfeited his interest in the land. As the failure to pay took place after the deed was executed, it could not have the effect of raising a resulting trust. The fact that the salary of Weintraub was applied by the plaintiffs to the expense account is inconsistent with the theory that there was a resulting trust, and tends to show that he was recognized, after the said agreement, as one of the owners of the land, and jointly liable for the purchase money. The agreement to pay him for his services was a part of the contract hereinbefore mentioned, made by the plaintiffs and said defendant on the 6th of July, 1908.

[5] The following principles are applicable to this case: "The rule is well settled that where one person lends money to another, to be used by the borrower in the purchase of land, no resulting trust arises in favor of the lender in the land purchased by the borrower, title to which is taken in the latter's name. And this has been held true, though at the time of the loan it was agreed between the borrower and the lender that the interest in the land to be purchased by the borrower should vest in the lender to the extent of his loans." 15 Enc. of Law, 1149, 1150. The principle just stated applied with greater force when, as in this case, the borrower and the lender are both liable under a mortgage executed by them, in favor of the vendor to secure payment of the purchase money.

[6] A resulting trust may be established by parol evidence; but, when the proposed testimony shows an agreement beyond what the law would imply, it involves an express agreement, inconsistent with a resulting trust. *Bell v. Edwards*, 78 S. C. 490, 50 S. E. 535.

[7] "A resulting trust arises in favor of one who pays the purchase money of an estate and takes title in the name of another, because of the presumption that he who pays for a thing intends a beneficial interest therein for himself; but this presumption cannot arise when a contrary intent appears, since it is based on the absence of evidence of such contrary intent. *Manning v. Screven*, 56 S. C. 83, 34 S. E. 22.

"Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be made by after advances, or funds subsequently furnished. It does not arise upon

subsequent payments, under a contract by another to purchase." *Oicott v. Bynum*, 17 Wall. 59, 21 L. Ed. 570.

The exceptions raising this question are sustained.

Although there was not a resulting trust, and the money advanced must be regarded in the nature of a loan, secured by the interest of Weintraub in the land, it does not follow that the plaintiffs are not entitled to relief. The plaintiffs have an equitable mortgage on the interest of Weintraub in the land, and there is no reason why, under the authority of *Phillips v. Anthony*, 47 S. C. 460, 25 S. E. 294, they may not in this action apply for such an order as will subject the interest of Weintraub to the payment of the amount due them by him.

Conceding that the agreement between Weintraub and the Suraskys, whereby the interest of Weintraub in the land should stand as security for the amount advanced by them, was obnoxious to the statute of frauds, nevertheless, when the Suraskys performed their part of the agreement, by advancing the money, Weintraub was estopped from relying upon such statute.

In the case of *Walker v. Railway*, 26 S. C. 80, 1 S. E. 366, it was held that if a parol agreement was obnoxious to the statute of frauds still one party cannot avail himself of this statute after full performance of the agreement by the other. The court therein used this language: "But even if the contract when originally made was obnoxious to the statute, yet after it had been fully performed by the plaintiff the defendant could not then avail itself of the statute"—citing *Bates v. Moore*, 2 Bail. 614; *Gee v. Hicks*, Rich. Eq. Cas. 5; *Carter v. Brown*, 3 S. C. 298, to which may be added *Brownlee v. Martin*, 21 S. C. 392, and *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580.

For the foregoing reasons I dissent from so much of the opinion of Mr. Justice WOODS, as is inconsistent with the views herein expressed.

WOODS, J. [8] I concur in the conclusion that there was no resulting trust in favor of the plaintiffs, but dissent from the last proposition laid down in the opinion of the Chief Justice that the plaintiffs have an equitable mortgage on the interest of the defendant Weintraub in the land. An equitable mortgage is not created by the mere advance of money accompanied by a parol agreement of the debtor that the creditor shall have a mortgage. There was no part performance, nor was there any promise to make a mortgage in the future from Weintraub to the Suraskys. Upon the purchase of the land by Weintraub and the Suraskys together and the making of the title to all of them, Weintraub took possession for all the par-

ties including himself, under the right which he had in common with the Suraskys to enter and hold the land as a tenant in common. A mere promise by Weintraub to the Suraskys to pay his portion of the purchase money advanced by them, and his agreement that they should have a lien therefor, cannot create an equitable mortgage as long as the statute of frauds remains the law of the land. None of the cases cited by the Chief Justice sustain the position that a lien on land can be created in favor of a creditor advancing money, by a mere parol agreement from the debtor that the debt shall be a lien, and I do not think any authority for such a proposition can be found. The subject has been discussed at length in the opinion in the case of *Folk v. Brooks*, 74 S. E. 46, and I refer to that opinion for a full statement of the reasons for my conclusion on this point.

[9] It follows that the plaintiffs are entitled to recover an ordinary money judgment against Weintraub for the sum of \$100 loaned to him to purchase his share of the land with interest thereon from the date of the loan. They will also be entitled to subrogation to the rights of the Cowards as mortgagees to the extent of any sum they may pay on the portion of the mortgage debt owing by Weintraub.

The judgment of this court is that the judgment of the circuit court be modified to conform to the conclusions herein expressed.

HYDRICK, WATTS, and FRASER, JJ., concur.

(90 S. C. 552)

NEW YORK LIFE INS. CO. v. MOBLEY.

(Supreme Court of South Carolina. March 11, 1912.)

1. ACTION (§ 35*)—STATUTORY REMEDIES—VACATION OF JUDGMENT—REMEDY AT LAW.

It was the intention of Const. 1868, art. 5, § 3, providing that the General Assembly shall provide for abolishing the distinct forms of action and for a committee on revision, and of the Legislature by Code Civ. Proc. 1902, § 161, to abolish proceedings by petition for rehearing and by bill of review, and to substitute therefor the remedy provided by Code Civ. Proc. 1902, § 195, providing for the opening and vacating of a judgment for fraud, inadvertence, or excusable neglect on motion in the court rendering the judgment.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273-294; Dec. Dig. § 35.*]

2. JUDGMENT (§§ 499, 521*)—COLLATERAL ATTACK—EQUITABLE RELIEF.

A jurisdictional defect which does not appear upon an inspection of the record does not render a judgment void, but only voidable; and proceedings to have the judgment declared a nullity, other than a motion in the cause in which the judgment was rendered, must be regarded as a collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 940, 964; Dec. Dig. §§ 499, 521.*]

3. JUDGMENT (§ 419*)—EQUITABLE RELIEF—GROUNDS.

An action cannot be maintained on the equity side of the court to set aside a judgment on the ground that it was a nullity, by reason of the fact that the summons was not served upon the defendant, unless the complaint alleges some other fact entitling plaintiff to equitable relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.*]

4. JUDGMENT (§ 407*)—EQUITABLE RELIEF—GROUNDS.

An action in equity for relief against a judgment on the ground that summons was not served on the defendant cannot be sustained because of the issuance of an execution upon the judgment, since relief against such execution may be obtained by motion in the cause in which the judgment was recovered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 769; Dec. Dig. § 407.*]

5. JUDGMENT (§ 460*)—EQUITABLE RELIEF—AVERMENT OF GROUNDS—MULTIPLICITY OF SUITS.

Equitable relief against a judgment for failure to serve the summons on the defendant will not be granted to prevent a multiplicity of suits, where no facts are alleged showing the necessity thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 879; Dec. Dig. § 460.*]

6. CONSTITUTIONAL LAW (§ 307*)—DUE PROCESS OF LAW—ENFORCEMENT OF JUDGMENT—SERVICE OF PROCESS.

The contention that the refusal of equitable relief against a judgment in an action wherein the summons was not served on the defendant, though it appeared from the return of the sheriff that it had been served, will permit the taking of property of the defendant without due process of law, contrary to Const. U. S. Amend. 14, will not be sustained; the defendant having an adequate remedy at law by motion in the cause in which the judgment was rendered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 925; Dec. Dig. § 307.*]

Appeal from Common Pleas Circuit Court of Lancaster County; R. C. Watts, Judge.

"To be officially reported."

Action by the New York Life Insurance Company against Nannie B. Mobley. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 89 S. C. 189, 71 S. E. 817.

James H. McIntosh, R. B. Allison, and D. W. Robinson, for appellant. J. Harry Foster, for respondent.

GARY, C. J. This is an appeal from an order refusing an injunction and sustaining a demurrer to the complaint.

The action was brought by the New York Life Insurance Company for the purpose of having the judgment mentioned in the complaint declared to be null and void, and, in the meantime, of enjoining the enforcement of the execution issued upon said judgment.

The grounds upon which the plaintiff asks relief are thus summarized by the appellant's attorneys: "That the plaintiff, which was the defendant in the former action, had

never been served with process and had had no opportunity whatever of being heard in the cause which had been instituted against it by the defendant. That the service of the summons and complaint in the action brought by defendant contained proof of service, such proof consisting of the certificate of the sheriff that he had served the summons and complaint on one M. L. Beckham, as an agent of the plaintiff company; but, in fact and in truth, said Beckham was not an agent of the plaintiff company, took no notice of the paper served upon him, and gave no information thereof to the plaintiff company; and that plaintiff has at all times had an agent, duly appointed and designated according to law, within this state, upon whom service of process could be made. That a judgment by default was taken and entered against the plaintiff upon such service, and entirely without the knowledge of the plaintiff, until a short time after it was entered. That plaintiff brought this action promptly, after learning of the default judgment. That the plaintiff had a good and valid defense to the action, which is set out in the complaint, to the effect that the policy of insurance sued on had lapsed several years before the death of the insured by reason of the nonpayment of the insurance premiums. That the plaintiff was prevented from setting up its defense and from being heard thereon *through no fault or negligence on its part*, and the judgment rendered against it is unjust; and that it will be inequitable and unconscionable to allow the enforcement of a judgment so taken. That the defendant is proceeding to enforce and collect said judgment, which is in fact null and void."

The plaintiff alleges "that, unless restrained, the defendant will issue execution on said judgment, and cause the same to be levied on its property, and thereby injure its good name and reputation within said state by creating the impression that it is unwilling to pay its just debts, and will harass and annoy it, and interfere with its business in said state, and involve said company in a multiplicity of suits, and will take the property of said company without due process of law, contrary to the fourteenth amendment to the Constitution of the United States, to the great and irreparable injury of said company, for which it can have no adequate remedy at law."

The grounds of demurrer interposed by the defendant's attorney were as follows: "That the plaintiff has no cause of action, as alleged in the complaint, as the judgment therein set out is not subject to a collateral attack, and that the cause of action pleaded is a collateral attack on the said judgment. That the plaintiff has a plain and adequate remedy at law, to wit, a motion in the orig-

inal cause to vacate, modify, or otherwise secure the appropriate relief, under section 195 of the Code, providing for the opening and vacating of a judgment for fraud, inadvertence, or excusable neglect. That the Code of Civil Procedure has abolished the form of action set out in the said complaint; and that there is no sanction thereof by the Code of Civil Procedure. That the said complaint fails to state facts sufficient to constitute a cause of action, in that the complaint fails to show that the plaintiff has not a plain and adequate remedy at law. That the complaint on its face shows that the matters therein have been adjudicated, and the alleged cause of action is *res judicata*."

His honor, Judge Watts, made the following order: "This cause was heard before me, pursuant to notice given at Chester, S. C., November 13, 1911, upon the affidavits submitted by plaintiff and defendant, the pleadings of the cause, and the demurrer. Being of the opinion that the action by plaintiff will not lie, its remedy being under section 195 of the Code, I decline to grant the restraining order asked for, and the motion is hereby denied."

The plaintiff appealed upon the following exceptions:

(1) "Because his honor held and ruled that the action of the plaintiff would not lie; it being respectfully submitted that the action would lie because: (a) The complaint set forth equitable grounds of relief; (b) the remedy sought by the plaintiff was a proper one; (c) the remedy is a direct proceeding to set aside the judgment upon the grounds that the same was void, and for equitable relief, as therein set forth, is in the same court, and between the same parties; (d) because this is a proper action, as provided in section 89, pt. 2, of the Code of Civil Procedure."

(2) "The order of his honor, holding that the plaintiff's action will not lie, and that its remedy is under section 195, and declining to grant an order restraining the defendant from levying and collecting its execution, it being too late to assert the remedy under these provisions, would deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States."

(3) "The order of his honor, denying to the plaintiffs the right to maintain this action, and declining to restrain the issuance of the execution by the defendant, denies to the plaintiff the equal protection of the law, contrary to law and to the provisions of the Constitution of this state and of the United States."

(4) "Section 195, pt. 2, of the Code of Civil Procedure, does not furnish any remedy in this case, because said section is only applicable to judgments which were entered through 'mistake, inadvertence, surprise or excusable neglect.' The judgment involved

here was not recovered through the defendant's mistake, inadvertence, surprise, or excusable neglect, but was entered without any notice whatever to or service of process upon the defendant."

(5) "That, inasmuch as the remedy provided under section 195, pt. 2, of the Code of Civil Procedure, is a right resting in the discretion of the court, and limited to one year, in the case at bar, where the plaintiff has never been served with process, and has never had an opportunity of being heard according to law, it is not an adequate remedy for the protection of the rights of the plaintiff, and deprives the plaintiff of the equal protection of the law, and takes its property without due process of law, contrary to the provisions of the Constitution of this state and the United States."

[1-3] In the case of *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831, the action was brought by the plaintiff therein to set aside a judgment previously recovered against her by the defendant therein, and to obtain an injunction to restrain the enforcement of the execution, issued on said judgment, solely upon the ground that she was never served with the summons in the former action, and had no knowledge of any such proceedings against her until her land was advertised for sale under said execution.

Mr. Justice (afterwards Chief Justice) McIver, in delivering the opinion of the court, used this language: "As it was well settled that a court of equity would not entertain a case asking for relief where the party complaining had a plain, adequate, and complete remedy at law, the practical inquiry in this case is whether, under the former practice, the plaintiff would have had a plain and adequate remedy for the wrong of which she complains by motion to the court, and in the case in which the judgment in question was rendered. If she had, then she cannot maintain an action on the equity side of the court to obtain the redress sought, but must resort to the simpler and less expensive remedy by motion. A review of the authorities will show, beyond dispute, that the court of common pleas has always obtained and exercised the power to entertain such a motion."

After reviewing the authorities, he proceeds as follows: "These cases unquestionably establish the doctrine that the proper mode of proceeding to set aside a judgment, prior to the abolition of the court of equity, was by motion to the court, and in the cause wherein the judgment was rendered; and therefore a bill in equity for that purpose would not be entertained by the court of equity, unless it contained allegations imputing to the case some feature of equitable cognizance, such, for example, as fraud, accident, or mistake, or unless a discovery was demanded. * * * That the same practice has been recognized and followed since

the court of equity was abolished as a separate tribunal. * * * If it is proposed to show that the return of the sheriff was false by evidence de hors the record, it should be done by a motion in that case; for, while it stands as it is, it must be regarded as a valid judgment in any other action or proceeding."

Section 3, art. 5, Constitution of 1868, which was not repealed by the Constitution of 1895, is as follows: "That justice may be administered in a uniform mode of pleading without distinction between law and equity, they [the General Assembly] shall provide for abolishing the distinct forms of action, and for that purpose shall appoint some suitable person or persons, whose duty it shall be to revise, simplify, and abridge the rules, practice, pleadings, and forms of the courts now in use in this state." Section 161 of the Code is as follows: "There shall be no other forms of pleadings in civil actions in courts of record in this state, and no other rules by which the sufficiency of the pleadings is to be determined, than those prescribed in this Code of Procedure." Section 195 of the Code provides: "The court may likewise, in its discretion, and upon such terms as may be just, * * * at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect."

In the case of *Durant v. Philpot*, 16 S. C. 125, which was a motion for a new trial on the ground of after-discovered evidence, Mr. Chief Justice McIver used this language: "Under the practice of the former court of equity, it might, perhaps, have been difficult to sustain the mode of proceeding adopted in this case. Under that practice, a petition for rehearing and a bill of review were sustainable on similar grounds, one of which was newly discovered evidence (*Hunt v. Smith*, 3 Rich. Eq. 541), but a petition for rehearing was the proper mode of proceeding where the decree had not been signed and enrolled or filed; whereas, after the filing of the decree, the proper mode of proceeding would be by application for leave to file a bill of review (*Simpson v. Downs*, 5 Rich. Eq. 425; *Hinson v. Pickett*, 2 Hill, Eq. 353), and such bill could not be filed without leave of the court (*Simpson v. Watts*, 6 Rich. Eq. 364 [62 Am. Dec. 392]). If, therefore, this should be regarded as a petition for rehearing, it is liable to two objections: First, because the decree has been filed; and, second, the petition is not verified by two counsel. *Ex parte Terry*, Rice Eq. 1; 8 Dan. Ch. Pr. 1623. On the other hand, if it be regarded as in the nature of a bill of review, no leave of the court to file it seems to have been obtained. It seems to us, however, that since the abolition of the court of equity, and the requirement of the Constitution, in section 3, art. 5, that justice shall be administered in a uniform mode of

pleading, without distinction between law and equity, these modes of proceeding by a petition for rehearing and bill of review have become inapplicable, and that now the same results can be obtained by motion. * * *

After quoting the foregoing, in *Ex parte Bank*, 56 S. C. 12, 33 S. E. 781, the court used this language: "From the foregoing, it is manifest that it was intended to abolish the proceedings by petition for rehearing and by bill of review, and to substitute therefor the remedy provided by section 195 of the Code, which was intended to be exclusive."

In the case of *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731, which was an action for partition, the question arose whether a judgment could be attacked in that proceeding on the ground that it was null and void. The court thus disposed of the question: "The judgment in *Porter v. Porter* is not void, but voidable; for the alleged jurisdictional defect is not manifest from an inspection of the record (which, presumptively, shows the contrary), but is only made to appear by evidence de hors the record. Such judgment, being merely voidable, is not subject to collateral attack, and must be held as valid and conclusive until set aside by a direct proceeding instituted for that purpose in that cause. * * * These actions cannot be considered such direct proceedings, brought for the purpose of impeaching the judgment in question."

The foregoing authorities show (1) that it was the intention of the Constitution and the Legislature to abolish proceedings by petition for rehearing and by bill of review, and to substitute therefor the remedy provided by section 195 of the Code, which, when applicable, was intended to be exclusive; (2) that a jurisdictional defect which does not appear upon an inspection of the record does not render the judgment void, but only voidable, and that any proceeding to have the judgment declared a nullity, other than a motion in the cause in which the judgment was rendered, must be regarded as a collateral attack on the judgment; (3) that an action on the equity side of the court to set aside a judgment on the ground that it was a nullity, by reason of the fact that the summons was not served upon the defendant therein, cannot be maintained, unless the complaint alleges some other fact entitling the plaintiff to equitable relief.

[4] We proceed to the consideration of the question whether there are any facts alleged in the complaint herein entitling the plaintiff to equitable relief; in other words, whether it shows upon its face that the plaintiff has a plain and adequate remedy at law. The first ground upon which the plaintiff relies is that an injunction is essential to the protection of its rights from the enforcement of the execution, issued upon the alleged void judgment. It cannot be successfully contended that this is a ground for

equitable interference, for the reason that such relief may be obtained by motion in the cause in which the judgment was recovered. This question is settled by the case of *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831, in which the court says: "It cannot be said that the necessity for an injunction would be sufficient to give the court of equity jurisdiction; for that relief was always obtainable by a motion to stay the execution, which the authorities above cited show could have been granted by a circuit judge at chambers even before the enactment of the statute conferring such power."

[6] The contention of the plaintiff that it is necessary to invoke the equitable aid of the court to prevent a multiplicity of suits is untenable, for the reason that no facts are alleged showing such necessity.

[8] The next ground upon which the plaintiff relies is that, unless restrained, the defendant will take the property of the plaintiff without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

In the case of *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913, the court had under consideration the validity of a judgment rendered against joint debtors, when the complaint alleged they were partners; but the summons was only directed to the one who was served. The court said: "If it should be said, as seems to be argued by counsel for respondents, that the motion should not have been granted, because the defendants failed to show by affidavit that they had a meritorious defense, or that they had sustained any prejudice, the answer is that, while such a showing may be required where the motion is to open a judgment by default upon the ground of some excusable mistake or negligence on the part of the defendants, no such showing is required where the judgment by default is sought to be set aside because without legal authority, for the obvious reason that in the one case the defendant is asking the favor of the court to be excused for his own default, while in the other case he is simply demanding his legal rights to be relieved from a judgment obtained by the plaintiff without pursuing the course prescribed by law. Accordingly it is said in 6 Ency. Pl. & Prac. at page 176: 'A motion to vacate or open a default or judgment thereon, because irregular or void, stands on a different footing from a proceeding for relief because of mistake in the defaulting party; and a case of excusable neglect need not be shown to authorize the court to grant the order, nor is an affidavit of merits or a good defense required.'"

These authorities show that a motion to be relieved from a judgment taken against a party through his mistake, etc., stands upon an entirely different footing from a motion to set aside a judgment on the ground

that the summons was not served on the defendant, so as to make him a party to the action. The first of these motions is based upon the conduct of the party making the motion, and is addressed to the discretion of the court, while the other is merely the assertion of a legal right, founded upon the failure of the *adverse* party to comply with the requirements of the law, and is not dependent upon the discretion of the court.

Section 195 of the Code is inapplicable to the second of said motions, which the court has authority to grant under the general power of the court to relieve against its judgments, on the ground that they are void or voidable. It will thus be seen that the plaintiff has a plain and adequate remedy at law, and the demurrer was properly sustained.

There was also an appeal from an order, made by his honor, Judge Gage, refusing to allow the plaintiff to amend its complaint by alleging fraud. It has not, however, been made to appear that his honor, the circuit judge, erroneously exercised his discretion. Judgment affirmed.

WOODS, HYDRICK, and FRASER, JJ., concur. WATTS, J., disqualified.

(90 S. C. 541)

AMERICAN FERTILIZING CO. v. SIMS
et al.

(Supreme Court of South Carolina. March 11, 1912.)

1. EVIDENCE (§ 419*)—PAROL EVIDENCE.

On assignment of a note payable in money, secured by a lien on a crop, parol evidence of an agreement to pay the note in services is inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 419.*]

2. APPEAL AND ERROR (§ 967*)—DISCRETION—DENIAL OF MOTION TO AMEND.

A denial of a motion to reopen a reference to a master and to allow an amendment to the answer, made more than 10 years after the original answer, is within the discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 967.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

Action by the American Fertilizing Company against E. L. Sims and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Bomar & Simpson, for appellants. Sanders & De Pass, for respondent.

FRASER, J. This is a suit on a note which included a lien on a crop for fertilizers signed by the appellants. The note was executed to one H. T. Butler for \$225, on the 17th of March, 1898. The suit was commenced in 1901. The plaintiff alleged that, at the time said lien note was given by the defendants, the said H. T. Butler was the

agent of plaintiff, and when said note was given it was and has ever since been the property of plaintiff, which is now the legal owner and holder thereof, and that no part thereof has been paid. The defendants admitted the purchase of the fertilizers and the execution of the note, but alleged that they bought from Butler and had paid the note to him by professional services of the defendant C. P. Sims, or the law firm of which he was a member; that the defendant Mrs. E. L. Sims had purchased the interest of Mr. Thomason, the law partner of Mr. C. P. Sims, without notice of any claim of the plaintiff; that Mr. Butler had recognized the defendants' rights and had delivered to the defendants a written order to the clerk of the court to mark satisfaction on the record; and, within the scope of a general denial, denied the plaintiff's ownership of the note.

There were two orders of reference to successive masters. The first order was to report on all the issues. The second was simply to take and report the testimony. The second master, Mr. G. T. Lanham, reported on all issues in his report, dated March 16, 1911. The appellants complain that the reference was closed without notice and moved to reopen the reference and to be allowed to amend their answer. Judge Watts, who tried the cause, ignored the master's findings as unauthorized, refused to recommit the case, refused the motion to amend, and gave judgment for the plaintiff for \$429.91. From this order the defendants appealed upon five exceptions, but have consolidated them to two. We adopt this consolidation.

[1] "It was error to allow the plaintiff to introduce evidence tending to contradict or vary the lien note on which this suit is brought."

The question as to whether the contract can be varied by testimony or no, and by what kind of testimony it can be varied (if at all), are purely academic questions in this case. The plaintiff sets up a contract of which it alleges it is the owner and offers written evidence that it is the owner. The defendant answers setting up a parol agreement that the note was to have been paid, not in money, according to its terms, but by professional services. The answer says, "And to pay them for their services the sum of \$250 and that this purchase of fertilizers should be in part payment therefor." The proof of this was by parol evidence alone. Now, exclude all evidence to vary the terms of the contract, and you have a contract for the payment of money and no money paid. A judgment follows of necessity. No one will contend that an assignment may not be had, whatever may be the effect of the assignment of such a paper. This exception is overruled.

[2] II. That his honor "erred in holding

that the motion to recommit the case and to be allowed to amend the answer of the defendant came too late."

Appellant says: "His honor, it will be observed, did not refuse this motion as a matter of discretion, but because, as matter of law, the motion was made too late." It does not appear that the denial of the motion was in obedience to a misapprehended command of the law and that the finding was not in the exercise of his discretion. A defense may "come too late" to appeal to discretion. Where the defense is purely technical (as here), it might not appeal to the discretion of a judge to allow any time beyond that which the law allows. In this case the original answer was sworn to on March 16, 1901. The affidavit upon which the motion was made was dated July 5, 1911. More than 10 years had elapsed, and we cannot say that the trial judge did not exercise his discretion, or, in the exercise of it, has abused it. This exception is overruled.

The judgment of this court is that the judgment appealed from is affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. WATTS, J., disqualified.

(90 S. C. 564)

OHIO POTTERY & GLASS CO. v. TALBERT.

(Supreme Court of South Carolina. March 11, 1912.)

1. APPEAL AND ERROR (§ 237*)—QUESTIONS IN LOWER COURT—SUFFICIENCY OF EVIDENCE—MOTION TO DIRECT VERDICT.

Under Supreme Court Rule 77 (75 S. C. 572, 73 S. E. vii), which provides that a point that there is no evidence to support a defense shall be first made by motion to direct a verdict, an exception on that ground cannot be considered on appeal if no such motion was made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 237.*]

2. APPEAL AND ERROR (§ 1078*)—OBJECTIONS—ABANDONMENT—FAILURE TO ARGUE. Exceptions are abandoned by failing to argue them on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Common Pleas Circuit Court of Greenwood County; R. O. Watts, Judge.

Action by the Ohio Pottery & Glass Company against B. C. Talbert. Judgment for defendant, and plaintiff appeals. Affirmed.

Giles & Ouzts, for appellant. D. H. Magill, for respondent.

FRASER, J. This was an action for goods sold and delivered to the defendant by the plaintiff. The defendant acknowledged having received the goods, but pleaded payment. The defendant claims that he paid for the goods and paid the agent from whom he

bought. The plaintiff denied that the agent to sell had any authority to receive payment. There was a verdict for the defendant. Plaintiff appealed.

The following are the exceptions:

"(1) We most respectfully submit that it was error of law in his honor to refuse the motion for a new trial when the record shows there was not a scintilla of evidence going to establish the fact that Bayol was the agent for the plaintiffs for the purpose of collecting the account in dispute, but, on the contrary, the positive testimony of the plaintiffs established the fact that Bayol was not the agent of the plaintiffs for that purpose.

"(2) It is most respectfully submitted that the jury disregarded the charge of his honor, and it was error of law to refuse the motion for a new trial.

"(3) It is most respectfully submitted that the testimony of the defendant shows conclusively that Bayol was the agent of the defendant when he received the purchase price for the bill of goods and was not the agent of the plaintiffs, and it was error of law for his honor to refuse to set aside the said verdict of the jury and order a new trial."

[1] The question of no evidence is a question of law, but this court has adopted and published the following rule 77 (75 S. C. 572, 73 S. E. vii): " * * * The point that there is no evidence to support a defense shall be first made by a motion to direct a verdict." No such motion was made, and this exception cannot be considered.

[2] The second and third exceptions were not considered in the argument, and therefore they are deemed abandoned.

The judgment of this court is that the judgment appealed from is affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. WATTS, J., disqualified.

(90 S. C. 490)

WILLIAMS v. McMANUS.

(Supreme Court of South Carolina. March 2, 1912.)

1. MORTGAGES (§ 32*)—ABSOLUTE DEED AS MORTGAGE—INTENTION OF PARTIES.

A deed absolute on its face may in equity be declared a mortgage, if the evidence shows that such was the intention of the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 60; Dec. Dig. § 32.*]

2. MORTGAGES (§§ 36, 38*)—ABSOLUTE DEED AS MORTGAGE—PRESUMPTION AND BURDEN OF PROOF.

The presumption is that a deed absolute on its face is what it purports to be, and its character as a mortgage can be established only by evidence clear, unequivocal, and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 109; Dec. Dig. §§ 36, 38.*]

3. MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to declare a deed absolute on its face to be in fact a mortgage, held sufficient to show that it was an absolute deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

4. SPECIFIC PERFORMANCE (§ 93*)—SALE OF REAL ESTATE—BREACH BY PURCHASER—TIME AS ESSENCE OF CONTRACT.

Where a purchaser of land, who was in possession under a contract which required him to pay taxes and a specified amount on the purchase price on a given day, time being stated to be of the essence of the contract, failed to do either, and subsequently suffered a default judgment to be taken against him by the vendor in proceedings to recover possession, under which he was ejected, he forfeited all rights under the contract and could not thereafter compel performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 245-248; Dec. Dig. § 93.*]

Appeal from Common Pleas Circuit Court of Lancaster County; S. W. G. Shipp, Judge.

Action by John Williams against R. C. McManus. Judgment for defendant, and plaintiff appeals. Affirmed.

John Williams, on September 6, 1906, conveyed the premises in controversy by a deed absolute on its face for a stated consideration of \$300 to R. C. McManus, who on the same day executed a bond for title in the penal sum of \$300, reciting that: "Whereas, the above bounden R. C. McManus has this day agreed to sell to the said John Williams the following described tract of land in the county of Lancaster, said state, to wit: All that piece, parcel or lot of land situated within the incorporate limits of the town of Lancaster, containing one-fourth (1-4) acre, more or less, being in the shape of a triangle and bounded on the north by lot of R. C. McManus; east by Main street of said town of Lancaster; south by right of way of Southern Railway Company; and on the West by lot of said R. C. McManus, on condition that the said John Williams shall pay the sum of three hundred forty-eight and no 100 (\$348.00) dollars, in manner following, that is to say: One hundred and seventy-four (\$174.00) dollars on September 1, 1907, and one hundred and seventy-four (\$174.00), dollars on September 1, 1907, and one hundred and seventy-four (\$174.00) dollars on September 1, 1908: Now the condition of this obligation is such, that if the said John Williams shall pay the said purchase money so as aforesaid stipulated and shall in the meantime pay all taxes on said land, and the said R. C. McManus shall on the completion of said payments make, execute and deliver, or cause to be made, executed and delivered, a good and sufficient deed of conveyance (with warranty against himself, his heirs and assigns only) of the land above described to the said

John Williams, then this obligation to be void and of none effect or else to remain in full force and virtue. And it is expressly agreed by and between the parties aforesaid that 'time is of the essence of this contract,' and that in the event of the nonpayment of said sum of money or any part thereof, promptly at the time herein limited, that then the said R. C. McManus is absolutely discharged from any and all liability to make and execute such deed and may treat the said John Williams as tenant holding over after the termination, or contrary to the terms of his lease; or if he prefer so to do may enforce the payment of the purchase money."

The following is the report of John T. Green, Special Referee:

"In obedience to an order of this court, of date October 27, 1909, the undersigned has taken the testimony in the above-stated cause and heard the argument of counsel on the issues of law and fact involved therein. The testimony so taken by me, consisting of 18 pages, is herewith separately reported. My rulings on objections made during the taking of the testimony are to be found noted on the margin. It is admitted that on the 5th day of September, 1906, the plaintiff, John Williams, in consideration of the sum of \$300 in cash paid to him executed and delivered to the defendant, R. C. McManus, the deed of conveyance, marked by me 'Exhibit C,' for the lot therein described; that on the same day defendant and plaintiff entered into the agreement marked 'Exhibit B,' called a 'bond for title'; and that the lot described in said bond for title is the same lot referred to in said deed of conveyance. The only issues raised by the pleadings and testimony in this case, as I take it, are as follows: (1) Was the said deed from plaintiff to defendant intended by the parties at the time of its execution to be an absolute sale and conveyance of the lot therein mentioned, as claimed by defendant; or was it intended by them as a mortgage to secure a loan of \$300 by defendant to plaintiff, as claimed by the latter? (2) Even if the said deed is held to be absolute, and that it was not intended as a mortgage, still was plaintiff entitled under the terms of the said bond for title to have the said lot reconveyed to him, when he tendered to defendant on April 10, 1909, the sum of \$364.98 and demanded a deed from defendant?

"After a careful review of the testimony adduced before me, my findings are as follows:

"Findings of Fact.

"I find from the preponderance of the evidence adduced before me:

"(1) That on a number of occasions prior to the date of the execution of the said deed of conveyance and bond for title, plaintiff applied to defendant for a loan of money on the lot in question; but that defendant

declined to make him any loan, expressing a willingness, however, to buy the said lot, if plaintiff would sell it.

"(2) That, at the time of the execution of the deed to the defendant, McManus, one F. R. Massey held a mortgage on said lot for \$200, which plaintiff was unable to pay.

"(3) That plaintiff is, and was at the time of the execution of the said deed, a colored man of more than average intelligence, that he could read and write, and that no advantage was taken of him in the execution of the said papers.

"(4) That the said deed of conveyance and the said bond for title were executed at the same time and place and before the same witnesses.

"(5) That the plaintiff remained in possession of the premises, after the execution of the said papers, until the 22d day of June, 1908, when he was ejected therefrom by the sheriff of Lancaster county under a warrant of ejectment issued to him by W. P. Caskey and B. F. Phillips, magistrates for said county, under section 2421 of the Code of Laws of South Carolina (1902).

"(6) That since the execution of the said deed of conveyance the defendant, McManus, has continuously paid the taxes on the premises in question.

"(7) That no money was paid or tendered by plaintiff to defendant under the said bond for title or otherwise up to the time of his said ejectment on June 22, 1908.

"(8) That on the 10th day of April, 1909, H. M. Dunlap, Esq., as attorney for the plaintiff, did tender to the defendant, McManus, the sum of \$364.98 and demanded that he execute to plaintiff a deed of conveyance for the lot in question, claiming that the said sum so tendered was 'in payment of the mortgage held by him from John Williams,' and that McManus refused to accept the same.

"(9) As to the most vital question of fact in the case, to wit, as to whether the said deed from plaintiff to defendant, which is absolute on its face, was really intended by the parties at the time to be a mortgage, I am forced to conclude from all the facts and circumstances of this case, as gathered from the testimony adduced before me, and from what I know of the character of the respective witnesses examined before me, that the original contract between the parties was a sale of the lot in question; that the deed of conveyance from plaintiff to defendant (Exhibit C) was a deed and not a mortgage; and that there was a contract (Exhibit B) to resell to the grantor (Williams) within a stipulated time, and upon conditions therein fully expressed.

"In the first place, no other conclusion can be drawn from the testimony in the case than that, at the time of the execution of the said deed, the said lot was not of greater value than \$300, the sum paid plain-

tiff by defendant. Again, in view of the fact as established by the testimony that the defendant, McManus, had time and again previously refused to loan plaintiff money on this lot, nothing appeared in the case that was calculated to induce him to change his mind as to the wisdom of becoming plaintiff's creditor. Again, the lot in question adjoined that of the defendant, McManus, and lay between the McManus lot and the Southern Railway depot—a fact that would induce McManus to pay more for it than any one else, but a fact that would not induce him to make a loan to plaintiff to the extent of the full value of the lot.

"Again, the testimony of Jas. M. Knight, who was one of the witnesses to the deed in question, strongly corroborated the positive statement of the defendant, McManus, to the effect that the deed in question was not intended as a mortgage to secure a loan, but to convey the absolute title in this lot to defendant.

"Again, that positive testimony of the witness Geo. F. Payseur, as to the admissions made to him by plaintiff to the effect that he had sold the lot to McManus with the right to buy it back in two years without paying any rent, seemed conclusive to me on the question of the intention of the said deed.

"In addition to the fact that the witnesses Knight and Payseur are entirely disinterested in this case, they are in no way related to the defendant and are men of character and veracity.

"Again, the admissions of plaintiff as made to T. Y. Williams, Esq., as to the transaction between plaintiff and defendant, would seem to leave no doubt even of the fact that the instrument in question was intended as a deed and not a mortgage.

"I have been able to find nothing in the testimony tending to corroborate the statements of the plaintiff as to the transaction in question, except the fact that he was allowed by defendant to remain in possession of the lot until his ejectment therefrom without paying rent. And even that fact is explained by plaintiff himself when he told the witness Geo. F. Payseur, in substance, that in selling the lot to defendant it was understood that he was to pay no rent for two years.

"In the absence of clear, unequivocal, and convincing evidence, the presumption will prevail that a deed of conveyance is what on its face it appears to be." *Brown v. Bank*, 55 S. C. 70, 32 S. E. 816; *Creswell v. Smith*, 61 S. C. 579, 39 S. E. 757; *Ray v. Counts*, 82 S. C. 557, 64 S. E. 1135.

"The above being my conclusions of fact in this case, I am forced to find as my

"Conclusions of Law.

"1. That the original contract between the plaintiff, Williams, and the defendant, McManus, was an absolute sale of the lot in

question; that the deed of conveyance from the former to the latter was a deed and not a mortgage; and that therefor defendant took the absolute title to the real estate described in said deed.

"2. That under the terms of the bond for title (Exhibit B) the defendant did contract to resell the said lot to plaintiff within a specified time; that plaintiff forfeited his rights under said contract by failing to comply with its terms, in that he failed to pay the taxes on said lot and to meet the first payment of the purchase money, as provided for in said contract or bond for title. I hold that time was sufficiently made the essence of this contract; and that, when plaintiff failed to make the first payment required of him on September 1, 1907, he forfeited his rights under said bond for title.

"In addition to this, the plaintiff, under the ejectment proceedings had before the two magistrates, failed to appear or to answer the rule to show cause, allowed judgment to be taken against him by default, and took no step to prevent his ejectment from the premises in question. Under such circumstances, I am forced to conclude that the tender by his attorney of \$364.98 on April 10, 1909, did not restore plaintiff's rights under said bond for title; and that defendant was not bound to accept the same and make plaintiff a deed to the said premises, as demanded by him. Having failed to comply with the terms of his contract to buy back this property from defendant, to whom he had previously sold it absolutely, plaintiff is not in a position to demand a specific performance of the contract—that defendant now make him a deed for the premises described in the complaint.

"Such being my conclusions of fact and law in this case, I would respectfully recommend that the complaint herein be dismissed, with the costs of the action."

Testimony was taken by the special referee, as follows (the figures in brackets referring to the objections hereinafter shown):

"W. B. Plyler, being duly sworn, testified as follows:

"Direct examination (by Mr. Dunlap): Q. Mr. Plyler, do you remember in the neighborhood of 1908 a conversation with you and John Williams here, the plaintiff, about a piece of property he had about the depot? It is described in the complaint as $\frac{1}{4}$ acre. Do you remember the conversation and the amount you offered him for property? (Objection [1] to this testimony by defendant on the ground that, if any testimony is competent as to value of the land, it must be as to the value of the land at the time of the execution of the deed and bond for title. The ruling of the referee reserved. All rulings on testimony will be reserved by referee until the conclusion of the reference.) A. Well, I had talked several times about that land, that property down there, and he did

not name no certain price, and I did not make any certain price. Q. You own considerable real estate in the town of Lancaster, and, of course, you are conversant with the prices of property by reason of your holdings, are you not, sir? What would you estimate that about this time, 1908, that this piece of property was worth? (Objection [2] of defendant on the same ground as stated above, and on the further ground that the witness has not qualified as an expert.) A. I thought there was more land than the men say— $\frac{1}{4}$ acre. Q. What would you think it was worth? A. Well, I thought it was worth \$400 or \$500. I didn't think very much about it. The thought just come up.

"Cross-examination (by Mr. Williams): Q. That was about 1908? A. Yes, sir; about two years ago or a little better.

"John Williams, being duly sworn, testified as follows:

"Direct examination (by Mr. Dunlap): Q. John, in September of 1906 it is admitted that you owned this tract of land down at the depot. Now just state what become of that piece of property? A. Commence at the beginning? Q. Just state the agreement between you and Dr. McManus. A. All right. Well, what I want to say is that the first of the contract with Dr. McManus, Mr. Carter come along by my house, I just asked— Q. As a result of your conversation with Mr. Carter, what did you do after your conversation? After you got through with Mr. Carter, what did you do with Dr. McManus? A. I sent to Dr. McManus about letting me have some money. Mr. McManus he said, 'About how much do you want?' Well, I says that I would like to have about \$300. He said, 'Reckon I could let you have that much,' I said I would be back to-morrow, and the next day come, and I come along back here and saw him about it, and the first thing he said to me was how long would I want it. I said about the space of two years. And we went in then to an agreement to get the money and he let me have it. At that time I wanted to pay Dick Massey out. And the next morning when I went to receive the money from Dr. McManus Dick Massey was there. After I had got the money, that was the end of it. Q. When you got the money, what did you do? Did you sign any papers? A. Yes, sir; I signed Doctor's papers for the money. Q. Did you get the money? A. He gave a check for the money; it was made out in a check. Q. Who got the proceeds of this money? A. Dick Massey. Q. Who gave it to him. A. I disremember whether Dick come down here and got it cashed or Mr. Charlie Jones. Q. How much did you pay at that time to Dick Massey. A. Dick Massey got \$200, or some \$210, I think. (Defendant objects [3] to the foregoing testimony on the ground that all transactions had between the plaintiff and defendant as regards the land in dispute should be proven by the written

memorandum of instruments showing same. Witness shown bond for title to R. C. McManus from John Williams, Exhibit B.) Q. Is that your signature? A. Yes, sir. Q. John, was it your intention at the time of getting this money from Dr. McManus to sell him your property or to give it as security? (Mr. Williams objects [4] on the ground that plaintiff's intention is evidenced by the deed and bond for title, and further that the plaintiff cannot testify as to his intention, but only as to the agreement had between the parties.) A. No, sir; I had no idea of selling my place, and it was not mentioned. Not a word was brought up about him buying it. He says to me, 'All I want is my money back.' There was nothing mentioned about buying or selling. Q. What rate of interest did he agree to charge you? A. Eight per cent. Q. After you gave this instrument of writing to Dr. McManus, who was left in possession of this property? A. I was in possession of the property. Q. Have you ever paid, or has he demanded up until the time of your ejection—has he ever demanded rent? A. No, sir; no rent has ever been mentioned. Q. About, or since, the execution of this instrument of writing, were you on up until the present time allowed to remain in possession? A. I was; yes, sir. Q. Well up until when? A. I mean from the time we went into the writing until I was ejected. Q. Well, after you were ejected, have you ever made an offer to Dr. McManus that you would return the amount of money that he gave to you? A. Yes, sir. Q. What was his answer? A. Why, he told me I was too late. Q. Do you know about when this was? A. A short time after I was ejected. About one week before I had to hunt up the man from whom I was to get the money. Q. Who paid the taxes on this property during the years you were in possession? A. I did. I paid the taxes up until 1908. (Defendant objects [5].) Q. About that time, say the latter part of 1908, were you offered any price for this piece of property, and how much? (Defendant objects [6] on the ground that it is two years later than the execution of this deed and option.) A. Yes, sir; I was offered by Mr. Plyler once—I was offered by him \$1,000, and the next man, Mr. Jim Porter, offered me a plantation of 40 acres. Q. Now, was this before or after you were ejected? A. It was before I was ejected.

"Cross-examination (by Mr. Williams): Q. John, you say Mr. Jim Porter offered you a plantation for the place? A. Yes, sir; out here by Blackmon, a colored man that has a plantation. Q. And you say Mr. Plyler offered you \$1,000 for it? A. And I told him I wanted \$1,500 for it, but would take \$1,200 for it. Q. So when Mr. Plyler says he did not make you any offer at all, he is not telling the truth? A. He mought of forgot about what he told me about that time. Q. Well, when was it now that you claim Mr. Plyler

made you this offer? A. This was at the time before I was ejected. I was about planting. I was setting down on the steps. Q. And at this time when Mr. Plyler was offering you \$1,000, and Mr. Porter a plantation, you were trying to raise money to buy this place back. You were going all over the country, to W. U. Clyburn and Col. Springs, and other people, trying to buy back this place before the time expired, and at the same time you were offered by Mr. Plyler \$1,000, with which you could have taken and paid Dr. McManus \$400, and had the balance left? A. Well, I was just expecting if I could have got the money I wanted—the amount—I would just take it. Q. And so when you needed only \$300 or \$400 to buy this place back you were offered \$1,000 and would not take it? A. Well, I just thought I could get more. Q. How much did you owe, John, when you made this deed to Dr. McManus? A. I owed Dick Massey \$200. Q. Was this all you owed on the land? A. All that I owed except \$10. I got \$300 from Dr. McManus to pay off Dick Massey. Q. And so you claim now that you are borrowing \$300 to pay off a \$200 debt? A. Well, with this \$300 I know I could pay off Dick and not owe him anything. Q. Well, you say you only owed him \$200, why did you not borrow \$200 from Dr. McManus to pay him off? A. Well, I could get the \$300, and I got the \$300. Q. Well now, John, is it not a fact that you went to Dr. McManus to try to borrow from him \$200 to pay off this Massey debt, and that he refused to let you have it? A. Doctor did? No, sir; he never refused to let me have it. Q. Well, why then, John, did you borrow \$300 to pay off a \$200 debt? A. I borrowed \$300 so that I could have money enough to settle all the debts that I owed. I just wanted the \$300 because I knew then I wouldn't have anything dragging or hanging over me—so that I wouldn't be in any strain. Q. Was Dick Massey pressing you right hard at that time? A. No, sir; Dick Massey was not pressing me very hard. I wanted the money—Dick wanted to rue back. Q. Well, before he found you were going to get this money from Dr. McManus, he was pressing you for this money? A. No, sir; I wanted it out of Dick's hands because Dick had made a threat that he intended to build a negro hotel on the corner. Q. Of your land? A. Yes, sir. Q. Well, as a matter of fact, you thought he was getting in pretty close behind you? A. No, sir. Q. Well now, John, just answer truthfully when you found out you could not borrow this money to pay this debt, you turned and sold it for the best price you could get. A. No, sir; I never did. Q. John, did you not, right after this deed was made to Mr. McManus, did you not say to Dr. G. F. Payseur here, on the streets of Lancaster, that you had sold this land to Dr. McManus? A. No, sir; I never told him so since I was born. Q. That you could not borrow the money and had to sell it—but that Dr. McManus had

given you two years in which to pay it back? A. No, sir; I never told nobody I had to sell it, never since I have been born. Q. While Mr. Payseur was doing some work on Mr. J. F. Gregory's house in the fall of 1908, the time he was fixing up the lightning rods, and talking about the matter, did you not tell Mr. Payseur that you had sold the land to Dr. McManus, but that he had given you a written contract which would allow you to buy back the land in two years' time without charging you any interest? A. No, sir; I never has talked that conversation with Mr. Payseur. I never had such conversation in all my life. No, sir. Q. Did you go into the furniture store department of the J. F. Mackey Company, one, or two or several times, and ask Dr. McManus to loan you money on this land in the presence of Mr. Jim Knight, and didn't he always refuse to do it? A. No, sir; when I asked Dr. McManus for this money he never refused. He never did. Q. Is it not a fact that you pestered him so much about loaning you money on this house that he got angry in the presence of Mr. Knight and used pretty sharp words to you? A. No, sir. Q. Didn't Dr. McManus always tell you he might buy your property, but he would not loan you money? A. No, sir, when we did come in contact about borrowing money, he never changed a word. Q. Well now, John, after September 1st, the date the first payment was defaulted, Exhibit B, did you have a conversation with Mr. T. Y. Williams about this at or near his office on Main street? A. On which occasion? Q. Did you have it on any occasion? I remember after being ejected I asked him what would I do about getting it back? What would I do? He told me he didn't know. Q. Did you not tell him at this time that you had sold this land to Dr. McManus and that he had given you two years in which to pay it back, but that one of the payments was not due when you were ejected? A. No, sir; there was nothing at all mentioned with me and Mr. Williams about buying the place back. Q. Did you not tell him on that occasion that you had a right to buy the land back at any time before the last payment became due? A. No, sir; I didn't. I didn't tell him that, but I had two payments, and the last payment was the one I was expecting to pay the whole to him at once—on the two payments. There were two payments mentioned, and I was expecting to pay the whole thing in the last payment. Q. John, wasn't it definitely understood between you and Dr. McManus, and wasn't it so shown to be the agreement in the presence of Mr. Knight and Mr. Jones, that what you would deed to him was an absolute sale of this property and that he would give you two years in which to buy it back? A. No, sir; if I had knew it was a sale I never would have let him have it. Q. You write your own name, don't you? You read pretty well, don't you? A. No, sir; I am not expert. Q. Have you ever read a South Carolina deci-

sion? Have you ever read an argument before the Supreme Court? Did you ever borrow one from me to read? A. I have got one of yours now. Q. And yet you come here today and say you signed up papers you don't know anything about or that you did not understand? A. I did not say that. Q. Well, you know a title of real estate when you see it, don't you? A. Well, if you give a title, I have never given anybody a title. Q. Well, isn't that a title? (Witness shown deed.) A. This was never read to me; it was simply handed to me to sign. Q. Who handed it to you? A. Mr. Charlie Jones. Q. Did he tell you what it was? A. No, sir; he told me it was a contract between Mr. McManus and me. Q. Did he tell you what kind of a contract it was? A. No, sir; he didn't tell me what kind of a contract it was; that it was just like the one the Doctor made for me that I signed. Q. Well, you signed papers to Dr. McManus didn't you? And you have signed papers to Mr. Charlie Jones, have you not? A. Yes, sir. Q. And who else have you ever signed papers to? A. Ed Davis. Ed Davis was the first man I ever started with. Q. And you want the referee to believe, with all sorts of business that you have done, and as well as you have managed to take care of yourself and attend to the affairs of life, that you do not know a title to real estate, and did not not know what you were doing? A. I never signed no title to real estate unless I was going to sell it. It was only a simple mortgage. Q. You sign it when you want to sell it, but not otherwise? A. I have never wanted to sell it. If Doctor had given me a little time, I never would have sold it. Q. John, don't you know if Dr. McManus had given you money on this property as a loan you would have taken a note or mortgage with 10 per cent. attorney's clause on it? A. That was what I was expecting giving him—a mortgage. I was expecting nothing but a mortgage. (Defendant offers in evidence deed from John Williams to R. C. McManus, dated the 5th day of September, 1905, Exhibit C.) Q. (By Referee). Did he demand that all papers be read over to him and explained? A. I asked Mr. Charlie Jones to tell me what it was. He said, 'It was just like the other one—a contract.'

"Redirect Examination (by Mr. Dunlap): Q. John, you were asked in regard to the money you borrowed from C. D. Jones and the others, in each instance did you give a similar paper to what you gave to Dr. McManus? A. No, sir; I only gave him a mortgage. Q. You were asked by Mr. Williams if you did not make application to Col. Springs for the loan of this money to pay off Dr. McManus. Now state to the court what Mr. Springs' reply was. (Objection [7] by Mr. Williams.) A. Mr. Springs said to me, 'Go and see would he take it.' And when I met Doctor and asked him would he take it, he said 'He did not have time to talk to me about it,' and went on off. And I went on

back and told the Colonel he would not talk to me about it, and I never had any more to say to the Colonel about it. Q. You were asked about a conversation with Mr. T. Y. Williams, and you started to make a reply: what was your answer to Mr. Williams' question about the conversation which took place between you and Mr. T. Y. Williams? A. I went to Mr. Williams after I was ejected and asked him what would I do about it. He told me, 'I don't know.' And then I was left alone for what to do. I went then to Mr. Foster. Well, then, Mr. Williams and me was out, and when he told me he didn't know what to do I didn't know what to say.

"H. M. Dunlap, being duly sworn, testified as follows: On the 10th day of April, 1909, I tendered to Dr. R. C. McManus \$364.98, being by my calculation the principal and interest on \$300 to April 10, 1909. I had figured from the date of the bond for title of R. C. McManus from John Williams, and the amount was \$364.98. I tendered this to Dr. McManus and announced I did so as the attorney for John Williams in payment of the mortgage held by him from John Williams. I announced to him the amount and asked him if he demanded that the money be counted. He stated first, 'I do not know what to say.' Then I asked him to either accept or decline the tender. He said, 'I will decline it, and refer you to my attorney, Mr. T. Y. Williams.' I then approached Mr. Williams, and he said, 'Of course, I will decline it.'"

The plaintiff rests.

Defendant offered in evidence proceedings by Caskey and Phillips, magistrates, in the petition of R. C. McManus, Plaintiff, v. John Williams, Defendant, to eject the defendant from the premises conveyed by his deed. On the 5th day of June, 1908, the defendant, R. C. McManus, under a claim of title, commenced a proceeding, under section 2421 of the Code of Laws of South Carolina (1902), to eject the plaintiff, John Williams, from the premises described in the complaint. The process, or pleadings, of the proceedings was duly and legally served upon the said John Williams on the said 5th day of June, 1908, said pleadings including the summons or rule to show cause, together with a verified complaint and copy of lease or bond for title. In both the rule to show cause and the complaint served upon the said John Williams, the said R. C. McManus specifically claimed title to the premises. That the said John Williams did not answer or demur by attorney, or otherwise, and did not appear, personally or by attorney, on the day set in the summons or rule to show cause for the hearing of said cause. The case was heard and submitted to a properly impaneled jury, and the said jury found for the said R. C. McManus, and the said John Williams was thereupon ejected from the premises under a warrant of the court.

"G. F. Payseur, being duly sworn, testified as follows: Q. I asked the plaintiff here,

John Williams, if some time shortly after the execution of this deed to R. C. McManus and the execution of the bond for title from Dr. McManus to him, if he did not tell you here in the town of Lancaster that he could borrow the money on the place from Dr. McManus, but had sold it to him, but that Dr. McManus gave him the right to buy it back within two years. State whether or not he did tell you that? A. He did. He told me that. Q. I asked him later on, when you all were putting lightning rods on the residence of Mr. Gregory, if he did not have a further conversation with you in which he told you that he had been unable to borrow the money from Dr. McManus, but had sold it to Dr. McManus. Sold the property to Dr. McManus with the right to buy it back within two years without paying any rent? A. He did. Q. He denied it Mr. Payseur. Now state whether or not he told you. A. He did; yes, sir. (Objection [8] by plaintiff as to the first contradiction as announced by Mr. Payseur, referring to the purchase of this property from John Williams, by Dr. McManus, on the ground that a proper foundation for the contradiction was not laid.) Q. Mr. Payseur, when was this? A. This was spring a year ago. Court was in session, the second week of the March term, last year. Q. Then that would be in the spring of 1909? A. A year ago next week. The second week of court.

"T. Y. Williams, being duly sworn, testified as follows:

"Direct examination (by Mr. Williams): Q. I asked the plaintiff, John Williams, whether or not he had a conversation with you when I examined him, this morning, and he stated that he did have a conversation with you. I asked him if he had not said to you that he had sold this property to Dr. McManus, but the last payment under his contract to buy it back was not due at the time he was ejected. And he stated that he had not. Please state whether he did or not. A. Well, I do not recollect any such a conversation after the time he was ejected. I suppose I had as many as one-half dozen conversations with John prior to the time he was ejected in regard to giving up possession to Dr. McManus, who was in possession of this property. These conversations, I suppose, covered a period of three, four, or probably six months. What I mean by this is during the months previous to the time he was ejected, I talked with him and tried to get him to surrender possession of the property without forcing us to eject him. Dr. McManus had turned the papers over to me and authorized me to get possession of the property. He always claimed to me that he had two years from the time the papers were executed to pay for the property, and refused to deliver possession because he stated the two years had not expired. He never claimed to me in any conversation I ever had with him that this property had been mort-

gaged, nor any claim other than that he had sold the property to Dr. McManus and had two years in which to redeem it. I suppose this claim was made to me in every conversation I had with him on four, five, or six different occasions. (Attorney for the plaintiff objects [9] to all of the testimony of witness T. Y. Williams, in so far as the attempts to contradict John Williams, in that the intended contradiction was laid so far after he was ejected. The witness states that his conversations were all prior to the ejectment.) Q. Please state whether or not you were at that time and are now familiar with the real estate values in the town of Lancaster and vicinity. A. I was then and am now. Q. From your knowledge of such values, what would you say was the value of the property when the deed was executed on the date of September, 1906, one-fourth acre, I believe, is here described? A. Well, leaving out the one-fourth of an acre, which includes the railroad's right of way, which they have the right to use in such manner as they see fit for railway purposes, that would not leave more than one-eighth of an acre outside of the railroad's right of way. The house on it, I suppose, would be worth about \$75. I wouldn't give anything for it, but I suppose at the time it was put up it would cost about \$75. It is built of cheap lumber, poorly constructed. I don't think it would be worth more than \$150. I wouldn't give more than that for it, and I think that \$300 for the house and lot was an excessive price.

"Cross-examination (by Mr. Dunlap): Q. That is based upon the fact that it is about one-eighth of an acre of land? A. Why, I know the lot, Mr. Dunlap, as thoroughly as I know my own lot; it is just across the road from me. One side is the right of way of the railroad and the other side is a ditch, and except to get John Williams out of there and to get him out of the vicinity I would not pay over \$150 for it. Q. The point you made, Mr. Williams, was that this one-fourth of an acre included the railroad's right of way; therefore that he could not have more than one-eighth of an acre of land; then the balance of your testimony would be based upon one-eighth of an acre? A. No, sir; what I said was this: One-fourth of an acre, as described in the deed, covers the railroad's right of way; that this right of way was included in it, and if the railroad saw fit to use it for railroad purposes—which it has—taking out this right of way, would leave about one-eighth of an acre. I would say this—considering that to be a fact, which it is—I thought that the \$300 was excessive, and stated further, to get John Williams away, I would not give over \$150 for the lot including that part of it covered by the right of way of the railroad.

"Dr. R. C. McManus, being duly sworn, testified as follows:

"Direct examination (by Mr. Williams): Q. Doctor, you are the defendant in this case.

Doctor, is that the deed set up in the complaint in this case? A. Yes, sir. (This is Exhibit C.) Q. Doctor, it is alleged in the complaint and sworn to by the plaintiff that this deed, Exhibit C, was intended as a mortgage and was not intended by executing this deed to convey the title to the property described in the deed. State whether or not this is true. A. The statement is not true. It was intended as a deed. Q. Did you ever loan John Williams any money? A. No, sir. Q. How much did you pay him for the lot? A. \$300. Q. Did you have any agreement with him at this time about selling him the lot back? A. Yes. Q. Is that agreement expressed in the bond for title, which has been proven already? A. Yes; that is the agreement. Q. Was there any other agreement between you and John Williams as to this lot except as it is expressed and set down in the Exhibit C and the bond for title, Exhibit B? A. There was not. Q. Doctor, I notice that the first installment due on the bond for title was \$174 on September 1, 1907. Was that payment made? A. It was not. Q. Did John Williams ever offer you that \$174 on or about September 1, 1907? A. No, sir. Q. Did any one else—any one representing him—offer you the first payment of \$174 on or before September 1st, when it was due? A. No, sir. Q. Had any payment been made to you on account of the bond at any time prior to the ejectment case? The time John was ejected from the premises? A. No, sir. Q. Mr. Dunlap and Dr. Foster testified to tendering you some money on a mortgage some time after the ejectment proceedings. Do you remember when that was? A. I do not remember. It was after the ejectment proceedings. Q. Had anybody, Doctor, ever made any claim to you until after these ejectment proceedings that this deed was a mortgage? A. No, sir. Q. When did you first hear of this claim as to that? A. When Mr. Dunlap came to me and made this tender after John had been ejected from the premises. Q. After John had been ejected from the premises? A. Yes, sir.

"Cross-examination (by Mr. Dunlap): Q. Doctor, you admit that you agreed that there were to be two payments, each of \$174, one due September 1, 1907, and another due September 1, 1908, do you not? A. Yes, sir. Q. You admit that Williams had the right to pay either of these any time up to September 1, 1908, or both of them? A. No. Q. Your contract does not provide that upon the failure to meet either of the two installments of \$174 that the whole amount shall not become due? A. No, sir; upon failure to meet the first installment all shall become due. This is my understanding. My understanding was that time was the essence of the contract, and a failure to meet the first payment at the specified time, the whole became due. Q. Doctor, you do know that John Williams was ejected prior to September 1, 1908? A. I don't know the exact date. Q. Doctor,

what did you mean by your answer awhile ago? A. I mean that he had a bond for title, and he had a specified time in which to buy this land back, and if he failed to make this first payment, time being the essence of the contract, that he then lost his right to buy the land back. Q. Do you remember what costs you paid, Doctor, in the ejectment proceedings? A. I think it was \$19.80. Q. To whom were those costs paid? A. W. P. Caskey. I think it was about \$19.80. Receipt may be for more than that. (Objection [10] by Mr. Dunlap on the ground that Dr. McManus was not legally bound to pay these costs, except that he being the plaintiff in the action and the only redress against Williams would be a judgment against Williams.) Q. John testified this morning that he didn't know what he was signing when he signed this deed. That it was not explained to him or read to him. State whether or not this is true? (Objection [11] by the plaintiff upon the ground that it is an opinion.)

"J. H. Knight, being duly sworn, testified as follows: Q. Mr. Knight, you are a witness to this deed from John Williams to R. C. McManus, are you not? You are also a witness to bond for title to John Williams? That is your signature, is it not, with Mr. Jones for the bond? A. Yes, sir. Q. Will you state whether or not it was understood that this was an absolute sale between the parties? A. When this deed was executed, it was to carry absolute title to the property described. (Plaintiff objects [12] upon the ground that this is an opinion.) Q. Mr. Knight, have you ever heard John Williams attempt to borrow money from Dr. McManus on this property? A. Yes, sir; three or four times. Q. Did Mr. McManus consent to loan him money? A. He refused to loan him money. Q. Did you ever hear Dr. McManus say he would not loan money on this property? A. I did. I have heard him further say he might buy it from him, but he would not loan him money on it. Q. Is it not a fact that he pestered him so much about borrowing money on the property that Dr. McManus lost his temper? Q. The last time that I remember John Williams coming in the store and asked Dr. McManus to loan him some money on the lot he refused to talk to him, and John went out, and the next thing that I remember I was back in the store at work. Dr. McManus and one or two others, to the best of my recollection, and John Williams was talking over the matter, and Dr. McManus called me up to the office and told me he wanted me to witness the papers. After John Williams went out of the door, I says to Dr. McManus: 'You have got the land; you have got the land.' (Plaintiff objects [13] to all of the testimony of Mr. Knight in so far as it refers to conversation, deeds, and acts prior to the signing of the deed and bond for title. And, further, that part of the testimony after the bond for

title and deed have been signed that refer to a conversation between Mr. McManus and himself in the absence of John Williams.)

"H. H. Horton, being duly sworn, testified as follows: Q. Mr. Horton, where do you reside, and what official position do you hold, if any? A. I am auditor for Lancaster county. Q. Will you state what property was returned by John Williams for taxation in 1906? A. One lot and a house. Q. Will you state whether any transfer to the lot was made on your books in the fall of that year or not? A. When I went to make up my duplicate for 1907 to enter the property on for taxation, I found in making the transfer, I found on the books where the transfer was made: 'September 5th, John Williams to R. C. McManus, one (1) lot, \$300.00.' And I made the transfer from John Williams to R. C. McManus in 1907. Q. Since that time will you please state who has returned that property and paid the taxes on it? A. Dr. McManus. Q. John Williams said this morning that he paid 1907 and 1908 taxes on it, Mr. Horton? A. No, sir; he never paid. Q. Mr. Horton, are you positive that Dr. McManus paid the taxes on this property in 1907? A. Yes, sir. Q. Are you certain he paid them in 1908? A. I am certain in 1908 and 1909. Q. Are you positive in 1907? A. I will not be positive unless I go back and look at the books. I am satisfied that it is not charged up to John Williams, and it must have been paid by Dr. McManus."

The following are rulings of referee on objections to testimony:

Objection 1. "In the argument before me this objection was waived by counsel for defendant."

Objection 2. "Waived in the argument."

Objection 3. "Testimony of J. F. Griffin stricken out."

Objection 4. "Objection sustained. The checks to Williams and Massey being the best evidence of the amounts received by each of them."

Objection 5. "So much of this answer as refers to what was said and done by the parties at the time admitted. The balance of this answer held incompetent."

Objection 6. "Objection sustained."

Objection 7. "The defendant on cross-examination having brought out a part of the conversation between Williams and Springs, this objection is overruled, and the answer to the question is admitted."

Objection 8. "Objection overruled; the time and place was sufficiently laid for the contradiction."

Objection 9. "I hold the above testimony incompetent for the purpose of contradiction, but competent for the purpose of throwing light on the question as to whether plaintiff sold the land in question to defendant or whether he merely obtained a loan on the land."

Objection 10. "Overruled."

Objection 11. "No answer to question, but I rule the latter competent as to whether deed was read or explained to plaintiff."

Objection 12. "The witness Knight being present at the transaction between the parties, I rule the answer to the question competent."

Objection 13. "This objection is sustained to the extent that I hold incompetent so much of Knight's testimony as relates to conversations with defendant in the absence of plaintiff; otherwise the objection is overruled."

Dunlap & Dunlap, for appellant. Williams & Williams, for respondent.

WATTS, J. On September 6, 1906, John Williams was the owner of a certain tract of land in the town of Lancaster, and on that day made a deed to R. C. McManus for the property, and McManus contemporaneously made a bond for title for the said property due and payable, September 1, 1907, for \$174, and on September 1, 1908, for \$174. That John Williams failed to pay the amount due September 1, 1907, and under ejectment proceedings June 5, 1908, issued out of magistrate's court, he was ejected from said property, and since said time McManus has been in possession. On May 22, 1909, this action was commenced by Williams to declare the said deed a mortgage and to require McManus to make a deed for the property upon the payment of the amount due. After issue joined, the matter was referred to John T. Green, Esq., who filed his report containing his conclusions of law and fact and sustaining the contentions of defendant, and holding that the deed was intended as written. To this report plaintiff excepted, questioning pretty much all of his findings both as to law and facts. Judge Shipp heard the case upon these exceptions and made a decree sustaining the referee, Mr. Green, and in his decree says: "I have carefully read the evidence offered in this case and the report of the referee. The referee carefully took all the evidence and made an able report on the facts and the law of the case. I fully concur with the referee in both his conclusions of fact and law, and, accordingly, the exceptions are overruled." Plaintiff appeals from this decree and questions his honor's decision and all his findings both as to law and fact.

The report of the referee should be reported in this case. He finds as a fact: That on numerous occasions prior to the date of execution of deed and bond for title, the plaintiff wished to borrow money from the defendant on lot in question. Defendant would not make the loan on the lot, but offered to buy if plaintiff would sell. That when papers were executed one Massey held a mortgage on the lot in question for \$200, which plaintiff was unable to pay. That the plaintiff was a colored man of more than ordinary intelligence. That he could read

and write, and no advantage was taken of him in the execution of the papers. That the deed and bond were executed at the same time, and before the same witnesses. That the plaintiff remained in possession of the premises after execution of papers until he was ejected by legal proceedings, under warrant of ejection, issued by two magistrates under section 2421 of the Code of Laws on June 22, 1908. That since deed of conveyance McManus paid taxes on the premises. That no money was paid or tendered to McManus on bond for title up to the time of ejectment. That on April 10, 1909, Mr. Dunlap, as attorney for plaintiff, made a tender to defendant for \$364.98 and demanded that he execute a deed for lot in question, claiming that the amount tendered was "in payment of the mortgage held by him from John Williams," and that McManus refused the same. He finds from all the facts and testimony in the case taken by him, and from his knowledge of the character of the witnesses examined: That the deed of conveyance was a deed, and not intended as a mortgage, and that there was a contract to resell to Williams within a stipulated time and upon conditions therein fully expressed. That the price of \$300, the sum paid to Williams for lot, was the full value of the lot at the time of sale. In the bond for title we find this: "And it is expressly agreed by and between the parties aforesaid that 'time is the essence of this contract,' and that in the event of nonpayment of the said sum of money or any part thereof, promptly at the time herein limited, that then the said R. C. McManus is absolutely discharged from any and all liability to make and execute such deed and may treat the said John Williams as tenant holding over after the termination or contrary to the terms of his lease; or if he prefer so to do he may enforce payment of the purchase money." It will be borne in mind that we have findings of fact by referee concurred in by the trial judge.

[1, 2] Was the deed of conveyance from Williams to McManus a mortgage or absolute sale? For while it is undoubtedly true that a deed which appears on its face to be an absolute conveyance may in equity be declared a mortgage if the evidence be sufficient to show that such was the intention of the parties, yet it is equally true that the presumption is that the deed is what on its face it purports to be—an absolute conveyance—and to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. 3 Pom. Eq. Jur. § 1196; Arnold v. Mathison, 3 Rich. Eq. 153; Petty v. Petty, 52 S. C. 54, 29 S. E. 406.

[3] "Whether any particular transaction amounts to a mortgage or absolute sale, with an agreement allowing the vendor to repurchase the lands at a special price and within

a time limited, must to a large extent depend upon its own special circumstances, for the question finally turns in all cases upon the real intention of the parties as shown upon the face of the writings or disclosed by the extrinsic evidence." 3 Pom. Eq. § 1195; Brown v. Bank, 55 S. C. 70, 32 S. E. 816. The evidence in this case satisfies me that the minds of Williams and McManus met, and they fully understood each other when the papers were executed herein. McManus would not loan Williams any money on mortgage, but purchased the land at a fair and adequate price, and in no manner overreached Williams, and the real intention of the parties, as disclosed by the evidence, was that it was an absolute deed. At the same time, it was the intention of the parties if Williams could comply with the terms and conditions of the bond for title, and promptly meet the payments therein provided for, McManus was to reconvey the property to him. Williams understood that he was selling to McManus, and that if he did not promptly meet the payments, as provided for, that his right to have the lot reconveyed to him would be defeated. It is "so nominated in the bond," because the agreement was that "time is the essence of this contract," and upon the nonpayment of the said sum of money, or any part thereof, promptly at the time herein limited, that McManus is absolutely discharged from any and all liability to make and execute such deed and could treat Williams as a tenant holding over. Williams was neither a lunatic nor a fool, but, on the contrary, was of ordinary intelligence, and there is some proof that he consulted a competent attorney. If it was intended as a mortgage by McManus, we are bound to conclude that he did not act as a good business man, in that he made no provision to reimburse himself for any necessary expenses that he might be put to in the enforcement of his legal rights. The courts are to enforce contracts as they are made, and not to relieve parties who become dissatisfied or think they have made a poor trade.

Ejectment proceedings were instituted on June 5, 1908, by McManus, under section 2421 of the Code, to eject Williams from the premises, and on that day a summons and a complaint was duly served on him. The complaint was verified, and the copy of bond for title was served also. In these proceedings McManus specifically claimed title to the premises. Williams failed to answer or appear in person or by attorney on the day for the hearing. The case was heard and submitted to a jury, properly impaneled, and the jury found for McManus, and Williams was ejected from the premises under a warrant of the court. This is a circumstance going to show that Williams knew by that by his noncompliance with the terms and conditions of the payments, as provided for

in the bond for title, that he had forfeited his claims thereunder, and submitted to the ejectment. He was ejected on June 22, 1908, and on May 22, 1909, 11 months from that time, he commenced this suit having on April 10, 1909, through his attorney Dunlap, made a tender to McManus of the sum of \$364.98, with a demand that he execute to him a deed of conveyance claiming that the sum tendered was "in payment of the mortgage held by him from John Williams." So it is seen that nearly 10 months after the ejectment is the first time that we hear of any contention on the part of Williams that the deed, absolute on its face, was a mortgage. Property might have gone up in value in that time. The evidence shows that, while Williams remained in possession, McManus paid the taxes.

[4] Where "time is made the essence of the contract," the parties are bound by the time limited in the contract, and the vendee forfeits his rights by a failure to comply within the specified time. *Doar v. Gibbs, Bailey, Eq. 371*. In this case it was agreed that "time is the essence of this contract," and the plaintiff failed to pay taxes as they became due and failed to meet the first payment due, September 1, 1907, as he had obligated himself to do. Then he forfeited all rights he had under the contract to recover. In the case of *Davenport v. Latimer*, 53 S. C. 572, 31 S. E. 633, Justice Jones says: "Generally a vendee cannot maintain an action against vendor for specific performance of a contract to sell land, unless he shows that he complied with, or offered to comply with, the contract on his part and was refused by the vendor. But since equity leans to compensation, in preference to forfeiture, the vendee, if he cannot show exact compliance with the contract on his part, may still have a specific performance or compensation, provided he is not guilty of laches in the assertion of his claim and stands ready and willing to comply, and shows reason satisfactory to the court in excuse of his failure to comply." The plaintiff in this case has not brought himself within the principle, for he went into a contract with his eyes open. He knew what he was doing. He obligated himself to pay taxes on the land he was to pay \$174 for on September 1, 1907, and the same amount on September 1, 1908. He knew that "time was the essence of the contract," and yet he failed to pay taxes and the \$174 due September 1, 1907, and made no effort to do so, and when served with ejectment proceeding papers on June 5, 1908, he did not pay or attempt to pay it. On April 10, 1909, he tendered the amount through his attorney and demanded deed and commenced this action May 22, 1909. All of this shows there was no excuse for his default, and from all the evidence in the case, we conclude that the natural, logical, and proper

conclusion is that he was at fault, and whatever rights he had on the bond for title he forfeited by failure to comply with the conditions he had obligated himself to perform.

The judgment of the circuit court is affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur.

FRASER, J. I concur in the result. The transaction here originated in an application for a loan. There was a contract to convey and reconvey as a part of the same transaction. The law, as I understand it, is well stated in *Pomeroy's Eq. Jurisp.* vol. 3, p. 171, § 1194: "Where land is conveyed by an absolute deed and an instrument is given back as a part of the same transaction, not containing the conditions ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a special time, the two taken together may be what on their face they purport to be—a mere sale with a contract of repurchase—or they may constitute a mortgage. In the first case, where the transaction is merely a sale and contract of repurchase, the agreement must be fulfilled according to its terms. If the grantor fails to pay the money at the stipulated time, all his rights, either at law or in equity, under the contract, are gone. There is no equity of redemption. In the second case, if the transaction be a mortgage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations. The maxim, 'Once a mortgage, always a mortgage,' applies to this condition with especial emphasis."

It is sometimes a very nice question as to whether a contract to convey and a contract to reconvey, executed at the same time, is to be taken as an absolute conveyance, with a mere right to repurchase, or whether the two papers together constitute a mortgage. If Williams, from the first, had claimed that this transaction amounted to a mortgage, he may have had a cause which this court could have sustained. He did not speak when he ought to have spoken, permitted himself to be turned out of possession, and for eight months laid no claim to the place, and it seems to me that whatever doubts the court may have had are solved against him. Courts ought to construe contracts between parties to be what on their face they purported to be, and, if otherwise, clear and convincing proof according to the strict rules of law must be furnished to show that they are not.

It seems to me that Williams' conduct is inconsistent with the position of a mortgagor, and for this reason I concur in the result.

(31 S. C. 1)

JONES et al. v. BELLINGER et al.
(Supreme Court of South Carolina. March
12, 1912.)

DEEDS (§ 133*)—VESTED REMAINDERS—TERMINATION OF LIFE ESTATE BY SUBJECTING ESTATE TO DEBT.

A deed conveyed land to a husband and wife for their joint lives, and after the death of either to the survivor for life, and after the death of both to the child or children of the husband and wife living at the death of the survivor and their heirs, any child of a predeceased child to take the share to which he would have been entitled, had his parents survived the life tenant, and provided that if any creditor should attempt to subject the life estate to the payment of the debts of either of the life tenants that the life estate should immediately determine, and that the remainder should vest immediately and absolutely in the remainderman. *Held* that, upon the threat and attempt of the mortgagee of the surviving life tenant to foreclose and subject the land to the payment of the debt, the surviving life tenant's interest terminated, and the title to the lands vested immediately in the children of the grantees, all of whom were living, to the exclusion of the grandchildren.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

Appeal from Common Pleas Circuit Court of Barnwell County; S. W. G. Shipp, Judge.

Action for construction of a deed by Laura Bellinger Jones and others against Melvina Bellinger and others; the infant defendants appearing by W. H. Jones, their guardian ad litem. Decree for plaintiffs, and defendants appeal. Affirmed.

The master's report, approved by the trial court, is as follows:

"The master, to whom the above-entitled cause was referred to take the testimony and report the same, together with his findings of fact, and conclusions of law, begs leave to report:

"That he has taken the testimony, notes of which are hereto attached. That from the evidence he finds: That on the 11th day of October, A. D. 1892, one A. T. Woodward conveyed to the late Martin Bellinger and the defendant Melvina Bellinger the lot of land described in the complaint, upon the following limitations: 'To have and to hold all and singular the said premises unto the said Martin Bellinger and his wife, Melvina Bellinger, for and during their joint lives and after the death of either, then to the survivor for and during the balance of his or her life; and after the death of both, then to such child or children of the said wife by him begotten as shall be alive at the death of the said survivor and their heirs, any child or children of a predeceased child or children to take the share or shares to which he, she or they, would have been entitled had their parents survived said life tenant: Provided nevertheless that the power is hereby expressly granted the said life tenants by their joint deed, or in the case of the death of either, by the deed of the sur-

vivor, may sell and convey said premises in fee simple, reinvesting the proceeds thereof in real estate of like value, taking conveyances therefor having like trusts and limitations as are herein contained. And further provided that if at any time any creditor or creditors shall attempt to subject the life estate hereby conveyed to the payment of the debts of either of said life tenants, then and in that case the estate, right, title and interest shall immediately cease and determine, and all of his or her interest and estate herein shall pass and vest in the other life tenant of them living, and if dead, then the remainder shall vest immediately and absolutely in the remaindermen.' That Dr. Martin Bellinger, one of the life tenants, died about the year 1893, more than eight years ago, leaving surviving him the other life tenant, who was his wife, and their three children, who are the plaintiffs in this action. Only one of these children has married, and she (Mrs. Laura Bellinger Jones) has three children, the infant defendants named in the complaint, each of whom is under the age of 14 years, and appears in this action by his or her father, W. H. Jones, as his or her guardian ad litem. That on the 1st day of November, 1911, Mrs. Melvina Bellinger became indebted to Idis Brabham in the sum of \$500 to be paid him December 1, 1911, together with interest thereon at the rate of 8 per cent. per annum, and in order to secure the payment of said debt gave said Brabham a mortgage on the lot in question; and said Brabham now asks that the lot be sold in order to pay said debt, and for judgment for the amount thereof against Mrs. Melvina Bellinger. That upon the threat of Brabham to foreclose said mortgage the plaintiffs filed this complaint, claiming that the interest and estate of Mrs. Melvina Bellinger in said lot had ceased, and that the title to said lot had thereupon become vested in the plaintiffs under the limitations contained in said deed.

"I conclude, as matter of law, that the defendant Idis Brabham is entitled to judgment against the defendant Melvina Bellinger in the sum of \$504.33, including interest to the date of this report at the rate of 8 per cent. per annum. That in consequence of the threat and attempt of Idis Brabham to subject said lot to the payment of the debt due him by Mrs. Melvina Bellinger, under the provisions of the mortgage given by her, Mrs. Bellinger's interest and estate in said lot ceased and determined, and the title to said lot became, under the terms of said deed, vested in the plaintiffs in fee.

"As said by the Hon. S. W. G. Shipp in the case of Symmes v. Cauble (affirmed in 85 S. C. 438, 439, 67 S. E. 549), 'the creditor had the right to terminate his (the life tenant's) estate, and that was the extent of their power. They had no right to make the es-

tate or any part of it their own.' This construction of the clause in the deed is also sustained by the decisions in the leading case of *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654; *Howe v. Gregg*, 52 S. C. 88, 29 S. E. 394.

"Inasmuch as the deed provides that the life estate of Mrs. Bellinger shall immediately cease and determine upon the attempt of the creditor being made to subject the life estate to the payment of his debt, it at the same time provided for the acceleration and immediate vesting of what would otherwise be contingent remainders in the plaintiffs until the death of their mother, liable to being defeated by their death before her. This is in accord with the general doctrine that the estate in remainder must vest immediately upon the termination of the life estate supporting it. *Geiger v. Brown*, 2 Strob. Eq. 859, note. If the estate in remainder were still contingent, it would fall with the supporting life estate. Hence my conclusion that the estate in remainder vested in the children of Dr. and Mrs. Bellinger immediately upon the termination of the life estate in Mrs. Bellinger, to the exclusion of the grandchildren, infant defendants, and that the plaintiffs are entitled to the relief demanded in the complaint. As the plaintiffs receive the greater benefits under this litigation, they should pay the costs of this action."

W. H. Townsend, for appellants. G. Duncan Bellinger, for guardian ad litem of infant appellants. James H. Hammond, for respondents.

WATTS, J. This is an appeal from a decree of Judge Shipp, confirming in a short order the report of H. L. O'Bannon, Esq., master for Barnwell county, made in the above case. The report of master should be printed in the case.

For the reasons set out by the master in his able report, we think there is no error in Judge Shipp's decree confirming the same, and adopting it as the decree and judgment of the court and under the authorities quoted in said report and his conclusions.

The judgment of the circuit court is affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

STATE v. HENRY et al.

(Supreme Court of South Carolina. Dec. 19, 1911.)

Appeal from General Sessions Circuit Court of Union County.

Sam Henry and another were convicted of an offense, and they appeal. On motion to dis-

miss appeal for failure to file transcript of evidence. Motion sustained.

Nicholls & Nicholls, for appellants. J. C. Otts, for the State.

PER CURIAM. Motion granted.

STATE v. HUNSINGER.

(Supreme Court of South Carolina. Dec. 19, 1911.)

Appeal from General Sessions Circuit Court of Spartanburg County.

Chas. Hunsinger was convicted of crime, and appeals. On motion to dismiss appeal. Dismissed.

Nicholls & Nicholls, for appellant. J. C. Otts, for the State.

PER CURIAM. Motion granted.

(137 Ga. 612)

PERDUE et al. v. ANDERSON.

(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

1. WRIT OF ERROR—DISMISSAL.

The writ of error in this case, having been prematurely brought, is dismissed.

2. APPEAL AND ERROR (§ 337*)—DISMISSAL—GROUNDS.

The writ of error having been dismissed as prematurely brought, the cross-bill of exceptions must likewise be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 337.*]

3. APPEAL AND ERROR (§ 337*)—DISPOSITION OF CAUSE—LEAVE TO FILE EXCEPTIONS.

Under the special facts of this case, leave is granted to file the certified copies of the main and cross bills of exceptions in the office of the clerk of the superior court as exceptions pendente lite.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 337.*]

(Additional Syllabus by Editorial Staff.)

4. APPEAL AND ERROR (§ 337*)—TIME FOR TAKING PROCEEDINGS—PREMATURE PROSECUTION.

In an action to recover land, where both parties claimed under a will, and counsel for the parties entered into an agreement to submit to the presiding judge, without a jury, a construction of the will, reserving the right to a trial on the facts after the court has construed the will, and the judge, in rendering his opinion construing the will, proceeds to enter a decree that the devisee under whom defendant claimed took a fee simple to the land, and that the land could not be recovered in the pending suit, a writ of error, prosecuted without trial on the facts, is premature, since a holding by the appellate court contrary to that of the trial judge in construing the will would require a trial of the facts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 337.*]

Error from Superior Court, Warren County; D. W. Meadow, Judge.

Action by Mrs. J. T. Perdue and others against T. L. Anderson, administrator. From the judgment, both parties bring error. Writ of error dismissed.

L. D. McGregor, for plaintiffs in error. E. P. Davis, for defendant in error.

ATKINSON, J. No case can be brought to the Supreme Court upon a bill of exceptions, so long as it is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the case, or final as to some material party thereto. To an interlocutory decree a bill of exceptions pendente lite may be filed. Civil Code, § 6138.

In the present case an action of complaint to recover 135 acres of land was brought. In the petition it was alleged that both parties claimed by virtue of the terms of a will, and that a devise was made to a certain legatee, defeasible upon a condition which had happened, and that the defendant claimed under such devise, and therefore had no title. The defendant denied holding all of the land under such devise, but alleged that a certain interest in the property of the testator passed to another legatee, who had conveyed it for a consideration to the devisee first mentioned; that there had been a subsequent division of the property, and that 114 acres, forming a part of that in controversy, had been set apart as the share thus conveyed. Counsel for the parties entered into an agreement to submit to the presiding judge, without a jury, a construction of the will, but expressly provided in the agreement of submission: "Neither party waives his or her right to a trial of the case on the facts after the court has construed the will." And also: "By this agreement and the judgment of the court on the same neither party is to be concluded on the facts of the case; and the question as to how much land W. S. Pate [the legatee who was alleged to have conveyed his interest] received as legatee under the will of Nathan Pate is left open to be passed on by a jury, as are all of the other facts in this case, except such as are herein agreed upon." Thereupon the presiding judge filed an opinion construing the will in a manner which would result favorably to the defendant. In the beginning of the opinion he referred to the agreement submitting the construction of the will to him, "with all the rights reserved to the parties as set out in said agreement attached hereto." At the close of his opinion he stated: "It may be that what is above held by this court is as far as is necessary to go in this matter; but under the pleadings and agreed statement of facts in the submission of the construction of the will to the court, it may not be beyond the intent of the parties and the spirit of the submission to go further." He then stated that it was held, ordered, and decreed that the devisee under whom the plaintiff alleged that the defendant claimed took a fee-simple, indefeas-

ible title to the land, "and that said land cannot be recovered in the suit pending."

[1-4] Under the enumerated circumstances, this ruling of the court was not such a final disposition of the case as to authorize it to be brought directly to this court by bill of exceptions. The parties did not agree for the presiding judge to enter a final judgment or decree in the case, but to adjudicate the proper construction of the will, reserving the right to further try the case on issues of fact before a jury. If this court should construe the will differently from the presiding judge in the court below, it would not terminate the case, but only be a step in the progress of the trial, and it would still remain open for trial upon other issues in accordance with the agreement of submission. If a single question of law is selected, and adjudication invoked upon it, and the case still left pending for trial on other issues, the issue submitted not necessarily controlling the whole case, this does not present a case for exception and for adjudication by this court, and a bill of exceptions brought for that purpose is premature.

Writ of error dismissed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 638)

WASHINGTON v. GOSSETT.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There being no complaint that any error of law was committed upon the trial, and the evidence being sufficient to support the verdict, the judge did not err in refusing to grant a new trial.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action between J. D. Washington and W. A. Gossett. From the judgment, Washington brings error. Affirmed.

Geo. A. H. Harris & Sons, for plaintiff in error. Eubanks & Mebane, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 635)

ANDERSON et al. v. DANIEL et al.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. DEMURRER TO PETITION.

The petition was not subject to any of the grounds of demurrer.

2. APPEAL AND ERROR (§§ 588, 706*)—REVIEW—INSUFFICIENT BRIEF OF EVIDENCE.

There being no bona fide effort to brief the evidence in the case, and the so-called brief of evidence contained in the record being largely composed of objections to evidence and the

arguments of counsel thereon, and colloquies between counsel and between counsel and the court, such document will not be considered as a brief of the evidence, and therefore no question depending on the evidence can be decided. *Price v. High*, 108 Ga. 145, 33 S. E. 946.

(a) It follows that the grounds of the motion for a new trial, complaining of the refusal to grant a nonsuit, the admission of certain evidence, and the direction of a verdict, in the absence of a brief of evidence, present no questions for determination.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2944-2947; Dec. Dig. §§ 588, 706.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by L. L. Daniel and others against L. C. Anderson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. E. Mann, for plaintiffs in error. Maddox, McCamy & Shumate, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 636)

HASELL & POWELL v. WOODSTOCK IRON WORKS.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 499*)—ASSIGNMENT OF ERROR—RULINGS ON EVIDENCE.

An assignment of error in a bill of exceptions to a ruling of the court in admitting evidence over objection is insufficient, where it does not appear what objection, if any, was urged to the admissibility of the evidence before the judge at the time of the ruling complained of. *Georgia Railroad v. Daniel*, 135 Ga. 108 (2), 68 S. E. 1024.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 499.*]

2. CORPORATIONS (§ 521*)—BREACH OF CONTRACT—DIRECTING VERDICT.

In an action against a corporation for breach of a contract alleged to have been entered into by the plaintiffs and a designated person as agent for defendant, where the answer denied the agency, and the evidence failed to show the fact, or that the act of the alleged agent in making the contract was ratified by the corporation after knowledge that he had undertaken to contract for it, there was no error, after evidence had been introduced by both parties, in directing a verdict for defendant.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 521.*]

Error from Superior Court, Chattooga County; J. W. Maddox, Judge.

Action by Hassell & Powell against the Woodstock Iron Works. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. P. Shattuck and W. M. Henry, for plaintiffs in error. F. W. Copeland, Jas. M. Bellah, and King, Spalding & Underwood, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 607)

LOUISVILLE & N. R. CO. v. NANNY et al. (Supreme Court of Georgia. Feb. 16, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 54*) — STOCK GUARDS—FAILURE TO REPAIR—ACTION FOR DAMAGES.

A landlord cannot recover in a suit for damages against a railroad company for failure to keep in good repair a stock guard, where the sole damage alleged is to the crop of a tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 54.*]

2. RAILROADS (§ 104*) — DEFECTIVE CATTLE GUARDS—RIGHT OF ACTION.

The right of action given by Civil Code, § 2699 et seq., is a statutory right, and applies only to the owner of the land, and not to a tenant. *Florida, etc., R. Co. v. Judge*, 100 Ga. 600, 28 S. E. 879; *Hardin v. Chattanooga So. R. Co.*, 113 Ga. 357, 38 S. E. 839; *Ala. Great Southern R. Co. v. Fowler*, 104 Ga. 148, 30 S. E. 243; *Southern R. Co. v. Harrell*, 104 Ga. 602, 30 S. E. 821.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 104.*]

3. GENERAL DEMURRER.

Under the principles above announced, and the former decisions of this court, the action was subject to general demurrer.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by J. P. Nanny and others against the Louisville & Nashville Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

O. N. King and D. W. Blair, for plaintiff in error. Maddox, McCamy & Shumate and W. W. Sampler, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(137 Ga. 634)

MONTGOMERY v. BAXTER.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—DENIAL OF CONTINUANCE.

The court did not err in refusing to continue the case on the ground of the absence of the defendant and his witnesses; it appearing from the record that the court did postpone the trial until the defendant appeared with his witnesses, and that they testified before the trial was concluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4121; Dec. Dig. § 1043.*]

2. ADMISSION OF EVIDENCE.

The ground of the motion for new trial complaining of the refusal to exclude evidence was too indefinite to present any question for decision.

3. NEW TRIAL (§ 105*)—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT.

The ground of the motion for a new trial relating to the alleged newly discovered evidence was without merit, as the evidence set forth was merely impeaching in character, and not calculated to produce a different result if a new trial was granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221, 229; Dec. Dig. § 105.*]

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by J. D. Baxter against H. B. Montgomery. From a judgment for plaintiff, defendant brings error. Affirmed.

F. A. Cantrell and J. G. B. Erwin, Jr., for plaintiff in error. O. N. Starr and T. W. Skelly, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 693)

MASSACHUSETTS BONDING & INS. CO. v. REALTY TRUST CO.

(Supreme Court of Georgia. Feb. 15, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 117*)—CONTRACTOR'S BOND—RELEASE OF SURETY.

Relatively to a surety on a contractor's indemnity bond, the owner of a building is not bound to withhold payments to the contractor, as stipulated and agreed in the contract, on the ground that the contractor is in default with the materialmen. Under the contract in this case, the contractor was to be paid in monthly installments, and the amount of the installment was to be fixed by the value of the materials and labor which entered into the construction of the building during the previous month, plus the agreed commission.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

2. EQUITY (§§ 51, 52*)—INDEMNITY AGAINST LIENS—ACTION ON BOND.

Where a contractor gave to the owner of a building which he was to construct a bond,

with surety, conditioned for the faithful performance of his contract, and the owner brings an equitable suit against the contractor and his surety for breach of the bond, wherein it is alleged that numerous subcontractors and materialmen are claiming liens against the building, which liens are disputed, but, if established, will be valid liens against the property, and the claimants of the liens are made parties, and a reference of the claims of lien to a master is prayed, and judgment is asked against the contractor and his surety for the amount of such claims found to be valid and due, such suit is maintainable without prior payment of the liens by the owner, on the ground of avoidance of multiplicity of suits and circuity of action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-172; Dec. Dig. §§ 51, 52.*]

3. EQUITY (§ 150*)—MULTIFARIOUSNESS.

Such a suit as is described in the preceding headnote is not multifarious for misjoinder of parties or causes of action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371-379; Dec. Dig. § 150.*]

4. PRINCIPAL AND SURETY (§ 117*)—CONTRACTOR'S BOND—RELEASE OF SURETIES.

The surety on the bond of a contractor for the faithful performance of a building contract is not released because at the time of the payment of the last installment of the contract price, pursuant to the terms of the contract, the work is incomplete and there are unpaid subcontractors and materialmen.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Realty Trust Company against the Massachusetts Bonding & Insurance Company and another. Judgment for plaintiff, and defendant Massachusetts Bonding & Insurance Company brings error. Affirmed.

Dodd & Dodd, for plaintiff in error. Wimbish & Ellis, for defendant in error.

EVANS, P. J. The Realty Trust Company contracted with H. L. Stevens to construct an office and theater building in the city of Atlanta. By the terms of the contract Stevens was to furnish all labor and material and to construct the building in conformity with the plans and specifications of an architect, at actual cost, plus 10 per cent., with a guaranty that the cost of the work should not exceed \$160,000, exclusive of his commissions and of certain extras referred to in the contract. The contract stipulated that Stevens was to be "paid for the execution of the work covered by the contract and such other work as may be ordered as hereinafter provided, actual cost, plus 10 per cent., to be paid as follows: On the 1st day of each month the party of the first part shall be reimbursed for all expenditures incurred in connection with the work for the month previous, plus 5 per cent. The remaining 5 per cent. to be due and payable within ten days after the completion and acceptance of the work by the architect.

* * * In consideration of the payments to be made as herein provided, the party of the first part guarantees that the actual cost of the work to be performed by the party of the first part under this contract shall not exceed the sum of one hundred and sixty thousand (\$160,000) dollars, not including the 10 per cent. hereinafter mentioned; and the party of the first part shall, if the cost exceeds this sum, complete said building as herein provided at his own expense." Pursuant to his agreement in the contract, Stevens gave to the Realty Company a bond in the sum of \$50,000, with the Massachusetts Bonding & Insurance Company as surety, conditioned for the faithful performance of his contract. This bond contained the following provision: "A substantial compliance with the contract herein referred to, on the part of the obligee herein, shall be a condition precedent to its right of recovery hereunder. And the obligee shall take from contractor, on the 1st day of each month, an itemized sworn statement of the amount and cost of labor employed and the amount and cost of material used or delivered to the contractor on the job for use in the building, and the obligee herein shall, at the same time, furnish the surety hereon with a true copy of such statement, by mailing the same to Fair Dodd, Atlanta, Georgia, its general agent."

The building was not completed by the contractor, and certain subcontractors and materialmen were claiming liens against the building, when the Realty Company filed its equitable petition against Stevens, the contractor, his surety, and the different claimants of liens. The petition alleged that Stevens entered upon his contract; that various monthly payments were made upon the architect's certificates during the progress of the work, according to the terms of the contract; that the last certificate of the architect included a sum which, added to the previous payments, exceeded the guaranteed contract price; that the plaintiff paid on this certificate \$13,748.71, which completed the payment of the full contract price; that the plaintiff took from the contractor, on the 1st day of each month, an itemized sworn statement of the amount and costs of labor employed, and the amount of material used, and furnished a true copy of it to the Surety Company as provided in the bond; that Stevens, though having received the entire contract price, has abandoned his contract, and the plaintiff has undertaken to complete the building, and a stated sum will be required for this purpose; that 25 named subcontractors and materialmen are claiming liens for work done on the building and material furnished, and though plaintiff denies its property is liable to these liens, yet it maintains that the contractor and surety on his bond are liable for such sums as it might be required to pay on account of their claims of lien, if found to be valid liens

against the plaintiff's property. A reference was prayed of these claims of lien to a master, to report as to the existence and amount of each, and the liability of the plaintiff's property therefor. Judgment was prayed against the contractor and his surety for such damages as accrued from the breach of the bond. General and special demurrers by the surety were overruled, and it excepted.

The subject-matter of the contract between Stevens and the Realty Company was the construction of a building upon stipulated terms. The contract provides that Stevens is to furnish all the labor and material, and construct the building according to the plans and specifications, at a cost not to exceed a guaranteed sum. The contract of the surety is that it is liable to the Realty Company to the extent of \$50,000, unless "the said Stevens faithfully, well, and truly perform his said contract in erecting and completing said building according to all its terms and provisions and the provisions of the plans and specifications made a part of said contract." In effect, the surety guarantees that Stevens will complete the building according to the contract; that is, he will deliver the completed building to its owner for the contract price. The allegation is that Stevens has abandoned his contract without completing the building, that certain materialmen are claiming liens in a stated amount, and that a certain sum will be required to complete the building. According to the allegations of the petition, the contractor has breached the contract, and the Realty Company is entitled to sue.

[1] The demurrer challenges the right of the obligee to recover anything on account of liens for material used in the construction of the building. Relatively to a surety on a contractor's bond for the faithful performance of the building contract, the owner of the building was not bound to withhold the payments made to the contractor, where such payments are stipulated for and agreed upon in the contract, on the ground that the contractor is in default with the materialmen. *Thomason v. Keeny*, 8 Ga. App. 854, 70 S. E. 220; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165. It is contended that the provision that "on the 1st day of each month the party of the first part shall be reimbursed for all expenditures incurred in connection with this work for the month previous, plus 5 per cent., the remaining 5 per cent. to be due and payable within ten days after the completion and acceptance of the work by the architect," contemplates that only such expenditures that were actually paid for by the contractor should be included in the monthly installments. We think this construction is too strained, when we consider the general scope and purpose of the bond. The contract reflects the intention of the parties that the contractor was to be paid in monthly installments, and the amount of the

installment was to be fixed by the value of the materials and labor which entered into the construction of the building during the previous month, plus the agreed commission. Indeed, the provision in the bond that the obligee shall take from the contractor, on the 1st day of each month, an itemized statement of the amount and cost of labor and of the material used or delivered to the contractor on the job for use in the building, and furnish the surety with a true copy of it, indicates an appreciation by the surety that they may be a source of liability from liens for unpaid material; and it exacted monthly notices of the extent of the material and labor used, that it might be advised of the facts, so that it might take such steps as it should deem proper to avoid liability from this source.

[2] Again, it is insisted that the obligee cannot recover the amount of these liens until it has discharged them by payment. It is true that in a common-law action for a breach of contract of indemnity the damages are usually limited to actual loss. But this action is equitable in its nature, and calls for the application of equitable principles. It is alleged that numerous subcontractors and materialmen, 25 in number, are claiming liens to the aggregate amount of \$48,768 upon the building and real estate upon which it is located, and, while denying liability to these several subcontractors and materialmen, they are made parties to the petition, and it is prayed that their claims of lien be referred to a master, who shall report the amounts due to them by the contractor, and to what extent, if any, they are liens against the building and real estate of the obligee. Unless this course is permissible, the owner of the building would be obliged to pay them at his risk, if paid without foreclosure, or await the pleasure of the materialmen to assert their liens within the statute of limitations, in as many suits as there are claims of lien, before he could have recourse on the bond. Such a requirement would result in vexatious delays and a multiplicity of suits, to prevent which equity will take cognizance and settle all the matters in one proceeding. By bringing the lienors into the case their rights will be fixed as against the plaintiff, and at the same time the extent of liability of the surety and its principal will be fixed.

[3] The joining of the lienors as defendants does not render the petition multifarious. *Wilson v. Stillwell*, 9 Ohio St. 467, 75 Am. Dec. 477. Our ruling in this respect does not in any way militate with the ruling in *McGarry v. Selz*, 129 Ga. 296, 58 S. E. 856. The bond in that case was essentially different from the one in the case at bar.

[4] After receiving the payment of the last installment of \$13,748.71, it is alleged that Stevens abandoned his work, leaving it

in an incomplete state, and did not apply this payment to subcontractors for material and labor. The surety set up in its demurrer that this last payment under these circumstances operated to discharge it from liability. The payments were made by the plaintiff to the contractor according to the stipulations in the contract, and the surety cannot claim as a release any act done by the plaintiff authorized by the contract. *Duluth v. Heney*, 43 Minn. 155, 45 N. W. 7; *Leavel v. Porter*, 52 Mo. App. 632.

The grounds of the demurrer are numerous, but we do not think they are meritorious. The foregoing principles which we have ruled control the essential points made by the demurrer.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 704)

SOUTHERN RY. CO. et al. v. TAYLOR.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 208, 222*)—INJURY TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. Civil Code, § 3131; *Stewart v. Seaboard Air-Line Ry.*, 115 Ga. 624, 41 S. E. 981; *East Tenn. R. Co. v. Reynolds*, 93 Ga. 570, 20 S. E. 70.

(a) In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or his master's representative, the servant must show that the order was a negligent one under the circumstances. If the order was negligent, and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received in complying with the order. 1 *Labatt on Master and Servant*, § 433 et seq.; *Central R. Co. v. Kenney*, 58 Ga. 486; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Daniel v. Forsyth*, 106 Ga. 568, 32 S. E. 621; *Hendrix v. Vale Royal Co.*, 134 Ga. 712, 68 S. E. 483, and citations.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 550, 648-651; Dec. Dig. §§ 208, 222.*]

2. INSTRUCTIONS.

Civil Code, §§ 3130, 3131, in regard to the master's duty to employ competent servants and furnish proper machinery, were not applicable in their entirety to the facts of this case; but as the judgment must be reversed on another ground, it is unnecessary to decide whether the giving of such sections in charge to the jury would require the grant of a new trial.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by R. F. Taylor against the Southern Railway Company and another. Judgment for plaintiff, and defendants bring error. Reversed.

Taylor sued the Southern Railway Company and Avery for personal injuries. There was a verdict for the plaintiff against both defendants, whose motion for a new trial being overruled, they excepted. Upon the trial the evidence submitted in behalf of the plaintiff tended to show the following facts:

The plaintiff was 45 years old at the time he was injured, was a bridge carpenter, and had been engaged in work as such for off and on about 20 years. Avery was superintending and directing the work in reconstructing a trestle on the railway company's road. The plaintiff was working on the trestle, with others, under Avery. A plank was needed at the place where the work was being done by the plaintiff and others. He testified as follows: "Mr. Avery told us he would look us up one; so he went off, and me and several went on back with him, and he pointed this plank out, and told us to go to the end of the trestle and get a rope and tie to it and lift it to the top, so we could put it down across that. It was Mr. Avery that directed us to go and get this particular plank. To get it we had to go down there to it and tie a rope to it. I reckon it was 3 or 4 feet below the top of the trestle to where this plank lay, somewhere along there below the top surface. It was on the side of the bent at the outside of the ballast. * * * In getting down off the bridge, I got down right here on this cap [referring to a model of the trestle], and had my right side, my face, turned towards the trestle, you know, and caught around the tie and cap too, and put my right foot on the right edge of the plank, and then put the other one down, you know; straightened up to get in position on the plank, and it turned with me and threw me. What caused the plank to turn with me was not having a full bearing; did not have enough bearing here, you know, over the plank, the width of the plank. Before I got down on it, I could not see from where I was that it did not have a full bearing. It lapped over, you know, and I could not discover it. It was standing out straight. You could not tell about it from the position I would have to get down on it. * * * The plank rested on the sill, and did stick out over it, and covered it. You could not see under the plank. If you was down under the plank, you could tell what was under it. I could not. * * * In getting down on that plank, there was no place to get down on it other than the place I did get down. I could not see any other place, and there was no other place. That was a safe place to step down upon. You know, this scaffolding was the only place you could get on, and you would have to get down there to tie the rope to it. Mr. Avery told us to get a rope and get down on it. He came along ahead of us and pointed out this plank and told us, 'Here is one you can get.' He was hunting a loose plank, to carry it back

for scaffolding, and he told us to get ropes and tie it, and move it down to the next place."

A witness for the plaintiff testified as follows in reference to the plank: "It had been there 5 or 6 days. It was not nailed. It was left there on Saturday when we quit, and it was there Monday morning. [The plaintiff was injured on Monday.] The trains passing would shake it a little. It would be bound to shake it. I don't know whether it would shake it off or not. * * * I heard Mr. Avery tell Mr. Taylor to get down and tie a rope around that plank, so that they could pull it up and move it to the next bent; and Mr. Taylor obeyed that order." Another witness testified: "This plank was put there for the purpose of serving on that part of the scaffolding. * * * I suppose the work was done there was the reason we were going to move that plank. * * * When Mr. Taylor got down on it, I suppose he could have stepped on the cap sill, instead of stepping on the plank. I don't know whether he could or not. I did not see the cap. I seen the plank, all right. I know the construction of it. I know that he could have stepped on the cap sill without stepping on the plank. This plank is something like 2½ feet below this top here. If you step off that point there, you have got to step around in that direction, then around and kind of under. I don't know how far it is from this top to underneath there, exactly. Of course, it is more inconvenient to go around down under there and get on that cap than to step on the 3x10 [the plank plaintiff got on]. It necessitates some strain from that point around underneath there, and on the plank. If this place had been sticking out as the plank, it would not have fallen. By close inspection any one could have discovered that this thing was not nailed, and that it did not stick out as far as the plank. By a casual observation I could not see it underneath there, how far it was under there." The witness had a model of the trestle before him when testifying.

There was evidence showing the nature and extent of the plaintiff's injuries, the amount he was earning at the time he was injured, and his life expectancy. The defendant introduced no evidence.

F. A. Cantrell and Maddox, McCamy & Shumate, for plaintiffs in error. Lawton Nalley and J. G. B. Erwin, Jr., for defendant in error.

ATKINSON, J. (after stating the facts as above). [1] No complaint is made of any inherent weakness or other defect in the plank or the sills upon which it rested, or that the sills did not project sufficiently for the plank to have had a secure position upon them; but the whole complaint is merely that the plank, though loose, projected so far beyond the ends of the sills as to render

it insecure, and when plaintiff rested his feet upon the outer edge it tilted, precipitating him and causing the injury. The plaintiff knew that the plank was not nailed, or otherwise fastened to the sills; in other words, that it was a loose plank. He saw that the ends of the sills upon which the plank rested did not extend beyond the plank, as he testified that he could not see the ends of the sills beyond the plank as he got down on it. Yet he undertook to stand on it, without any effort to ascertain whether it would be safe for him to do so, notwithstanding he knew that the plank was loose, and that the ends of the sills upon which it rested could not be seen beyond it. If Avery, the representative of the railway company, was with Taylor at the time the latter got down on the plank, the peril of doing so in obedience to Avery's order was no more apparent to the latter than to Taylor; and if the danger was hidden to both of them, and could not have been discovered by the exercise of ordinary care, then Taylor could not recover, for he assumed the risk incident to getting on the plank. If the danger was obvious, then it was equally so to both Taylor and Avery. The plank did not constitute a part of the work planned by Avery, nor a part of the permanent structure of the trestle, but was merely a loose plank, left where a portion of the trestle had been completed. Considering the plaintiff's age, his long experience in bridge-building, and his knowledge of all the circumstances of the situation at the time he got upon the plank, and applying the principles announced in the first headnote to all the facts of the case, the plaintiff was not entitled to recover.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 607)

SOUTHERN RY. CO. v. FRIX.

(Supreme Court of Georgia. Feb. 16, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 446*)—OPERATION—INJURIES TO ANIMALS ON TRACK.

The evidence submitted in behalf of the plaintiff showing that his horses ran along the railway track ahead of the train, of their own accord, until, reaching a trestle, they fell into it and were injured, and that the train was moving very slowly, hardly faster than a man could walk, so that the horses had time to escape, and that the whistle was continuously blown to frighten them from the track, and that the disaster was caused by the horses following the track, when the character of the embankment along which they were running was such that they might have left the track without going upon the trestle, the plaintiff failed to prove a cause of action against the railway company, and the court erred in not granting a nonsuit. *Gay v. Wadley*, 86 Ga. 103, 12 S. E. 298.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 446.*]

2. RAILROADS (§ 439*)—OPERATION—INJURIES TO ANIMALS—PLEADING.

Under the allegations of the petition, the embankment and obstructions along it were such as to render it impossible for the horses to leave the track; and therefore the petition as amended was not subject to demurrer.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 439.*]

3. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

As a nonsuit should have been granted, it is unnecessary to pass upon the grounds of the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by M. L. Frix against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, for plaintiff in error. J. G. B. Erwin, Jr., for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 734)

LAMAR et al. v. LAMAR.

LAMAR v. LAMAR et al.

(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

1. WILLS (§ 641*)—CONSTRUCTION—PRIOR AND SUBSEQUENT ITEMS.

It is competent for a testator, in a subsequent item of a will, to impose restrictions and limitations upon a bequest made in a former item; and in the present case this was done in clear and unambiguous language.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1525-1527; Dec. Dig. § 641.*]

(Additional Syllabus by Editorial Staff.)

2. WILLS (§ 548*)—CONSTRUCTION—PRIOR AND SUBSEQUENT ITEMS.

A will left certain stock in three companies, subject to trusts or limitations over, specifying that the bequest was subject to a restriction in a later item of the will. Similar language as to a restriction in the later item was used in regard to another share, where there was no trust. By the third item a share in the estate, including stock in the same companies, was left to a son in fee simple. The fourth item directed that stock of the three companies should be held by the executors until January 1, 1925, and then distributed among the legatees mentioned in items 1 and 3 and certain paragraphs of item 2, "as in each of said items and paragraphs written," provided that, if any of the legatees should die before January 1, 1925, leaving no child or children, the income and dividends from the stock, as well as the stock, should revert to the estate and be distributed among the surviving children in equal shares. *Held*, that the provision as to reversion applied to the bequest contained in the third item, as well as to the other items of the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 548.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Mrs. Jack Lamar and another, executors, against W. D. Lamar, executor. To a judgment for defendant, plaintiffs bring error, and defendant files a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

Mrs. Jack Lamar and Henry J. Lamar, Jr. (hereinafter called the Third), brought their equitable petition, alleging that they were the executrix and executor, respectively, of the last will and testament of Henry J. Lamar, deceased (called the Second), and praying for an accounting against Walter D. Lamar, as executor of the estate of Henry J. Lamar, Sr. (referred to in the petition as the First). It is alleged in the petition that the defendant, as executor aforesaid, is in possession of certain shares of stock which had been bequeathed by the third item of the will of Henry J. Lamar, Sr. (the First), to Henry J. Lamar, Jr. (the Second), in fee simple, and that petitioners are entitled to the possession of the stock so bequeathed and certain dividends and profits arising therefrom. It appears from the answer filed in the case that the executor of Henry J. Lamar, the First, differs with the petitioners in their construction of the will of their testator, insisting that the shares of stock referred to in the third item of the will were not bequeathed to the legatee named in that item in fee simple, but that the bequest was affected by certain restrictions and limitations appearing in another item of the will. The portions of the will material to a consideration of the issues in the case are as follows:

"Item 1st. I devise and bequeath unto my son, Henry J. Lamar, Jr., in trust for my grandson, Henry J. Lamar Washington," certain property, describing it. "The income and interest of the money and property herein bequeathed, as well as that arising from the aforesaid residence lot in Nashville, Tenn., or so much thereof as may be necessary, is to be used by said trustee for the support, maintenance and education of my said grandson during his minority, provided he remains under the control and influence of, and is domiciled with my immediate family, or some member thereof; but in the event my grandson should be removed beyond the limits of the state of Georgia, or should otherwise be taken from the control and influence of my immediate family, or some member thereof, or his domicile be changed therefrom, said income, interest and profits shall no longer be applied to his support, maintenance and education, and all of said income, interest and profits not expended by reason of the direction aforesaid, shall not pass with the money and other property herein bequeathed to him, but shall revert to and become a part of my estate for equal distribution amongst my children as hereinafter directed." Testator then pro-

ceeds to give certain directions about the property bequeathed to his said grandson, and closes item 1st as follows:

"Having received by due transfer all the parental powers of his father over my said grandson, I hereby appoint Henry J. Lamar, Jr., guardian of his person, and in event of his failure or inability to act, I appoint Walter D. Lamar such guardian in his stead.

"The bequest of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock and the Bradfield Regulator stock, herein made, is subject to the restrictions hereinafter imposed by a subsequent item of this, my will.

"Should Henry J. Lamar, Jr., from any cause be unable to act as trustee for my said grandson, then I appoint Walter D. Lamar trustee in his stead, with all the powers herein conferred upon Henry J. Lamar, Jr., as trustee."

"Item 2nd. I will and direct that all the residue of my estate, of whatever the same may consist and wheresoever the same may be situated, shall be divided into six equal shares or parts and shall be disposed of as follows, each legatee, however, to account for such advancements, as have heretofore or may hereafter be made, as stated in subsequent clauses of this will, but without liability for interest thereon:

"(A) To my son, Walter D. Lamar, one such sixth equal share which I direct shall consist, in part, of my lands in Butts," etc., giving him also stock in all of the corporations above named, and the testator then closes this paragraph (A) in the following language: "The bequest of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock, and the Bradfield Regulator stock is, however, subject to the restrictions hereinafter, in a subsequent item of this will, imposed."

"(B) To my son, Henry J. Lamar, Jr., in trust for my daughter, Valeria McLaren, I give one other sixth part of my estate, consisting, in part, of" a certain property, real and personal, including stock in the corporations already mentioned. The testator proceeds: "The aforesaid property to be held by the said Henry J. Lamar, Jr., in trust for my said daughter, for and during her natural life, and, at her death, for such child or children as she may leave surviving her, by her present or any future husband, share and share alike, with the power to her trustee to advance, with her consent, such sums to each child that may be born to her, if any, as may be reasonable, upon the marriage of such child or children, or upon their arrival at the age of twenty-one years; the said trustee to pay over to my said daughter the income arising from the aforesaid property as the same may come into his hands. In the event of the death of my said daughter, leaving no child or children, she is hereby invested with the power to dispose of one-half of the aforesaid property by

will to any person she may choose; that right of disposition by will being, however, restricted to the exercise of this right over the aforesaid property, other than the eighty shares of Lamar & Rankin Drug Company stock, the seven shares of 'S. S. S.' Company stock and the ten shares of Bradfield Regulator stock, the power to dispose of which by her will being hereby withheld; the other half of said property to revert to my estate. In the event my said daughter should die leaving no child or children, and without making a disposition of any of said property by will, then the whole of it is to revert to my estate and become a part thereof." After making certain directions, the testator closes this paragraph (B) as follows: "The bequest herein made of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock and the Bradfield Regulator stock is subject, however, to the restrictions hereinafter, in a subsequent item of this, my will, imposed."

"(C) I give to my daughter, Mrs. Fannie L. Rankin, in trust for herself and children, one other sixth part of my estate, consisting, in part, of" certain stock in the corporations already named above. The testator gives her the power of making certain advancements to her children, and directs how the same shall be accounted for, and closes said paragraph (C) with the following words: "The bequest of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock, and the Bradfield Regulator stock, herein made, is subject, however, to the restrictions hereinafter imposed by a subsequent item of this, my will."

"(D) I give and bequeath to my son-in-law, Eli S. Shorter, one other sixth part of my estate, to be held by him in trust for my daughter, Wilena Shorter, for and during her natural life, and, at her death, to her children, share and share alike, said one sixth part consisting of" shares of stock in all the corporations already named above. The testator then provides for advancements to her children, and directs how the same shall be accounted for, closing said paragraph (D) with these words: "The bequest herein made of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock and the Bradfield Regulator stock is, however, subject to the restrictions, hereinafter by a subsequent item of this my will, imposed."

"(E) As a part of one other sixth share of my estate, I give and bequeath to my son, Walter D. Lamar," certain described property, real and personal, including stock in all of the corporations already above named, "in trust for my son, J. T. Lamar. * * * This bequest of the Lamar & Rankin Drug Company stock, the 'S. S. S.' * * * Company stock, and the Bradfield Regulator stock, however, is subject to the restrictions herein-

after imposed by a subsequent item of this, my will. The income from all of the aforesaid property to be applied to the maintenance of said J. T. Lamar, and the remainder of said income, after the application of so much thereof as may be necessary for his support and maintenance, I direct shall be, by said trustee, distributed amongst his children in equal shares. At his death, I desire and direct that the aforesaid property, as well as the income that may remain on hand, shall vest in and become the property of his children, share and share alike. As a part of this one sixth share, I give to my daughter-in-law, Mrs. Julia Lamar, for and during her natural life," a certain house and lot, and at her death or upon her marriage the same to pass to and become the property of the children of J. T. Lamar. "The remaining part of this one sixth share of my estate, that is to say, one sixth part, less the property herein bequeathed to Walter D. Lamar, as trustee for J. T. Lamar, and the house and lot bequeathed to Mrs. Julia Lamar, I give and bequeath to my son, Henry J. Lamar, Jr., in trust, to hold and manage for the benefit of such children as my son J. T. Lamar now has, or may hereafter have born to him, by his present or any future wife, a portion of said remaining part, consisting of" certain shares of stock in all of the corporations already above mentioned. The testator then says: "The bequest of the Lamar & Rankin Drug Company stock, the 'S. S. S.' (Swift's Syphilitic Specific) Company stock, and the Bradfield Regulator stock is, however, subject to the restrictions hereinafter and in a subsequent item of this, my will, imposed." The testator then provides for successors in trust for J. T. Lamar and his children.

"Item 3rd. I give and bequeath to my son, Henry J. Lamar, Jr., one other sixth part of my estate, consisting, in part, of seventy-five shares of Exchange Bank stock, if not disposed of by me before my death, and, if so disposed of, then seven thousand and five hundred dollars in cash, in lieu thereof; also eighty shares of Lamar & Rankin Drug Company stock, seven shares of 'S. S. S.' (Swift's Syphilitic Specific) Company stock, ten shares of Bradfield Regulator stock, and twenty-five shares of Albany Drug Company stock, subject, however, to advances of thirty-nine thousand and one hundred and fifty dollars, which I have heretofore advanced to him, to have and to hold the same in his own right, for himself and his heirs forever."

"Item 4th. I desire and direct that all the shares of stock of the Lamar & Rankin Drug Company, the 'S. S. S.' (Swift's Syphilitic Specific) Company, and the Bradfield Regulator Company, herein devised under the preceding items and paragraphs of this, my will, shall be held by my executors, hereinafter named, until the first day of January in the year of our Lord nineteen hundred and twenty-five, at which time, and not until

then, I direct that said stock be distributed amongst the legatees mentioned in items 1 and 3 and paragraphs (A), (B), (C), (D) and (E) of item 2, as in each of said items and paragraphs directed; the dividends arising from all of said stocks up to the first day of January, 1925, to be divided in the following manner, to wit: The dividends and profits arising from said Lamar & Rankin Drug Company stock shall be distributed to each of said legatees, annually and within eight months after they are declared by said company in the proportion as said stock is herein bequeathed to each legatee in said items and paragraphs of this my will and testament; and the dividends and profits arising from the Swift's Syphilitic Specific Company stock shall in like proportion be distributed to each of the legatees in said items and paragraphs mentioned, whenever and as often as the same shall amount to ten thousand dollars; and the profits and dividends arising from the Bradfield Regulator Company stock shall in like proportion be distributed to each of the legatees in said items and paragraphs mentioned, whenever and as often as the same shall amount to five thousand dollars. The corpus and the income herein provided for to be subject to the same uses, trusts and limitations as is provided for respectively in item 1 and paragraphs (B), (C), (D) and (E) of this my will and testament; provided, however, that if any of the legatees, to whom the same is devised, shall die before the first day of January, 1925, leaving no child or children, the income and dividends from the said stocks so bequeathed to such legatee, as well as the stock, shall revert to and become a part of my estate to be distributed amongst my surviving children in equal shares. The excess of said stocks or shares which I may own at my death over and above the number hereinbefore specifically devised, I direct also to be held by my executors until January the first, 1925; the dividends and profits arising therefrom to be distributed amongst my children at the time above designated in this item, and in the proportion as each may hold said stock; the said stocks and dividends therefrom to be subject to the same uses, trusts and limitations as is provided for in paragraphs (B), (C), (D), and (E) of this my will. In the event of the death of any one of my children before January the first, 1925, leaving no child or children, then his or her share of this stock, as well as the dividends, shall revert to my estate to be distributed amongst my surviving children, share and share alike."

Upon the trial of the case the jury returned a verdict for the defendant, and further found that the defendant was entitled to the control and custody of all certificates of stock of the estate of Henry J. Lamar, Sr., deceased, which were in the possession of their testator, Henry J. Lamar, Jr. (the

Second), at the date of the latter's death. The court entered up judgment accordingly, and further decreed that "the legacy of Henry J. Lamar, 2d, in and to the three stocks mentioned in the petition—that is, the special legacy in item 3 of the will of Henry J. Lamar, 1st, as well as the legacy of the excess shares as shown in paragraph 4 of said will, has reverted to the estate of said H. J. Lamar, 1st, to be divided among the other children of H. J. Lamar, 1st, as provided in said will and under the terms of said will, said Henry J. Lamar, 2d, and his heirs, administrators, executors, and assigns, being excluded from the division of said reversion, which excluded both corpus and dividends." The plaintiffs made a motion for a new trial, which the court overruled, and they excepted. The defendant, by cross-bill of exceptions, assigned error upon the exclusion of certain documentary evidence offered by him at the trial.

Gurry, Hall & Roberts, for plaintiffs in error. Hall & Hall, for defendant in error.

BECK, J. (after stating the facts as above). [2] An examination of the will of the testator will show, that, relatively to the stock in three specified companies, a common purpose or scheme pervaded the entire will, in the respect hereafter mentioned. Certain shares of this stock were left to the legatees. As to some of these, there were trusts or limitations over, and it was also specified that the bequest as to the stock was subject to a restriction stated in a later item of the will; and similar language as to a limitation was used in regard to another distributive share, where there was no trust. By the third item a share in the estate was left to a son. This included stock in the same three companies. Here there was no declaration of a trust or remainder over, and no specific reference made to a future item. Then followed item 4. This began with the following words: "I desire and direct that all the shares of stock of the Lamar & Rankin Drug Company, the 'S. S. S.' (Swift's Syphilitic Specific) Company, and the Bradfield Regulator Company, herein devised under the preceding items and paragraphs of this, my will, shall be held by my executors, hereinafter named, until the first day of January in the year of our Lord 1925," when a distribution should take place. It is beyond controversy that this language was sufficiently broad to cover the shares of stock in the three companies mentioned, which had previously been bequeathed to all of the legatees, including those which had been bequeathed to the son absolutely, as well as those which had been bequeathed to others incumbered with a trust or remainder. Therefore item 4 began by dealing with all the shares of stock in those three companies, which had been bequeathed, and not merely some of them. It was then declared that at the date mentioned the stock

should be "distributed among the legatees mentioned in items 1 and 3, and paragraphs (A), (B), (C), (D) and (E) of item 2, as in each of said items and paragraphs written." It could not have been the purpose of the testator, by this language, to limit the retention of stock until the date mentioned merely by saying that, when it should be divided, it should be distributed as written in previous items and paragraphs of the will. After providing for divisions of dividends and profits arising from the stock in the interval, the item then declared "the corpus and income herein provided for," etc. What corpus and income was "herein provided for"? Obviously, it included all the shares of stock in the three named companies previously mentioned; for, as stated above, the item is careful to cover and provide for all such shares dealt with in any preceding item of the will. Therefore, when the expression, "the corpus and income herein provided for," was employed, it could not be restricted to anything less than all the shares in those companies which had previously been provided for. Omitting, for the moment, the reference to the uses and trusts applicable to some of the distributive shares, the item then proceeds: "Provided, however, that if any of the legatees, to whom the same is devised, shall die before the first day of January, 1925, leaving no child or children, the income and dividends from the said stocks so bequeathed to such legatee, as well as the stock, shall revert to and become a part of my estate to be distributed among my surviving children in equal shares." What is the meaning of the words, "if any of the legatees, to whom the same is devised"? The same as what? Unquestionably the same as something which had preceded—the same stock as that which had been mentioned, or as to which provision had been already made in that item. As has been seen, there has been a provision and reference so made to all of the stock in the three companies which had been bequeathed in previous portions of the will. What, then, could the same stock mean, except all of the stock which had been so bequeathed? To be the same it must be all, not a part, of whatever those words refer to. It cannot be held that the statement, "the corpus and the income herein provided for to be subject to the same uses, trusts and limitations as is provided for in item first and paragraphs (B), (C), (D), and (E) of this my will and testament," operated to limit the other provision for a reversion of the stock to only so much of it as had been made subject to certain uses, trusts, and limitations in the previous items and paragraphs mentioned. The testator was preserving and carrying forward the uses, trusts, and limitations respectively applicable to certain distributive shares. But by so doing he did not cut down the amount of the stock dealt with in item

4 from the whole to only a fractional part, or destroy the express provision for a reversion, applicable to all the stock.

This construction is further borne out by the fact that there was an excess of shares in the three companies beyond those which had been specifically bequeathed in previous items of the will. In the item which is now under consideration the testator undertook to deal with this excess, thus showing that he had in view, in making this item of the will, the entire stock in these three companies—first, that which he had previously bequeathed specifically; and, second, all the excess of stock in those companies which he might own and which he had not previously specifically dealt with. In other words, the fourth item of the will shows an intent on the part of the testator to deal with the stock in these three companies entirely and in accordance with the general testamentary purpose in the respect mentioned. In that portion of the item which deals with the excess of the stock it was provided that, "in the event of the death of any one of my children before January 1, 1925, leaving no child or children, then his or her share of this stock, as well as the dividends, shall revert to my estate, to be distributed amongst my surviving children, share and share alike." In this connection, again, the testator mentioned the trusts and limitations previously created as to certain shares of the estate, and, in pursuance of the general scheme in that regard, said: "The said stocks and dividends therefrom to be subject to the same uses, trusts and limitations as is provided for in paragraphs (B), (C), (D) and (E) of this my will." It cannot be successfully contended that, by this reference, the testator intended to limit the provision for distribution of the excess, so as to make the clause as to a reversion apply to only a part of such excess. So that, construing the fourth item as a whole, the reference to the uses, trusts, and limitations expressed in other items neither limited the amount of stock dealt with in that item, nor the general provision (applicable to all of the stock so dealt with) that upon the death of a legatee prior to the date fixed for distribution, leaving no child or children, the stock applicable to that share should revert to the estate and be distributed among the testator's surviving children in equal shares. This construction gives to the will a consistent testamentary scheme as to these stocks. The construction which would exclude from the reversionary provision the bequest of stock in the companies to the son, contained in the third item of the will, would attribute to the testator inconsistency and lack of harmony in intent as to these stocks. Carrying out the same general purpose, by item 6 it is provided that, should any of the property "herein bequeathed" revert to the estate, it should "be divided equally amongst

my surviving children." He again adds: "To be held for such uses and trusts and with the same restrictions and limitations as attach to the legacies herein bequeathed to such children."

[1] If the construction which we have thus placed upon item 4 is a correct one, it is evident that it must be construed with and modifies the broad language employed in the third item, which gave absolutely some of these stocks to one of the testator's sons. A testator unquestionably has the power, after having given, in one item of his will, a bequest to a legatee for himself and his heirs, forever, to attach a condition, by a later item, under which the property will revert upon a certain contingency. If the contingency did not happen, the legatee would have an absolute title. If it did happen, there would be a reversion. The question is, not, can he do it, but has he done it? We think that the testator has by the fourth item expressly provided for a reversion, applicable to this distributive share as well as to others. The decree of the court was in accordance with what is ruled above.

Judgment affirmed on main bill of exceptions. Cross-bill of exceptions dismissed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 636)

SALMON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 266*)—PERSONAL INJURIES—LIABILITY.

It was held in *Southern Ry. Co. v. Harbin*, 135 Ga. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011: "In an action against a railway company and its servant, to recover damages for the homicide of the plaintiff's son, solely in consequence of the servant's misfeasance, where a verdict is returned finding the servant not liable, but finding in favor of the plaintiff against the railway company, such verdict should be set aside and a new trial granted." Upon a review of the ruling made in that case, in which five Justices concurred and one dissented, the ruling is reaffirmed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 854-858; Dec. Dig. § 266.*]

2. APPEAL AND ERROR (§ 1201*)—DISPOSITION OF CAUSE—REMAND TO LOWER COURT—AMENDMENT.

Salmon brought an action for personal injuries against the Southern Railway Company and Hopkins, in which the petition alleged that "the said defendants, by their joint and concurrent negligence, as herein described, have endamaged plaintiff in" a given sum, "and this action is brought jointly against them." "The defendant Hopkins was the engineer in charge of the said engine of the freight train upon which plaintiff was at work, and all the acts of negligence charged against the railroad company were committed by the said other defendant, Hopkins, and the said railway company was negligent through said Hopkins, and said Hopkins was negligent as representing said railway company, and the

negligence of the two concurred, and this action is brought therefor." Upon the trial of the action a verdict was rendered in favor of the defendant Hopkins against the plaintiff, and in favor of the plaintiff against the railway company. The railway company alone moved for a new trial, in which motion there was no ground presenting the point that the verdict should be set aside and a new trial granted because the jury by their verdict exonerated Hopkins, the other defendant, whose misfeasance as the servant of the railway company was the sole cause of the plaintiff's injuries. A new trial was refused, and upon review thereof by this court the judgment of the trial judge was reversed and a new trial ordered on the ground of an erroneous instruction to the jury. *Southern Ry. Co. v. Salmon*, 132 Ga. 753, 65 S. E. 70. When the case came on for a second trial in the superior court, the court allowed the defendant railway company to amend its answer by setting up in effect that the verdict and judgment rendered on the first trial were conclusive of the nonliability of the railway company, in that it was there found and adjudged that Hopkins, the railway company's servant, whose misfeasance was the sole ground of negligence alleged against the defendant railway company as causing the injuries, was not negligent as claimed.

(a) The allowance of such amendment was not error for any of the following reasons urged against it: Because (1) it was a special plea and not sworn to; (2) it was "a dilatory plea and should have been filed at the first term available after the decision of the Supreme Court"; (3) the railway company had waived the defense set up in the amendment, because the judge on the first trial had instructed the jury that they could find any one of three verdicts, viz., a verdict in favor of the plaintiff and against the railway company alone, a verdict in favor of the plaintiff against both of the defendants, and a verdict in favor of the defendants, and that such instruction was not excepted to nor complained of in the motion for a new trial made by the railway company; (4) it set up "no defense whatever to this action"; and (5) "the case was called for trial and the parties announced ready before the amendment was tendered."

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1201.*]

3. ADMISSIBILITY OF EVIDENCE—SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT.

There was no error in the rulings of the court in admitting or rejecting evidence. The evidence submitted demanded a verdict in favor of the railway company on its amended answer, and the court did not err in directing a verdict in behalf of the railway company and in overruling the plaintiff's motion for a new trial.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by J. Z. Salmon against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 132 Ga. 753, 65 S. E. 70.

R. R. Arnold and Lipscomb, Willingham & Wright, for plaintiff in error. Maddox, McCamy & Shumate and Geo. A. H. Harris & Sons, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 602)

J. I. CASE THRESHING MACH. CO. v. BROACH.

(Supreme Court of Georgia. Feb. 10, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—WARRANTY.

Where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between them, and parol evidence of prior or contemporaneous conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. If such writing contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies. *Bullard v. Brewer*, 118 Ga. 818, 45 S. E. 711; *Holcomb v. Cable Co.*, 119 Ga. 466 (2), 46 S. E. 671; 2 *Mechem on Sales*, § 1254; *Fay & Eagan Co. v. Dudley*, 129 Ga. 814, 58 S. E. 826; *Seitz v. Brewster's Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441; *Sales*, Cent. Dig. § 721.]

2. SALES (§ 38*)—VALIDITY—FRAUD.

Where a written contract of bargain and sale stipulates that "this sale is made under inducements and representations herein expressed and no others," it is not a valid defense to an action for the price of the goods that the purchaser was induced to enter into the agreement by reason of false representations made by an agent of the seller, but not contained in the contract, when there is nothing to show that the purchaser was misled or deceived as to its contents, or in any manner prevented from ascertaining the same. *Equitable Mfg. Co. v. Biggers*, 121 Ga. 381, 49 S. E. 271. See, also, *Biggers v. Equitable Mfg. Co.*, 124 Ga. 1045 (2), 53 S. E. 674.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

3. SALES (§ 38*)—ILLEGALITY—FALSE REPRESENTATIONS.

Applying the foregoing rulings to the facts of the present case, as shown by the written contract between the parties, the court erred in not dismissing the affidavit of illegality to the mortgage execution; for, even if the alleged representations of the salesman of the plaintiff company, as set out in the affidavit, were fraudulent, and made to induce the defendant to purchase the engine which he bought under the terms of the written contract signed by him, and for part of the purchase price of which he gave his notes and the mortgage to secure the payment of them, it appears from such contract that he expressly agreed that the company should not be bound by any representations or misrepresentations made by such agent. There was no averment in the illegality that any device or trick was perpetrated upon the defendant by the company or its agent to induce him to sign the written contract. In this connection, see the cases above cited, and *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735 (2), 56 S. E. 1030.

(a) The present case, wherein there was a complete and certain agreement between the parties, is manifestly different from such cases as *McCrory v. Fritchard*, 119 Ga. 876, 47 S. E. 341; *Pryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654; *Anthony v. Cody*, 135 Ga. 320, 69 S. E. 491, and such other cases, where the

action was based on a promissory note which did not purport to contain the entire contract between the parties.

(b) The case under consideration differs, also, from such cases as *International Harvester Co. v. Dillon*, 126 Ga. 672, 55 S. E. 1034, wherein the defense set up was a breach of a warranty contained in the written agreement, while in the present case the defense sought to be set up was the misrepresentations of the agent of the plaintiff, made during the negotiations of the sale, and prior to the execution of the written contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

4. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

The court having erred in refusing to dismiss the affidavit of illegality, it is unnecessary to pass upon the motion for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

Error from Superior Court, Oglethorpe County; D. W. Meadow, Judge.

Action by the J. I. Case Threshing Machine Company against W. A. Broach. Judgment for defendant, and plaintiff brings error. Reversed.

Broach bought of Randall, the plaintiff's salesman in charge of its Atlanta office and storeroom, a 12 horse power compounded portable engine, at the price of \$850, paying in cash \$200 and freight charges of \$55.40, and giving his notes for \$650, with a mortgage on the engine. He signed, also, a written order or contract of sale, which Randall signed as salesman. Upon refusal to pay the notes, foreclosure of the mortgage was commenced; and Broach interposed an affidavit of illegality. The plaintiff moved to dismiss this affidavit as insufficient in law to arrest the foreclosure, because it undertook to vary the written contract of sale by setting up a parol agreement and representations made at the time of its execution, and a warranty different from the one therein contained. The motion was overruled, and, after verdict for the defendant, a new trial was denied. The plaintiff excepted to these rulings.

The written order for the engine contained the following stipulations: "No person has any authority to waive or alter or enlarge this contract, or to make any new or substituted or different contract, representation, or warranty. Salesmen, mechanics, and experts are not authorized to bind the company by any contract or statement. Said machinery is purchased upon and subject to the following independent conditions, and none other, namely: It is warranted to be made of good material, and durable, with good care, to do as good work under the same conditions as any made in the United States, of equal size and rated capacity, if properly operated by competent persons with sufficient steam or horse power, and the printed rules and directions of the manu-

facturers intelligently followed. If by so doing, after trial of ten days by the purchasers, said machinery shall fail to fill the warranty, written notice thereof shall at once be given to J. I. Case Threshing Machine Company at Racine, Wis., and also to the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance, said company reserving right to replace any defective part or parts; and if the machinery cannot be made to fill the warranty, the part that fails to be returned by purchaser free of charge to the place where received, and the company notified thereof, and at the company's option another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned, and the contract rescinded to that extent, and no further claim made on the company. Failure so to bind [?] such trial or to give such notices in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company, and that the said machinery is satisfactory to the purchasers, and the company shall be released from all liability under the warranty. Any assistance rendered by the company, its agents or servants, in operating said machinery or in remedying any actual or alleged defects, either before or after ten days trial, shall in no wise be deemed any waiver or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty. When at request of purchaser a man is sent to operate the said machinery, which is found to be carelessly or improperly handled, said company putting same in working order again, the expense incurred to J. I. Case Threshing Machine Company shall be paid by the purchaser. If any part of the machinery, excepting belting, which is not warranted, fails, from defect of material, while this warranty is in force, the company has the right to repair or replace the same, on presentation of the defective part or parts; but deficiency in any piece shall not condemn other parts, and purchaser shall expressly waive all claims for damages on account of the nonfulfillment of said warranty by any of the above-described machinery. Each machine and attachment is ordered at a separate fixed price, which price, unless otherwise specifically agreed, bears the same ratio to the aggregate price above specified as the company's 1906 list price of each said machine and attachment bears to the aggregate list price of all said machines and attachments. This order is divisible as to each machine and attachment ordered, and the failure of any separate machine or attachment to give the warranty shall not affect the rights of the parties with respect to any other machinery sold the purchasers or any warranty

of such other machinery, and no cause of action arising out of this contract or transaction shall be offset or counterclaimed against any liability of the purchaser arising out of any other contract or transaction. In no event shall the company be liable otherwise than by return of cash and notes actually received by it. Failure to fully settle on delivery as above provided, or to comply with any of the conditions of this warranty on purchaser's part, or any change in the printed terms of this warranty or the conditions thereof by any persons whomsoever, agent or otherwise, by addition, erasure, or waiver, or any abuse, misuse, unnecessary exposure of machinery or waste committed or suffered by the purchasers, discharges the company from all liabilities whatever. No representation made by any person as an inducement to give and execute this order shall bind the company. The purchaser hereby waives notice of the acceptance of this order by the company."

The affidavit of illegality was in substance as follows: When Broach went to buy, he asked Randall to show and price to him a 15 horse power engine and boiler, stating that he wanted it to run his sawmill with a 48-inch saw. Randall said he had in stock no 15 horse power simple engine, but had and would sell Broach a 12 horse power compounded and portable engine that would do the work of a 15 horse power simple engine with less fuel and water, and would operate his sawmill with ease and efficiency, and would develop at least as much horse power as any 15 horse power simple engine, and urged Broach to purchase the same. Broach then stated to Randall that he (Broach) was a farmer, not a machinist, and knew nothing of the construction and principles of the different kinds of engines, or of a compounded engine, and whether it was or could be made as efficient as a simple engine of nominally greater horse power rating; and Randall willfully and knowingly made to him the statements and representations just set forth, for the purpose of inducing him to buy the engine for which he contracted. Immediately upon receipt of it he undertook to operate his sawmill with it; and it failed completely to develop sufficient power to run the saw, although he used all the skill at his command, guided by such instructions as were furnished by the plaintiff. When he had exhausted his own ingenuity, and availed himself of all the assistance and suggestions of the plaintiff, he immediately reported these failures to the plaintiff, which responded by sending its agents and mechanics with instructions so to alter, repair, and reconstruct the engine as to make it do the work of driving the sawmill, all of which efforts failed to increase or improve the power of the engine to the stipulated requirements. Convinced from his own efforts, and those of the plaintiff, that

the engine could not be made to perform the services contracted for, and that consequently the engine was worthless to him, he tendered it to the plaintiff, offered to rescind the contract of purchase, and demanded that the plaintiff refund to him the cash payment and cancel the notes, which the plaintiff refused. Wherefore he prays that the contract be adjudged fraudulent and void, and for judgment against the plaintiff.

Joel Cloud and Cary, Upham & Black, for plaintiff in error. Cobb & Erwin, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 608)

ERK v. SIMPSON.

(Supreme Court of Georgia. Feb. 16, 1912.)

(Syllabus by the Court.)

1. SALES (§ 192*)—REMEDIES OF SELLER—RE-SALE.

A fruit grower and a produce company entered into a written contract whereby, "for and in consideration of \$1,000 (represented by a check duly certified) this day delivered," the fruit grower agreed to deliver "f. o. b. at Rome, Ga., first ten car loads of peaches of the Elberta variety, and the said second party hereby contracts and agrees to pay to the party of the first part 85 cents per crate of six baskets for all good, sound, hard peaches which are approved and accepted by party of the second part through its authorized agent at Rome, Ga., the peaches to be paid for when accepted and loaded in the cars at Rome, Ga., and the bill of lading delivered to the party of the second part. The \$1,000 check referred to in this contract to be returned to the party of the second part when all of said purchase price of said peaches is paid: Provided, however, the same may be used toward paying for the last cars delivered." Held, that this contract did not authorize the seller to cash the check at once and keep the money, and at the same time to demand payment for each of three car loads of peaches as they were shipped, and on failure of payment for the first car load of a draft given by the local agent of the buyer to divert the second and resell it at a loss; the amount of the purchase price for the two car loads being less than the amount of money so held by him.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 192.*]

2. SALES (§ 192*)—REMEDIES OF SELLER—RE-SALE.

Nor, after so diverting the second car load, which had been received and approved by the agent of the buyer as provided by the contract, could the seller tender a third car load, and, upon its refusal, sell it and hold the buyer liable in damages for the difference between the amount realized and the amount which such car load would have brought at the contract price.

(a) There is no evidence in the record tending to show a waiver or assent on the part of the purchaser to a deviation from the terms of the contract on the part of the seller.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 192.*]

3. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

Some parts of the defendant's answer were demurrable; but as the same grounds of the demurrer covered some allegations which were good and some which were bad, and as the ruling above made deals with the merits of the defenses, the grounds of the demurrer need not be considered in detail.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

4. EVIDENCE (§ 323*)—HEARSAY—MARKET VALUE.

Where a witness had testified that he had been engaged in marketing peaches and other fruits for 18 or 20 years in the locality where the contract was made and to be fulfilled, and that he kept "posted" as to the prices of fruit in car load lots in the different markets during the season covered by the contract, by means of daily communications by telegraph, there was no error in permitting him to testify that, from information received at that time, the markets where the peaches were resold compared favorably with other markets, and that, from a book of the copy telegrams of that year, the market price for Elberta peaches during the season covered by the contract was from \$1 per crate downward, while a few markets between certain dates mentioned quoted the price at \$1.25 per crate. Such evidence was not objectionable as being hearsay.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 323.*]

5. DEPOSITIONS (§ 111*)—ADMISSION IN EVIDENCE—TIME FOR OBJECTIONS.

Where the depositions of a witness were taken before a commissioner under Civil Code 1910, § 5910 et seq., and certain objections to parts of the testimony were made and noted, this did not preclude the party against whom the evidence was offered from objecting at the trial in court to certain parts of the testimony on the ground that they were hearsay and secondary in character, although such objections were not noted on the examination before the commissioner.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329-339; Dec. Dig. § 111.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by J. H. Erk, trustee, against W. P. Simpson. Judgment for defendant, and plaintiff brings error. Reversed.

W. P. Simpson and the Pittsburg Fruit & Produce Company entered into the following written agreement: "This agreement, made and entered into this the 14th day of July, 1906, between W. P. Simpson, of said state and county, of the first part, and the Pittsburg Fruit & Produce Company (Incorporated), of Pittsburg, state of Pennsylvania, of the second part, witnesseth: That for and in consideration of \$1,000 (represented by a check duly certified), this day delivered to the party of the first part by the party of the second part, the party of the first part hereby agrees to deliver f. o. b. at Rome, Ga., first ten car loads of peaches of the Elberta variety, and the said party of the second part hereby contracts and agrees to pay to the party of the first part 85 cents per crate of six baskets for all good, sound, hard peaches which are approved and accepted by

the party of the second part through its authorized agent at Rome, Ga., the peaches to be paid for when accepted and loaded in the cars at Rome, Ga., and the bill of lading delivered to the party of the second part. The \$1,000 check referred to in this contract to be returned to the party of the second part when all said purchase price of said peaches is paid: Provided, however, the same may be used toward paying for the last cars delivered. It is agreed that said first party shall not be liable for failure to deliver said ten cars of peaches if such failure is due to providential causes or a strike."

On December 22, 1906, the company brought suit against Simpson. As amended, the petition alleged as follows: The defendant delivered only one car load of peaches to the plaintiff, the price of which amounted to \$297.50. Another car load was accepted by the plaintiff's agent at Rome, but the defendant diverted it while it was in transit, and it was never finally received by the plaintiff. Defendant shipped only three car loads of peaches during the year 1906. Under the contract with plaintiff, he was to ship ten car loads of peaches. He only made three car loads of peaches of the Elberta variety in that year, and they were of such low grade that they did not come up to the standard fixed by the contract. The defendant had no authority to cash the check when he did so. Having done so, it was an acknowledgment upon his part that the amount would be applied to the payment of the three car loads of peaches, and he had no authority to apply the check, or the money received thereon, to any other purpose. Having delivered but one car load on the contract, the defendant became liable to the plaintiff for the balance of the funds remaining in his hands after paying for such car load. If he suffered any loss by reason of shipping the peaches to any other person, it was his own fault, for which the plaintiff was not liable. About September 5th, after all the Elberta peaches were gone, and there was no possibility for the defendant to deliver the other nine car loads named in the contract, the plaintiff demanded of the defendant the balance of the \$1,000, after deducting the amount of the car load of peaches actually received.

The defendant answered as follows: After the making of the contract the defendant delivered to the plaintiff's agent one car load of peaches, the price of which amounted to \$452.20. The plaintiff's agent delivered to the defendant a draft for that amount drawn on the plaintiff. It was forwarded for collection, and was dishonored and returned to the defendant. Prior to such dishonor the defendant delivered to the plaintiff's agent another car load of peaches, and the agent executed to him a second draft for \$446.25 to cover the purchase price thereof. Before this second car reached its destina-

tion, the defendant learned that plaintiff had refused to pay the first draft. Thereupon the defendant diverted the second car, because of the dishonor of the first draft, and the consequent breach of the contract. From the proceeds of the second car he received \$116.54, thereby sustaining a loss of \$329.71, the difference between the amount of the draft given therefor and the amount so received. The defendant tendered to the plaintiff's agent another car load of peaches, containing 525 crates. This car load the plaintiff refused to accept, and the defendant shipped it to Providence, R. I., and realized therefrom the sum of \$71.83, thus sustaining a loss of \$374.42. After receiving notice of the dishonor of the draft given by the plaintiff's agent for the first car load, the defendant notified the agent that he intended to resell the peaches bought by the plaintiff of the defendant, and hold the plaintiff liable for the difference in price realized on the sale and the contract price. In making the resale of the two car loads, the defendant exercised his best judgment in selecting the market in which to sell them, so as to realize the best price for said peaches. He has always been ready to perform the terms of the contract binding on him, and so notified the agent of the plaintiff; but the latter declined to accept the peaches in accordance with the contract. He suffered damages to the extent of \$1,156.33 on the three car loads of peaches. For this he prayed to recover judgment.

While the case was pending the plaintiff became a bankrupt. The trustee was made a party plaintiff, and the case proceeded. So far as necessary to an understanding of the decision, the evidence is stated in the opinion. At the close of the evidence, the court directed a general verdict for the defendant. The plaintiff moved for a new trial, which was refused. He excepted to this ruling, and to the overruling of a demurrer to certain parts of the answer.

Geo. A. H. Harris & Sons, for plaintiff in error. Dean & Dean, for defendant in error.

LUMPKIN, J. The purchaser of certain peaches brought suit against the seller, under the contract set out in the statement of facts, to recover the balance of the \$1,000 represented by the certified check, after deducting the purchase price of the peaches received. The court directed a verdict for the defendant, and the plaintiff excepted.

[1] 1. Under the contract, the certified check for \$1,000 was placed with the seller apparently to guarantee payment for the peaches purchased, or to be used in paying for the last of those delivered. They were to be paid for when accepted by the agent of the purchaser at Rome, and loaded in cars at that place, and the bill of lading delivered to the purchaser. The certified check was to be returned to the purchaser when all of

the purchase price was paid, provided that it might be used toward paying for the last cars delivered. There is not a word in the contract indicating that such check was put up as a forfeit, or as liquidated damages for a breach of contract. The seller was given no authority to cash the check, unless for the purpose of paying for the last cars of peaches agreed to be shipped. The contract to return the check negated any right of the holder to cash it for other purposes, and so render himself unable to return it. There is no hint in the contract that the parties intended that the seller should cash the check at once, have the use of the \$1,000 represented by it during the whole season, and require the purchaser to pay for the peaches as each car was delivered, and thus have in his hands, and subject to his use, both the \$1,000 and the price of the peaches. When the seller, on the same day that he received this check (or draft, as it is also called), and before delivering any peaches, cashed it (as was admitted), he violated the contract. It was argued in the brief of counsel for defendant in error that the purchaser waived this, because such purchaser "paid the draft." The evidence did not disclose that the check or draft was drawn on the purchaser. If it was a check, it must have been drawn on a bank. Besides, it was a "certified" check or draft, and there is nothing in the record to show that the purchaser could have stopped payment.

[2] 2. Four days after delivering the first car load of peaches, the seller delivered to the buyer, through its agent at Rome, a second, which the agent inspected and accepted. After this delivery, the seller's agent learned that the draft given by the buyer's agent on his principal for the price of the first car load had not been paid; and thereupon the seller diverted the second car load, which was in transit, sent it to Ohio, had it sold, and charged to the buyer the difference between the agreed price and what was received under the sale. What right the seller had to do this is not apparent. The contract provided for delivery of the peaches "f. o. b. Rome, Ga.," upon approval and acceptance by the buyer's agent there, and delivery to the purchaser of the bill of lading. The second car was inspected, accepted, and delivered. While the shipper may have a right of stoppage in transitu, when the vendee becomes insolvent before he obtains actual possession (Civil Code 1910, § 2739), we know of no law which authorized the seller to take the car load of peaches away from the purchaser, after such a delivery, because the purchaser had not paid the draft for the first car load, and deal with the second car load as if refused. There was no evidence that the purchaser had then become insolvent. The seller had \$1,000 of the purchaser's money in his hands. This was more than the price of both car loads of peaches. He was in no danger whatever of loss on

those two cars. He could not at the same time break the contract and insist on its performance by the other party.

There was some evidence, not in entire accord, as to whether the agent of the seller actually tendered or offered other peaches to the agent of the purchaser, or whether he only said he could get up eight car loads in addition to the first two, by getting his neighbors to join with him, and also as to whether such peaches would have been of the quality called for by the contract. But, aside from this, when the seller cashed the check, and, after delivering a second car load of peaches to the defendant at Rome, took it away by diverting it and selling it elsewhere because a draft for the first car load had not been paid, the buyer was not compelled to receive further car loads. The purchaser was entitled to have restored to it the \$1,000, after deducting the amount due for the car load of peaches which it received and failed to pay for. And the purchaser having become bankrupt pending the case, the trustee in bankruptcy, who was made a party, could recover.

[3] 3. Some parts of the defendant's answer were demurrable; but inasmuch as the same grounds of demurrer covered some allegations which were good and some which were bad, and as the ruling made above deals with the merits of the defenses, it is unnecessary to discuss the grounds of demurrer in detail.

[4] 4. Proof of market price in certain markets necessarily involves a hearsay element, and is not subject to the same strictness of rule as proof of a physical fact or occurrence. The fourth headnote requires no elaboration. *Central Railroad Co. v. Skellie*, 86 Ga. 686 (4), 692, 12 S. E. 1017; *Armour & Co. v. Ross & Barfield*, 110 Ga. 403, 412, 35 S. E. 787.

[5] 5. The depositions of a witness were taken before a commissioner under Civil Code 1910, § 5910 et seq. Before the commissioner certain objections to parts of the testimony were made and noted. On the trial of the case in the superior court, other objections were raised to the testimony, on the ground that it was hearsay and secondary in character, and stated the conclusions of the witness. The court held that such objections should have been made at the time when the testimony was taken, and refused to entertain them when the depositions were read on the trial. This was error. Civil Code 1910, § 5913, declares that all motions or applications to postpone or adjourn the proceedings, "and all objections to the witnesses or proceedings, shall be made to the commissioner, and, if in writing, filed with the return, and, if not in writing, noted in and become part of the return, with the ruling of the commissioner thereon, and the answer of the witnesses, whether the objection be sustained or not." It will be observed that this section requires applications for

postponement or adjournment, and "all objections to the witnesses or proceedings," to be made to the commissioner. Such objections are to be noted and returned with the answers of the witnesses, whether the objection be sustained or not. The language used indicates rather objections to witnesses and the form of procedure than substantial objections to the competency or relevancy of certain parts of the evidence. We do not think that it was the intention of the Legislature to require the admission of secondary or hearsay evidence, unless objection thereto was made before the commissioner. See, in this connection, *Georgia Ry. & Elec. Co. v. Bailey*, 9 Ga. App. 106 (3), 70 S. E. 607. This construction harmonizes the practice with that where the evidence is taken by interrogatories, though, of course, the two methods of obtaining testimony are not identical. No doubt good reason might be suggested why, in taking depositions, where both parties have the right to be present, to make objections, and to examine the witnesses, objections ought to be noted, so that the adverse party might conduct his examination accordingly. But we cannot hold that the Legislature has required that all objections to evidence on the ground of being secondary or irrelevant or hearsay should then be made, under penalty of waiving the right to urge such objections on the trial. As the rulings of the presiding judge in regard to the objections made to certain evidence appear to have been based on the ground that they could not be made before him, because not made before the commissioner, and not upon the merits of the objection, we deal with the question in the same manner.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 684)

GLOVER v. COX et al.

COX et al. v. GLOVER.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 713*) — CONFORMITY TO PLEADINGS—NAME OF PARTY.

Where a corporation, whose correct name is the National Building Association of Baltimore City, and its trustees, pray for a judgment in the name of the trustees of the corporation against a debtor of the association, and a verdict and judgment are rendered in favor of "the trustees for the said National Building & Loan Association of Baltimore," and subsequently the defendant in the judgment files a petition to set aside the judgment on various grounds, but fails to make the objection that there is a variance between the corporate name as stated in the pleadings and as stated in the verdict and judgment, and such petition is dismissed on general demurrer, the defendant is thereafter estopped from making the objection of variance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. EXECUTION (§ 311*)—DEED—DESCRIPTION OF PARTIES.

A misrecital of the name of the plaintiff in execution in a sheriff's deed does not destroy the validity of the deed, if the judgment and execution are so described therein that they may be fully identified.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 918, 920; Dec. Dig. § 311.*]

3. DEEDS (§ 83*)—RECORD—INSTRUMENTS ENTITLED TO RECORD—ATTESTATION.

A deed, purporting to be the deed of the National Building Association of Baltimore City, executed in its behalf by M. McDonald Pritchard and W. R. Dimmock as trustees, and reciting that the corporation has recovered judgment against the grantees on a stated day and for a certain sum, and that the deed is executed for the purpose of having the execution levied upon the property and having it sold thereunder, pursuant to Civil Code 1895, § 2771, bearing the caption, "Georgia, Fulton county," and signed by "M. McDonald Pritchard, Trustee, and W. R. Dimmock, Trustee," and attested as follows: "Signed, sealed, and delivered in presence of Robert Ogle, Clerk Superior Court of Baltimore City, the Same Being a Court of Record. [Seal of Court.] Peter Stevens. As to Dimmock: J. R. Fox. J. H. Porter, N. P., Fulton Co., Ga."—prima facie imports that it was executed by Pritchard in Baltimore City and by Dimmock in Fulton county, Ga., and within the jurisdiction of the attesting officials, and it was properly admitted to record.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 83.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Laura Glover against Mrs. E. L. Cox and others. To a judgment for defendants, plaintiff brings error, and defendants file a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

This was an action by Laura Glover against the National Building Association of Baltimore City, a corporation of the state of Maryland, M. McDonald Pritchard, as trustee for the corporation, also of Baltimore, state of Maryland, Mrs. E. L. Cox, and Jno. W. Nelms, sheriff, to vacate and set aside a sheriff's deed and to recover the land. Various amendments to the petition were allowed, and the petition and amendments were demurred to. Some of the demurrers were sustained, and some overruled. The defendants filed their answers, and the case was tried before the judge, without the intervention of a jury, who rendered judgment for the defendants. The plaintiff sued out a bill of exceptions, complaining of the judgment, and assigning error on certain pendente lite exceptions; and the defendants sued out a cross-bill of exceptions.

On the trial of the case it was made to appear that on April 23, 1897, Laura Glover executed to M. McDonald Pritchard, of the city of Baltimore, state of Maryland, and W. R. Dimmock, of Fulton county, Ga., trustees for the National Building Association of Baltimore City, upon a consideration of \$1,-

680, certain land. The deed stipulated that "the said parties of the second part are to hold said property in trust as security to secure the payment of the dues upon 42 shares of stock to the National Building Association of Baltimore City, * * * upon due performance of said covenants to reconvey the same to the said Laura Glover, and, if not, they are to sell the same at public outcry," etc. The trustees accepted the trust in writing, and the deed was duly recorded. Laura Glover having made default in the payment of the indebtedness secured by the deed, the trustees, by virtue of the power of sale in the deed, advertised the land for a sale to occur on June 7, 1898. Four days prior to the time the sale was to take place Laura Glover filed a suit against the National Building Association of Baltimore City and W. R. Dimmock and M. McDonald Pritchard, as trustees for the association, to enjoin the sale. The association and the trustees answered the petition, and prayed that the temporary injunction be dissolved, and the trustees be allowed to proceed with the sale, that a special decree be passed, charging the property in dispute with a special lien for the indebtedness of the association, that the property be sold for the satisfaction of said indebtedness, that judgment be rendered for said amount, and that other and further relief as to the court seemed proper be granted. The defendants subsequently amended their answer, praying that a judgment be rendered in favor of the defendant against the plaintiff for the sum admitted to be due, that the instrument attached to the petition be declared to be a deed passing title to the trustees to secure the sums admitted to be due, that the judgment above referred to be a special lien upon the land in dispute, that the trustees make a quitclaim deed to the plaintiff, and that execution be issued upon said judgment, and that it be levied upon said land, and that a sale thereof be made. On March 15, 1910, a verdict was rendered, the material parts of which are as follows: "That the instrument attached to the petition in said cause is a deed, and not a mortgage; that the trustees for the said National Building & Loan Association of Baltimore do recover of the plaintiff, Laura Glover, the sum of \$1,424.40, principal, and \$279.55, interest to date, and future interest; that said trustees of said association have a special lien upon the land for the sums aforesaid; that judgment and execution, to be issued upon this verdict when said trustees quitclaim said land to the plaintiff, be levied upon said land, and the same be sold to satisfy said judgment and execution." The judgment complained of in this proceeding was rendered on March 30, 1900. The clerk issued a *fi. fa.*, directed to all and singular the sheriffs of said state, against Laura Glover, and especially the land described in the deed to secure debt, reciting the principal, inter-

est, and cost, "which at our superior court for said county to wit, on the 15th day of March, 1900, the National Building & Loan Association of Baltimore, as plaintiff, recovered against said Laura Glover, defendant, for principal, interest, and cost." A quitclaim deed was filed by the trustees to Laura Glover, and recorded on June 7, 1900.

On June 8, 1900, the sheriff of Fulton county levied the *fi. fa.* on the land, which was fully described, and recited "that the above-described property was deeded to the trustees by Laura Glover. See Deed Book 126, page 290. Levied on as the property of Laura Glover, June 8, 1900." The sheriff entered on the *fi. fa.* the following entries: "Served Laura Glover personally with the above levy June 18, 1900." "Georgia, Fulton County. After due and legal advertisement as required by law, the property described in the attached levy was exposed for sale at public outcry before the courthouse door in the city of Atlanta, Fulton county, Georgia, on the 1st Tuesday in December, 1901, within the legal hours of sale, when and where the same was knocked down to National Building & Loan Association for the sum of \$500, being the highest and best bidder, and the receipt of said sum is hereby acknowledged. This December 3, 1901. R. P. Thomas, D. Shff." Next follows the receipt, signed by the plaintiff's attorneys, for \$435.90, as a credit on the *fi. fa.*, and an entry apportioning the cost among the officers of court. On the back of the *fi. fa.* is a statement that it was issued on a judgment dated March 15, 1900, in suit No. 0037, also style of the case, amount of the judgment as to principal, interest, and cost, and the various places of entry on the execution dockets as required by law, with the names of the plaintiff's counsel. Also there was the entry: "I, G. H. Tanner, do hereby amend this *fi. fa.* by adding before the name of the plaintiff in *fi. fa.* the following words: 'M. McDonald Pritchard and W. R. Dimmock, Trustees for.' This October 5, 1900, G. H. Tanner, Clerk." Also the entry: "This amendment allowed this October 31, 1900. J. H. Lumpkin, Judge." Also an entry that the same was recorded in Book 126, page 88, the 5th day of December, 1901. On December 3, 1901, the sheriff of Fulton county executed and delivered a deed conveying the land in controversy to National Building Association of Baltimore City, wherein the following recitals appear: "Whereas, in obedience to the writ of *ieri facias* issued from the superior court of the county of Fulton, at the suit of National Building & Loan Association against Laura Glover," etc. "The above-described property was deeded to said trustees by Laura Glover. See Deed Book 126, page 290." A claim was filed, after the levy of the *fi. fa.*, by Laura Glover, as agent and trustee for Arsene L. and Elise Glover, and the style of the case was "National Building & Loan Association v. Laura Glover, Defend-

ant in *fi. fa.*, and Laura Glover, Trustee, Claimant." The claim case was tried prior to the sale, and the property was found subject.

On February 10, 1903, Laura Glover filed, in Fulton superior court, a petition against W. R. Dimmock and M. McDonald Pritchard, as trustees of the National Building Association of Baltimore City, in which, after reciting the filing of the petition, as set out, in suit No. 6037, wherein she sought to enjoin the sale of the disputed property by the trustees, and the filing of the cross-bill in that case, she alleged as follows: "On March 15th said case was heard. The court at said trial directed a verdict to be made in accordance with the prayer of the answer of the defendant, which was done. A verdict and decree was made in said case on said date, which adjudged same to be a deed, and not a mortgage, and that the trustees of said association had a special lien on said land for the sum of \$1,446 principal and \$279.55 interest to that date, and that judgment and execution issue for that amount, and that defendant make a deed to plaintiff, and that defendant pay the costs. Said judgment and verdict were erroneous, as said paper was not in law a conveyance of the title, as it appears on its face. That her plea of usury was a good one, and voided said paper as a deed. That this proceeding is filed within three years from the date of said judgment." She prayed that the verdict and decree rendered against her in favor of W. R. Dimmock and M. McDonald Pritchard be vacated and set aside. This suit was dismissed on general demurrer, which judgment was affirmed by the Supreme Court. On August 10, 1904, Laura Glover filed an action in ejectment against Mrs. E. L. Cox, who purchased the land from the National Building Association of Baltimore City, which resulted in a verdict for the defendant, which judgment was affirmed by the Supreme Court.

W. H. Terrell, for plaintiff in error. L. Z. Rosser and J. H. Porter, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The correct name of the corporation which loaned the money and to whom the deed to secure the loan was made is the National Building Association of Baltimore City. It appeared in its true name in the pleadings filed by itself and its trustees in which the judgment was rendered. The verdict and judgment is in favor of the "trustees for the said National Building & Loan Association of Baltimore." In her petition the plaintiff alleges the sheriff's sale and deed to be void, "because there is no judgment in Fulton superior court against petitioner in favor of W. R. Dimmock and M. McDonald Pritchard, trustees for National Building & Loan Association of Baltimore." If this allegation is to be taken literally, it

is disproved by the record. If it is to be taken as an allegation that the variance in the corporate name between the judgment and the pleadings is of such vital nature that the judgment is void, it becomes necessary to inquire into the legal sufficiency of the attack made on it. The judgment followed the verdict. "Verdicts must have a liberal construction, and should be construed so as to stand if practicable; and the judge may examine the entire pleadings, the admissions in the answer, and all the undisputed facts, in making a final decree." *Mayor, etc., of Macon v. Harris*, 75 Ga. 761. There can be no doubt that the National Building & Loan Association of Baltimore, referred to in the verdict, is the corporation which was a party to the case, and the correct name of which appeared in the pleadings as the National Building Association of Baltimore City. The misnomer of the corporation in the verdict and judgment is not so radically different as to indicate an entirely different corporation was intended. The plaintiff is estopped from complaining of this irregularity. After the sale of the land, she filed a proceeding to set aside this verdict and judgment, and her petition was dismissed on general demurrer. Although she did not raise this particular objection, she is just as much estopped by the judgment as if she had made the point. It is not permissible for a party who has several grounds of attack on a judgment to file successive actions on each ground to vacate the judgment. The defect was an amendable one; and the defendant in the judgment, having litigated with the plaintiffs as to the validity of the judgment, should have raised this objection, and, failing to do so, she will be thereafter estopped. *Bradford v. Water Lot Co.*, 58 Ga. 280 (3); *Mitchell v. Toole*, 63 Ga. 93.

[2] 2. It is alleged that the levy and sale are void, because the deed filed for levy and sale recites that it was filed for the purpose of having a *fi. fa.* in favor of the National Building Association of Baltimore City levied on the property, and for no other purpose, and that the variance in the name of the plaintiff in the sheriff's deed and the judgment and execution is a fatal defect. This variance between the recital of the name of the plaintiff in the sheriff's deed and in the *fi. fa.* does not render the deed void. It is said in 3 Freeman on Executions, § 329: "While the recital of the several facts upon which the officer's authority to convey is not indispensable, yet it is usually made or attempted in each deed. The attempt frequently results in mistakes. The name of one of the parties, the date of some of the facts, or the amount of the execution or of the sale, may be incorrectly stated. But, if the recital is unnecessary, the fact that it is either imperfectly or incorrectly made can be of no consequence." See, also, 3 Devlin on Real Estate, § 1430. Certainly the misrecital

of the name of a plaintiff in the judgment, does not vitiate the deed, if the identity is made clear. *Loomis v. Riley*, 24 Ill. 307; *Union Bank v. McWharters*, 32 Mo. 34. In the case of *Wilson v. Campbell*, 33 Ala. 249, 70 Am. Dec. 586, a judgment was entered in favor of the Branch Bank at Mobile as plaintiff, and the execution followed the judgment. In the sheriff's deed the execution was recited as having issued in favor of the "Branch of the Bank of the State of Alabama at Mobile," and the court held that the deed was not rendered invalid because of the variance between the judgment and execution under which the sale was made and the recitals thereof in the deed. In the case in hand the reference in the sheriff's deed to the execution under which the sale was made is so clear that no confusion can result from the misrecital, and the deed is not void on this account. See *White v. Forsyth*, 136 Ga. 634, 71 S. E. 1073.

[3] 3. The sheriff's sale is alleged to be void, because the deed from the plaintiffs to the defendant, filed for the purpose of levy and sale, was not properly attested for record. As will be seen from the statement of facts, Laura Glover had borrowed money from the National Building Association of Baltimore City, and had secured the loan by deed to W. R. Dimmock and M. McDonald Pritchard as trustees for the association. Under the statute the grantee or lender must sue his debt to judgment, then execute a quitclaim deed to the grantor or borrower, and, when this deed is filed and recorded, the execution issued upon the judgment may be levied on the land. A levy and sale, made without filing and recording the deed, is void. *Benedict v. Gammon*, 122 Ga. 412, 50 S. E. 162. So that it becomes necessary to inquire into the legality of the record of the deed made by the trustees of the National Building Association of Baltimore City for the purpose of levy and sale. The caption of the deed is "Georgia, Fulton County." It is made "between M. McDonald Pritchard and W. R. Dimmock, as trustees of the National Building Association of Baltimore City, parties of the first part, and Laura Glover, of the second part." It contains this clause: "Whereas, the said National Building Association of Baltimore City, on the 15th day of March, A. D. 1900, recovered judgment against the said Laura Glover for the sum of \$1,743.80, upon which execution has issued; and whereas, the said execution is a special lien upon the above described property: Now, therefore, in accordance with the Code of Georgia of 1895, § 2771, have parties of the first part executed this deed, for the purpose of having said execution levied upon said property, and having it sold thereunder in satisfaction thereof, and for no other purposes whatsoever." It is signed and attested as follows: "In witness whereof, the parties of the first part have hereunto set their

hands and fixed their seals the day and year above written. M. McDonald Pritchard, Trustee. W. R. Dimmock, Trustee. Signed, sealed, and delivered in presence of Robert Ogle, Clerk Superior Court of Baltimore City, the Same Being a Court of Record. [Seal.] Peter Stevens. As to Dimmock: J. R. Fox. J. H. Porter, N. P. Fulton County, Ga."

The recording acts only authorize the clerk of the superior court to record such papers as are entitled to record and which have been attested in manner and form as the statute prescribes. The registry of a deed serves a dual function. It is constructive notice of the existence of the original deed and permits its reception in evidence without proof of its execution. Our recording statutes provide that "in order to authorize the record of a deed to realty or personalty, if executed in this state, it must be attested by a judge of a court of record of this state, or a justice of the peace or notary public," etc. Civil Code 1910, § 4202. "To authorize the record of a deed to realty or personalty, when executed out of this state, the deed must be attested by or acknowledged before a commissioner of deeds for the state of Georgia, * * * or by a judge of a court of record in the state where executed, * * * or by a clerk of a court of record under the seal of the court," etc. Civil Code 1910, § 4203. Unless a deed shows on its face that it is entitled to record, the clerk should not record it. In the absence of a recital in a deed that it was executed elsewhere, the presumption is that the situs of its execution was the place named in the caption; and unless it appears from the face of the paper that the officer by whom it was officially attested was without the territorial limits of his official jurisdiction in attesting the same, it will be presumed *prima facie* that he was acting within his jurisdiction. *Rowe v. Spencer*, 132 Ga. 426, 64 S. E. 468. But if the attesting official describes himself as an official of a county different from that stated in the caption, the *prima facie* presumption is that the deed was executed at the place named in the caption and attested by an official of the county which he describes himself to be; and if that official has no authority to attest deeds in the venue of the caption, the deed cannot properly be recorded. *Allgood v. State*, 87 Ga. 668, 13 S. E. 569. Every presumption which the law may indulge from the maxim, "*Omnia præsumuntur solemniter esse acta*," may be invoked in favor of the inference that the deed was executed within the attesting official's jurisdiction, where the deed does not bear evidence to the contrary. In the case of a deed executed by one person, the application of the foregoing rules are attended with less difficulty than where there are several signers. In the case at bar the caption of the deed was "Georgia, Fulton County." As to one of the signers it was attested by an official of that county, and as to this

signer there can be no doubt that the deed was properly executed for record. As to the other signer, the deed does not disclose his residence, but does bear internal evidence that he is the trustee of a corporation of Baltimore City and is making the deed in its behalf. This at least affords some ground for assuming that the trustee in the performance of a corporate act was at the place of business of the corporation. Indeed, were it not for the presumption to be drawn from the situs of the caption and the official jurisdiction of the attesting magistrate to one of the signers, we might assume that both trustees in the performance of a corporate act were discharging corporate functions at the home of the corporation.

One fact apparent from the double attestation is that the deed was not signed coincidentally by the two trustees. And is not this sufficient, in connection with the fact that the other trustee was performing a corporate act for a corporation of Baltimore City and went before a clerk of a court of record of Baltimore City to have his signature attested, to justify the inference that one trustee signed the deed in Fulton county, Ga., and the other signed it at Baltimore City? We think so. In drawing this conclusion, we do not put the recital of the situs in the caption in opposition to the recital of the jurisdiction of the attesting official. On the other hand, we give effect to both, by holding that the recital of the situs in the caption and the recital in the signature of the magistrate who attested Dimmock's signature that he was an official of the same county indicates that the deed was executed in Fulton county, Ga., by Dimmock; and the other circumstances to which we have adverted indicate that the other signer, Pritchard, executed the deed at Baltimore City. Courts will always construe an official document or official act so as to give effect to it, if it can be done consistently with the act and the rules of construction. The point is not that the public or the person interested is concluded by the inference, because all-unde evidence is allowable to show that the deed was not properly attested for record, but whether the deed bears on its face facts authorizing the inference that it was properly executed for record. We deem it a fair presumption that the deed was not executed simultaneously by the two signers, that it was executed by Dimmock in Fulton county, Ga., and by Pritchard at Baltimore City, and that it was entitled to record.

The foregoing rulings make it unnecessary to decide the other points raised in the record.

Judgment affirmed on the main bill of exceptions; cross-bill dismissed. All the Justices concur, except HILL, J., not presiding.

(127 Ga. 533)

DE LOACH et al. v. GEORGIA COAST & P. R. CO.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 518*)—RECORD—SCOPE AND CONTENTS—AMENDMENT.

An amendment offered, but disallowed by the court, is no part of the record, and consequently cannot be considered by the Supreme Court, unless it be set out in the bill of exceptions, or annexed thereto as an exhibit, and duly authenticated. *Moore v. Town of Guyton*, 110 Ga. 330, 35 S. E. 339.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

2. EMINENT DOMAIN (§ 293*)—REMEDIES OF OWNERS OF PROPERTY—ACTIONS FOR COMPENSATION.

The petition contained, among others, the following allegations: The plaintiff owned a tract of land containing 8 acres, more or less, in a named city, bounded on the north, south, and west by the lines of a certain named person, and on the east by the right of way of the defendant railroad company. The defendant has a railroad running through the city, which railroad runs for 1,400 feet within 10 feet of the lands of the plaintiffs, on which they have a dwelling. The railroad was placed there by another company, which sold it to a second company, which changed its name to that of the defendant, "and it is liable at present for all the damages that the said railroad has occasioned to said property ever since it was first laid down, and is liable for all the damages that are now being done to said property by said road. The said railroad was built in the main street of the city of Glenville, near your petitioners' property as aforesaid, without their consent, and they were no parties to letting the said road place its track where it is. That, before said road was built as aforesaid, your petitioners' land lay alongside of the main street of said city a distance of 1,400 feet, and the building lots bordering on said street were indeed very valuable, and there were several building lots bordering on said street that the said nuisance has caused to depreciate in value in a very large sum." The operation of the railroad causes a continuing nuisance and disturbance to any person occupying the lots, and creates danger to the lives of persons and stock going on and from the premises. It has destroyed the value of the property for building purposes, as the noise made by the trains passing opposite the property makes it impossible for one to live in peace and safety so near the railroad. *Held*, such petition was properly dismissed on demurrer.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 293.*]

3. EMINENT DOMAIN (§ 293*)—RAILROADS (§ 129*)—NUISANCE (§ 48*)—REMEDIES OF OWNERS OF PROPERTY—ACTIONS FOR DAMAGES.

While there is some vague suggestion that at one time the property, or some of it, abutted on the public highway, it is alleged in the present petition that at the time the suit was brought the property was bounded on that side by the right of way of the railroad company. The pleadings must be construed most strongly against the pleader; and these allegations are not sufficient to show that the plaintiffs were the owners of lots abutting on a public street in a city at the time the railroad was laid upon it longitudinally, and are still so, and that such lots have been damaged by the

act of the defendant, so as to bring the case within the ruling in the case of Athens Terminal Co. v. Athens Foundry & Machine Works, 129 Ga. 393, 58 S. E. 891.

(a) In so far as the damage was done by the company which originally constructed the railroad, it was alleged that such company sold its road to another, which by a change of name became the defendant. A mere sale of its property by one railroad company to another does not alone make the purchaser liable for damages previously caused by the vendor. *Hawkins v. Central R. Co.*, 119 Ga. 159, 46 S. E. 82.

(b) In so far as the action rests upon the mere maintenance by the defendant of a nuisance created by another company, from which it purchased, no demand was shown for an abatement. Civ. Code 1910, § 4458; *Southern R. Co. v. Cook*, 106 Ga. 450, 32 S. E. 585.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 293;* *Railroads*, Cent. Dig. §§ 392, 393, 399-403; Dec. Dig. § 129;* *Nuisance*, Dec. Dig. § 48.*]

4. SUFFICIENCY OF PETITION—DAMAGES FROM OPERATION OF RAILROAD.

In so far as it rests upon a claim for damages arising from the operation of the railroad, it is fatally defective for the reasons above indicated.

Error from Superior Court, Tattnall County; B. P. Rawlings, Judge.

Action by A. J. De Loach, next friend, and another, against the Georgia Coast & Piedmont Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Way & Burkhalter, for plaintiffs in error. Hitch & Denmark, Hines & Jordan, and E. C. Collins, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 605)

JOHN MALLOCK & CO. v. KICKLIGHTER. (No. 3,653.)

(Court of Appeals of Georgia. Feb. 12, 1912.
Rehearing Denied March 2, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS OF ERROR—SUFFICIENCY.

The assignments of error alleging that certain instructions of the court were not authorized, and were "otherwise illegal," are not supported by the record. The evidence authorized the instructions given; and, if these instructions were for any other reason illegal, the allegation that they were "otherwise illegal" is too general to present any point for the consideration of this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

2. DAMAGES (§ 62*)—DUTY TO MINIMIZE DAMAGES—BREACH OF CONTRACT.

The evidence authorized the court to instruct the jury that, wherever there is a breach of contract, the party injured by the breach is bound to make reasonable efforts to minimize his damages, and that if, in this case, there was a breach or breaches of the contract by Mallock & Co., it was Kicklight-

er's duty, if he could, to minimize his damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-132; Dec. Dig. § 62.*]

3. TRIAL (§ 198*)—INSTRUCTIONS—EFFECT OF CONTRACT.

The question as to whether the plaintiff, by agreeing that certain cotton be handled by the defendants as factors, for the account of and under the direction of the bank, which had a title to the cotton by reason of ownership of the bills of lading, surrendered any rights claimed by him, or which he may have had, due to a breach of a prior contract with the same factors, was an issue of fact, and was properly submitted by the court to the jury for determination. Nor did the court err in instructing the jury, in this connection, that a surrender of the plaintiff's pre-existing rights, growing out of a breach of the contract by the factors, would not necessarily arise, unless the plaintiff expressly or impliedly agreed that, if they handled the cotton, he would surrender his claim against them.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 198.*]

4. TRIAL (§ 198*)—INSTRUCTIONS—DUTY OF COURT—CONSTRUCTION OF MEMORANDUM.

It was the duty of the court to construe for the jury the written memorandum introduced in evidence, and the court did not err in instructing them in that connection, that such memorandum or remarks was not in and of itself an express release of the plaintiff's demands.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 470; Dec. Dig. § 198.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by P. R. Kicklighter against John Mallock & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Adams & Adams, for plaintiffs in error. A. L. Alexander and Osborne & Lawrence, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 604)

MORTON v. CITY OF ROME. (No. 3,529.)

(Court of Appeals of Georgia. Jan. 15, 1912.
On Rehearing, March 2, 1912.)

(Syllabus by the Court.)

1. CERTIORARI (§ 28*)—WHEN LIES.

"The writ of certiorari cannot be used to bring in question the legal existence of the court to which the writ is directed." *Bass v. City of Milledgeville*, 122 Ga. 177, 50 S. E. 59.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 41; Dec. Dig. § 28.*]

2. MUNICIPAL CORPORATIONS (§ 23*)—BOUNDARIES.

The old corporation known as "East Rome" is included in the limits defined in the new charter of the "City of Rome." *Acts of 1909*, p. 1256, § 2.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 23.*]

3. APPLICATION FOR CERTIORARI.

There was no error in refusing to sanction the application for the writ of certiorari.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Pearl Morton was convicted of violating an ordinance of the City of Rome. From an order of the superior court refusing a writ of certiorari, she brings error. Affirmed.

Henry Walker, for plaintiff in error. Max Meyerhardt, for defendant in error.

HILL, C. J. Judgment affirmed.

On Rehearing.

[1] The ruling embodied in the first head-note conclusively decides this case, and renders unnecessary a discussion of the other questions raised.

[2] In one of the grounds of the petition for certiorari it is insisted that the recorder's court of the city of Rome does not exist, having been repealed on August 10, 1909. In this view of the case it was entirely immaterial, in the consideration of the certiorari by the judge of the superior court, whether the charter of the city of East Rome still exists or has been repealed. It is strenuously insisted by counsel for the plaintiff in error that the act which sought to include the territory embraced in the city of East Rome within the corporate limits of Rome was ineffectual for that purpose, because the Legislature, six days after the passage of that act, passed an act amending the charter of East Rome; and it is also insisted that the assumption that the charter of East Rome has been repealed, in the opinion of the Supreme Court in *Ivey v. City of Rome*, 129 Ga. 286, 58 S. E. 852, is mere obiter, because the question was not directly presented or involved, and we are asked to certify this question to the Supreme Court. Under the terms of the constitutional amendment creating this court we are not permitted to uselessly certify questions to the Supreme Court. It is only when an answer to the certified question is material to the proper determination of the cause that we are permitted to certify questions for instructions.

[3] Since the Supreme Court decided in *Bass v. City of Milledgeville*, 122 Ga. 177, 50 S. E. 59, that the writ of certiorari could not be used to bring in question the legal existence of the court to which the writ is directed, the judge of the superior court was necessarily compelled to refuse to sanction the writ of certiorari.

The application for rehearing is denied.

(10 Ga. App. 701)

FLEMING et al. v. SMITH, Governor.
(No. 3,777.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

BAIL (§ 79*)—CRIMINAL PROSECUTIONS—PROCEEDING TO FORFEIT BAIL.

Where a bond given in a criminal case was duly forfeited, and a rule nisi issued and

scire facias served, and before the term of the court to which the scire facias was made returnable the principal voluntarily appeared in the sheriff's office in vacation, paid all the accrued costs of the forfeiture, and tendered a second bond, which was accepted and approved by the sheriff, sureties on the first bond were discharged from all further liability, and it was erroneous to enter against them a judgment absolute. Pen. Code 1910, §§ 959, 960.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 79.*]

Error from City Court of Hartwell; W. L. Hodges, Judge.

Proceeding by Hoke Smith, Governor, against P. L. Fleming and others, to forfeit a bail bond. From a judgment absolute against the defendants, they bring error. Reversed.

A. A. McCurry, for plaintiffs in error. J. Rod Skelton, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 675)

GEORGIA SOUTHERN & F. RY. CO. v.
KELL (No. 3,734.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT—DENIAL OF NEW TRIAL—SUFFICIENCY OF EVIDENCE.

The statutory presumption of negligence, arising on proof of killing by the running of the locomotive and cars of the railroad company (Civil Code 1910, § 2780), was not fully rebutted. No error of law is complained of, and the judgment refusing to grant a new trial must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8860-8876, 3948-3954; Dec. Dig. § 1005.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by R. S. Kell against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John I. Hall, J. E. Hall, Fulwood & Murray, and M. P. Hall, for plaintiff in error. Ridgill & Griner, J. H. Pata, and J. S. Ridgill, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 753)

LANGLEY MFG. CO. v. FREY & CO.
(No. 3,830.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. CERTIORARI (§ 59*)—DISMISSAL—ASSIGNMENT OF ERROR.

A petition for certiorari should not be dismissed for want of an assignment of error, when it sets forth the evidence alleged to have been introduced at the trial, the judg-

ment of the inferior judicatory, and avers that the judgment is contrary to law, contrary to evidence, and decidedly and strongly against the weight of the evidence.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 150-152; Dec. Dig. § 59.*]

2. CERTIORARI (§ 15*) — REVIEW OF JUDGMENTS—SCOPE.

Where there is no disputed issue of fact, the judgment of the inferior judicatory may be reviewed by certiorari. *Toole v. Edmondson*, 104 Ga. 776, 31 S. E. 25.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 23-27; Dec. Dig. § 15.*]

3. EXEMPTIONS (§ 48*) — GARNISHMENT — WAGES.

The monthly wages of one employed to check cotton as the same is weighed and classified, and who also works as a stenographer, typewriter, and letter filer, are not subject to the process of garnishment. *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64-72; Dec. Dig. § 48.*]

4. CERTIORARI (§ 69*) — DETERMINATION OF CASE.

The certiorari should have been sustained, and a new trial ordered; but, as the evidence on the new hearing may be different, a final judgment should not be entered. *Almand v. Railroad Co.*, 102 Ga. 151, 29 S. E. 159.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185-194; Dec. Dig. § 69.*]

Error from Superior Court, Richmond County; *H. C. Hammond*, Judge.

Action between the Langley Manufacturing Company and Frey & Co. From the judgment, the Langley Manufacturing Company brings error. Reversed.

Jas. M. Hull, Jr., and *Lansing B. Lee*, for plaintiff in error. *A. R. Williamson* and *M. C. Barwick*, for defendants in error.

POTTLE, J. Judgment reversed.

(10 Ga. App. 679)

BAKER v. GASKINS. (No. 3,789.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 341*) — DOCUMENTARY EVIDENCE—TAX DIGEST.

A certified copy from the tax digest is admissible to show what property has been returned by a taxpayer for taxation.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 341.*]

2. SUFFICIENCY OF EVIDENCE.

The circumstances proved were sufficient to authorize a verdict finding the property subject to the execution.

Error from City Court of Nashville; *W. D. Bule*, Judge.

Action between *Nona Baker* and *F. W. Gaskins*. From the judgment, *Baker* brings error. Affirmed.

J. W. Powell, for plaintiff in error. *Alexander & Gary*, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 678)

SOUTHERN RY. CO. v. PATTON:

(No. 3,737.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT—EVIDENCE TO SUPPORT.

The undisputed evidence showed that plaintiff's steers were killed by the running of the locomotive and cars of the defendant railroad company, and their value was proved. The presumption of negligence thus raised was not clearly rebutted, and, in the absence of any error of law, the verdict, approved by the trial judge, must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3950; Dec. Dig. § 1005.*]

Error from Superior Court, Habersham County; *J. B. Jones*, Judge.

Action by *J. T. Patton* against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harold W. Ketron and *A. G. & Julian McCurry*, for plaintiff in error. *Claude Bond*, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 651)

WEST v. MORRIS. (No. 3,368.)

(Court of Appeals of Georgia. Jan. 15, 1912. Rehearing Denied March 2, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 333*) — ACTION — PLEADING — ALLEGATION OF PROMISE.

The court did not err in overruling the general demurrer.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 333.*]

Error from City Court of Atlanta; *H. M. Reid*, Judge.

Action by *R. S. Morris* against *W. H. West*. From a judgment overruling demurrer, defendant brings error. Affirmed.

Smith, Hastings & Ransom, for plaintiff in error. *A. E. Ramsaur* and *A. E. Wilson*, for defendant in error.

RUSSELL, J. According to the allegations of the petition, the defendant requested the plaintiff, as his agent, to employ an attorney to make an abstract of title for him. This, of course, would imply a promise on the part of the defendant to pay a reasonable fee to the attorney whom the plaintiff, as the defendant's agent, employed, and consequently there was enough in the petition to withstand a general demurrer, and the court did not err in overruling the demurrer in the form in which it was presented.

It appears, however, from the contract which was entered into, that the petition would have to be amended by inserting a new plaintiff, suing for the use of the pres-

ent plaintiff, before he could recover the commissions, also claimed, even if he establishes the other allegations of the petition. The contract upon which the suit is based is as follows:

"Atlanta, Ga., Feby. 17, 1910.

"I hereby agreed to purchase from owner, through R. S. Morris, agent, one house and lot, known as 305 Formwalt St., for which I agree to pay \$3,400.00 on the following terms: \$2,500.00 cash, assume loan for \$——, due —— at ——, and balance \$25.00 per month with 7% interest made on or before. I have this day, at 9 o'clock a. m., deposited with R. S. Morris, agent, \$25.00 to bind this trade. A reasonable length of time to be allowed for examination of titles by my attorney, and if titles are good, I agree to make settlement at once; but if titles are not good, and cannot be made good in a reasonable length of time, this deposit is to be returned to me and trade canceled. Upon my failure to comply with contract, I agree to pay R. S. Morris, agent, the amount of his commission on said sale.

"[Signed] W. H. West, Purchaser.

"—— hereby accept the above offer upon the terms and conditions herein named, and guarantee the titles to be good, and agree to pay R. S. Morris, agent, a commission on the gross amount as follows, viz.: 5 per cent. on the first \$2,000, and 3½ per cent. on the excess over the first \$2,000. In the event the buyer fails to pay for the property as stipulated above, then the amount paid in is forfeited, and is to be kept by R. S. Morris, agent, as compensation for services rendered by him in the trade.

"[Signed] D. M. Deitch, Owner."

Morris cannot recover upon this contract, though Deitch, the owner, suing for his use, might do so.

Judgment affirmed.

(10 Ga. App. 708)

BALES v. FIRST NAT. BANK OF DUBLIN.
(No. 3,791.)

(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

PARTIES (§ 65*)—Costs (§ 260*)—AMENDMENT—NOMINAL AND USE PLAINTIFFS—FRIVOLOUS APPEAL.

Where the payee in a promissory note sues thereon in his own name for the use of another, and the usee, before the commencement of the action, has acquired the legal title by indorsement of the note sued on, the petition is amendable by striking the name of the original plaintiff and allowing the action to proceed in the name of the usee. Civil Code 1910, §§ 5689, 5690; *Swilley v. Hooker*, 126 Ga. 353, 55 S. E. 31; *Woodbridge v. Drought*, 118 Ga. 671, 45 S. E. 266. There being no defense filed to the suit on the merits, and no question raised except as above decided, the judgment is affirmed, with 10 per cent. on the

amount of the judgment as damages for frivolous appeal.

[Ed. Note.—For other cases, see *Parties*, Dec. Dig. § 65;* *Costs*, Dec. Dig. § 260.*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by the First National Bank of Dublin against William Bales. Judgment for plaintiff, and defendant brings error. Affirmed, with damages.

Chappell & Larsen, for plaintiff in error. Adams & Flynt, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(10 Ga. App. 702)

CHANCE v. SOUTHERN RY. CO.

(No. 3,784.)

(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1212*)—REVERSAL—PROCEEDINGS AFTER REMAND.

Where a motion for a new trial was dismissed, and subsequently an order was passed vacating the dismissal and reinstating the motion, and where thereafter the motion was overruled, and this last judgment was reversed by the Court of Appeals, and a new trial ordered, the respondent in the motion cannot, on the second trial of the case, by a motion to "dismiss the case," for the first time call in question the validity of the order reinstating the motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1212.*]

2. TRIAL (§ 139*)—NONSUIT—SUFFICIENCY OF EVIDENCE.

The evidence in the present record being substantially different from that introduced on the former trial (*Southern Ry. Co. v. Chance*, 7 Ga. App. 650, 67 S. E. 836), and there being evidence upon the present trial, which was not introduced on the first trial, from which the jury could find that the noise made by the engine was both unusual and unnecessary, a nonsuit should not have been granted.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 139.*]

Hill, C. J., dissenting.

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by N. T. Chance against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. E. Roop and S. Holderness, for plaintiff in error. Maddox, McCamy & Shumate, S. J. & B. F. Boykin, and W. P. Cole, for defendant in error.

POTTLE, J. Judgment reversed.

HILL, C. J. (dissenting). I do not think that the plaintiff materially strengthened his case by the additional evidence as to the character of the noise made by the engine, and in my opinion the present case is con-

trolled by the prior decision of this court. Southern Ry. Co. v. Chance, 7 Ga. App. 650, 67 S. E. 836.

(10 Ga. App. 702)

FLEMISTER GROCERY CO. v. WRIGHT MERCANTILE & LUMBER CO.
(No. 3,782.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 25*) — GROUNDS — "NON-RESIDENT."

A mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a "nonresident," within the meaning of the statute relating to attachments. Stickney v. Chapman, 115 Ga. 761, 42 S. E. 68.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 61-72; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4823-4825; vol. 8, p. 7733.]

2. DOMICILE (§ 9*)—EVIDENCE.

Where an attachment was issued on the ground of nonresidence, and this ground was traversed by the defendant, it was not erroneous to allow him to testify that he was only temporarily absent from the state on business, and that he intended to come back to Georgia to live. The fact of actual residence is to be determined by the ordinary and obvious indicia of residence; and where one leaves the state of his residence, his declaration that he intended his absence to be only temporary, and that he intended to return to the state of his residence, is explanatory of his conduct, and is competent.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 38; Dec. Dig. § 9.*]

3. REVIEW ON APPEAL.

No error of law appears, and the facts disclosed by the record fully support the verdict in favor of the traverse of the ground of nonresidence.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by the Flemister Grocery Company against Wright Mercantile & Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Sampler, for plaintiff in error. W. E. Mann, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 758)

McCLURE v. DUNCAN. (No. 3,858.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict in favor of the plaintiff in the distress warrant, and the court did not err in overruling the certiorari.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by J. M. Duncan against W. J. Mc-

Clure. Judgment for plaintiff, and defendant brings error. Affirmed.

Worley Adams and Linton Johnson, for plaintiff in error. Sam B. Swilling, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 754)

TYRE v. JONES. (No. 3,834.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and the verdict was warranted by the evidence.

Error from City Court of Dublin; Chas. Akerman, Judge pro hac.

Action between J. B. Tyre, administrator, and G. A. Jones. From the judgment, Tyre brings error. Affirmed.

J. S. Adams, for plaintiff in error. W. C. Davis, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 706)

MACON, D. & S. R. CO. v. SMITH.
(No. 3,799.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

PRESUMPTION OF NEGLIGENCE — STATUTORY PROVISION.

The statutory presumption of negligence (Civ. Code 1910, § 2780) was not fully rebutted. Besides, there were circumstances proved corroborating the presumption.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by T. H. Smith, executor, against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Minter Wimberly, Adams & Flynt, and Akerman & Akerman, for plaintiff in error. James A. Thomas, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 656)

CALHOUN v. CENTRAL OF GEORGIA RY. CO. (No. 3,643.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1068*) — REVIEW — HARMLESS ERROR—INSTRUCTIONS.

As even the plaintiff's evidence demanded a verdict for the defendant, the errors assigned upon the charge of the judge are immaterial. There was no testimony in behalf of the plaintiff, other than such as required a find-

ing that the casualty was a pure accident; but, even if the usual presumption of negligence applicable to injuries resultant from the operation of the trains of a railroad company could be said to have arisen, this presumption was fully rebutted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. § 1068.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Lee Calhoun against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 7 Ga. App. 528, 67 S. E. 274.

Osborne & Lawrence and R. R. Arnold, for plaintiff in error. H. W. Johnson, for defendant in error.

RUSSELL, J. There are various assignments of error predicated upon the charge of the court. The court erred in charging that the plaintiff, who was an employé of the defendant company, must show himself free from fault. This was unnecessary in this case. The action, as was pointed out when this case was here before (7 Ga. App. 528, 67 S. E. 274), was distinctly brought under the federal "employer's liability act." Some of the other excerpts from the charge, to which exceptions are taken, may not be aptly adjusted to the cause. But all of these exceptions become immaterial; for, upon review of the plaintiff's own testimony, it is quite apparent that the finding of the jury in behalf of the defendant was demanded. No other verdict could have been legally reached. Even if the jury believed the unreasonable story of the plaintiff, there was nothing that could have been done by the engineer that was not done, and the plaintiff himself did nothing. He did not even call the attention of the engineer to the cow which he said was approaching from his side of the track, and which, according to his account, he thought would probably be run over. He did not ring the bell to frighten the cow, and deliberately got down from his seat in the presence of danger and went to shoveling coal. There was no negligence proved by the plaintiff, except his own. There was nothing in the testimony of the defendant's witnesses to evidence anything but a pure accident.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 707)

BROWN v. BOWMAN. (No. 3,802.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 687*)—FRATERNAL ORDERS—NATURE.

The admission that a mutual benefit society organized to do an insurance business is

a fraternal benefit order, duly licensed as such by the state, is equivalent to an admission that such an order has a representative form of government and a lodge system, such as is described in section 2866 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.*]

2. INSURANCE (§ 694*)—MEMBERSHIP—PREMIUMS—INITIATION OF INSURED.

Where such a fraternal benefit order issues a policy of insurance and accepts from the policy holder a note for the premium, it is no defense to an action on the note that the maker thereof has never had an opportunity to be initiated into one of the subordinate lodges of the order.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 694.*]

3. FRATERNAL BENEFIT ASSOCIATIONS—NOTE FOR PREMIUM—ESTOPPEL.

Quære: Where an association has been duly licensed by the state as a fraternal benefit order and authorized to organize and conduct its business under the provisions of section 2866 et seq. of the Civil Code of 1910, can a policy holder in the order defeat recovery upon a note given for the premium, by showing that the association was never organized in accordance with the provisions of the statute, and that it has no representative form of government or lodge system as therein provided?

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by Lee S. Brown against Lewellyn Bowman. Judgment for defendant, and plaintiff brings error. Reversed.

Lee S. Brown brought suit in a justice's court against Lewellyn Bowman upon a promissory note given for the premium due on an insurance policy issued upon the life of the defendant by the Fraternal Life Association. The defense was that the insurance association was not a fraternal benefit order, as defined by Civil Code 1910, § 2866, because it did not have a representative form of government and a lodge system, with a ritualistic form of work. The answer of the magistrate recites: "It was agreed by counsel that the Fraternal Life Association was a beneficiary order, and that it was licensed to do business as such in the year 1908, and that Lee S. Brown was the manager and joint owner of same." The defendant testified that when the policy was issued to him, and when he gave the note sued on for the premium, the agent never said anything to him about it being necessary to establish a lodge, or for him to be initiated into a lodge, that so far as he knew no lodge was ever established, that he and many others who gave premium notes lived in the same community and talked frequently about the notes, and that they had never heard of any lodge being established by the association. Several witnesses were permitted to testify, over objection by the plaintiff, that they had given notes for premiums to the Fraternal Life Association, and that they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

had never heard of any lodge being established by the association, nor had they ever been initiated into any lodge. The defendant prevailed at the trial, and in the petition for certiorari error is assigned upon the admission of testimony of the witnesses above referred to, and also upon the ground that the verdict in favor of the defendant was contrary to law and the evidence. The trial judge overruled the certiorari.

J. T. Sisk, for plaintiff in error. Geo. C. Grogan, for defendant in error.

POTTLE, J. (after stating the facts as above). [3] It was admitted that the Fraternal Life Association had been licensed by the state to do business as a fraternal benefit order. If this is true, it is clear that the association would be estopped to deny its corporate existence, or its authority to accept contracts of insurance, in a suit brought by a beneficiary upon one of such contracts. 1 Joyce, Insurance, § 350, p. 39; 29 Cyc. 15-16. As estoppels must be mutual, it would also seem to be clear that, when the duly authorized officers of the state issue a license to an insurance company to do business within the state, a policy holder could not, in defense to an action brought upon a premium note, challenge the right of the insurance company to do business within the state, or raise the question that the company had not complied with the statutes of this state, so as to authorize it to execute contracts of insurance. See 2 Joyce, Insurance, § 1311; 1 Bacon, Benefit Societies, § 60. The license having been duly and regularly granted, it would seem that the right of the company to do business could be brought into question only in a direct proceeding instituted by the state.

[1] But it is not necessary upon the present record to definitely determine this question. It was agreed that the insurance association was a fraternal benefit order. Civil Code 1910, § 2866, defines a benefit order to be one "formed or organized and carried on for the benefit of its members and their beneficiaries, and having a representative form of government and a lodge system, with ritualistic form of work for the meeting of its lodges, chapters, councils, or other designated subordinate bodies, and the benefits, insurance, charity, or relief shall be payable by a grand or supreme body of the same, excepting sick benefits, which may also be paid by local or subordinate bodies."

[2] The evidence in the present case shows that no subordinate lodge was organized in the community where the defendant resided, and that he was never initiated in any lodge. But the law does not require the institution of a subordinate lodge in every community where a fraternal benefit order issues policies of insurance. It would, we think, be a sufficient compliance with the statute if such

an order had one lodge, such as is described in the statute, at some place in the state, where its members might be initiated. The fact that a particular member might not have been initiated into a lodge would not render the association illegal, or invalidate its contracts. Nor do we think that the failure of the association to give a particular policy holder an opportunity to be initiated into one of its lodges would render invalid and unenforceable either a policy of insurance issued to such member or a note given by the member in payment of a premium due on the policy.

We are not prepared to hold that a policy holder can defeat recovery on a premium note, even though it should appear that the association had no lodges within the state. But, so far as this case is concerned, it does not appear but that this association may have a number of lodges in different parts of the state. The admission that it was a fraternal benefit order necessarily carries with it the idea that the association has a representative form of government and a lodge system, such as is described in the statute; and, this being so, its contracts will not be held to be invalid, nor will a policy holder be allowed to defeat a premium note solely upon the ground that he has not been initiated into one of the lodges of the association. The certiorari should have been sustained.

Judgment reversed.

(10 Ga. App. 664)

CATE v. KNIGHT et al. (No. 3,722.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER (§ 28*)—PLEADING—ISSUES AND PROOF.

Where an affidavit founded upon Civil Code 1910, § 5395 et seq., charges the defendant with both forcible entry and forcible detainer, in order to authorize a general verdict against the defendant, it must appear that he entered upon the premises in defiance of the occupant, and with such a display of force as to deter him from maintaining his possession, and that, after so entering, the defendant detained possession of the premises with a display of like force.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 129-131; Dec. Dig. § 28.*]

2. REFUSAL OF CERTIORARI—ERROR.

Applying this rule to the facts of the present case, the court erred in refusing to sustain the certiorari.

(Additional Syllabus by Editorial Staff.)

3. FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE—SUFFICIENCY.

In an action of forcible entry and detainer, evidence held insufficient to show any forcible entry or forcible detainer of the premises in question by defendant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. § 29.*]

Error from Superior Court, Walker County; J. W. Maddox, Judge.

Action by James Knight and others against Charles Cate. Judgment for plaintiffs, and defendant brings error. Reversed.

Foust & Payne, R. M. W. Glenn, and W. M. Henry, for plaintiff in error. W. P. McClatchey, for defendants in error.

POTTLE, J. Knight and others instituted an action against Cate under the provisions of Civil Code 1910, § 5395 et seq., charging that the defendant did, "with menaces and force and arms, violently and without authority of law," take possession of a described lot of land, and does now "forcibly detain same without authority of law." The jury found for the plaintiff, and the defendant excepts to a judgment overruling his certiorari. The only point made in this court is that the verdict is contrary to law and the evidence.

[1] It has been held that, where a defendant is indicted for forcible entry and detainer as one offense, he cannot be convicted unless the evidence shows both a forcible entry and a forcible detainer. *Blackwell v. State*, 74 Ga. 816. Analogizing this to the civil proceeding, it would seem that, where the affidavit alleges both a forcible entry and a forcible detainer, it would be necessary to prove both a forcible entry and a forcible detainer. See, in this connection, *Griffin v. Griffin*, 116 Ga. 754, 42 S. E. 1005. The only issues involved in a proceeding of this character are the possession and the force. Civil Code 1910, § 5398.

[3] There is some question under the evidence as to whether the plaintiffs were in possession of the premises in dispute; but, without reference to this question, we are clear that the verdict was unauthorized, because no such force was shown as is contemplated by the statute. "To enter upon premises in defiance of the occupant, and with such a display of force as reasonably to deter him from maintaining his possession, is forcible entry." *Lissner v. State*, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389. See, also, *Lewis v. State*, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255; *Griffin v. Griffin*, 116 Ga. 754, 42 S. E. 1005; *Hamrick v. Darnell*, 43 Ga. 433; *Lott v. Peterson*, 95 Ga. 516, 20 S. E. 275. It seems from the evidence that the defendant owned lot No. 200, and the plaintiffs owned lot No. 233. There was a dispute in reference to the location of the line between these two lots. The defendant built a house and occupied it. He claims that the house is on his lot, and the plaintiffs claim that he built the house over the line on their land. There is absolutely no evidence of any character to show any forcible entry by the defendant. One of the plaintiffs testified that he told the de-

fendant not to build or to move on the place. But the mere fact that the defendant disregarded this notice, and peaceably and quietly moved into the house which he had built, is no evidence of force such as is contemplated by the statute. Nor do we think there was any evidence authorizing a finding that the defendant had forcibly detained the premises in dispute.

After the defendant had moved into the house, one of the plaintiffs went to him and told him to move off, and he refused to do so, "but told him that before they got rid of him they would have a happy time of it." He made no display of force, offered no violence, and made no other threat. It is claimed that this was such a show of force, such an indication that the defendant would use force, if necessary, to maintain his possession, as to bring the case within the rule laid down in *Lissner v. State*, supra; but we do not agree with this conclusion. The defendant's language may have been a mere idle threat. He may simply have meant that he intended to resist the plaintiffs with legal proceedings, which he had a right to do. At any rate, there was absolutely no manifestation of any force. The proceeding is not intended to try title to land, nor to take the place of an action of ejectment, nor to settle disputed land lines.

[2] There being no evidence of either forcible entry or of forcible detainer, the trial judge should have granted the certiorari. Judgment reversed.

(10 Ga. App. 742)

SIMS-MCKENZIE GRAIN CO. v. G. E. PATTERSON & CO. (No. 3,820.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

SALES (§§ 333, 339*)—DEFAULT OF PURCHASER—RIGHT OF RESALE—NOTICE TO PURCHASER.

Where a purchaser fails to take and pay for goods sold, and the measure of the seller's damages is the difference between the contract price and the market price at the time and place of delivery, before the seller can conclude the purchaser upon the question of damages by a resale of the rejected goods, it is essential that he should notify the purchaser of his intention to resell. A petition for damages, brought by a seller of goods against a purchaser who refused to take and pay for the goods, is subject to demurrer when it neither alleges the market value of the goods at the time and place of delivery nor that after notice to the purchaser the goods were resold by the seller and a price less than the agreed price realized at the resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 919, 926; Dec. Dig. §§ 333, 339.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. E. Patterson & Co. against the Sims-McKenzie Grain Company. Judg-

ment for plaintiffs, and defendant brings error. Reversed.

Walter A. Sims, for plaintiff in error. R. H. Jones and Alfred C. Broom, for defendants in error.

POTTLE, J. The allegations of the plaintiff's petition, so far as are necessary to an understanding of the opinion about to be rendered, are as follows: Damages are alleged in the sum of \$272 for the breach of a written contract, under the terms of which the plaintiff sold to the defendant five cars of oats to contain 5,000 bushels, which were to be shipped in February, buyer's option, and for which the defendant was to pay 58 cents per bushel, "f. o. b. Atlanta." The oats not having been ordered out, the petitioner alleges their shipment in four cars, each containing 1,250 bushels, on February 28th. The petition further alleges that upon the arrival of the oats in Atlanta the defendant accepted one car and rejected the others; that after tender and refusal to accept, and further refusal to pay for the oats as contracted for, the plaintiff availed itself of the right to resell the oats, and on the 25th of March, through its broker, did sell the oats under the highest offer of 52 cents per bushel. The following damages were alleged as arising out of and incident to the aforesaid breach of the contract: Difference between contract price and resale price, \$225; demurrage, \$38; brokerage on reselling, \$9.

The defendant demurred to the petition upon the following grounds: (1) Because it set forth no cause of action; (2) because under the contract the oats were to be shipped in five cars of 1,000 bushels each, and it appeared from the petition that they were shipped in four cars of 1,250 bushels each; (3) because the petition failed to allege what was the difference between the contract price and the market price of the oats at the time and place of delivery; (4) because the petition failed to allege that the defendant was notified of the plaintiff's intention to resell the oats, and of the time and place of the resale; (5) because it appeared from the petition that the resale of the oats was unreasonably delayed; (6) the item of \$38, demurrage, should be stricken; (7) the items for brokerage and resale should be stricken. The demurrer was overruled, and the defendants excepted.

"If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or he may sell the property, acting for this purpose as agent for the vendee, and recover the difference

between the contract price and the price on resale; or he may store or retain the property for the vendee and sue him for the entire price." Civil Code 1910, § 4131. In the present case the seller elected to resell the property. The theory of the petition is that the defendant is bound for the difference between the contract price and the price realized at the resale, without reference to whether the latter price represents the market value of the oats or not. There are no allegations in the petition that the defendant was notified of the plaintiff's intention to resell. Before the plaintiff could avail itself of the special statutory right to resell the property and conclude the defendant on the question of damages by the price realized at the resale, it was absolutely necessary that notice should be given, though it was not essential that the notice embrace information as to time and place of the sale. *Green v. Ansley*, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110; *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

The decision in *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011, does not rule to the contrary. The headnote in that case is somewhat misleading, but the opinion is very clear in laying down the rule above announced. Indeed, it appeared in that case that the goods were never tendered, no demand for payment was ever made, and the goods were resold before the time for payment or that for delivery had arrived. Where the seller fails to give notice, he can still hold the purchaser liable for the difference between the contract price and the market price at the time and place of delivery, without reference to what disposition is made of the rejected goods. In the present petition there is no allegation in reference to the market price of the goods sold at the time and place of delivery. In the absence of a notice of intention to resell the goods as agent of the purchaser, the purchaser was not bound by the price realized at the time of the resale.

It cannot be said as a matter of law in the present case that the seller delayed unreasonably in making a resale of the goods. The contract was for five cars of 1,000 bushels each. It was a substantial compliance therewith to ship the oats in four cars of 1,250 bushels each. The defendants were not chargeable with demurrage, nor with brokerage charges resulting from a resale of the oats. There being no allegation as to what was the market value of the oats at the time and place of delivery, and no averment that notice had been given the purchaser, as Civil Code 1910, § 4131, requires, the petition was subject to the demurrer filed thereto, and should have been dismissed.

Judgment reversed.

(10 Ga. App. 686)

HODNETT v. MANN. (No. 3,725.)

(Court of Appeals of Georgia. March 8, 1912.)

*(Syllabus by the Court.)***1. VENDOR AND PURCHASER (§ 3*)—CONSTRUCTION OF CONTRACT—LEASE WITH OPTION.**

Where an owner of land contracts with another to sell the land at a stipulated price, to be divided into installments becoming due at specified times, and further stipulates that, in the event the installments are not paid when they mature, the owner shall be paid a specified sum, as rental for the land, the legal effect of the contract is to create the relation of landlord and tenant between the parties, with an option to the tenant to purchase the land upon the terms and conditions set forth in the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 8; Dec. Dig. § 3.*]

2. LANDLORD AND TENANT (§ 245*)—RENT—LIEN.

Where, after the execution of such a contract and before the first installment of the purchase price becomes due, the parties mutually agree upon a rescission of so much of the contract as relates to a purchase of the land, the owner has a lien upon the crops grown upon the premises described in the contract, both for rent and for supplies furnished by him which were necessary to make the crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 988-990; Dec. Dig. § 245.*]

Error from Superior Court, Coweta County; R. W. Frieleman, Judge.

Money rule between G. P. Hodnett and L. B. Mann. From the judgment, Hodnett brings error. Affirmed.

T. F. Rawls, for plaintiff in error. W. L. Stallings, for defendant in error.

POTTLE, J. This was a money rule. The contest was between the holder of a common-law *fi. fa.* issued in 1909 and the holder of a distress warrant sued out in 1910 and claiming rent for that year. The judge awarded the fund to the holder of the distress warrant, and the judgment creditor excepts.

The facts were these: In January, 1910, Mann entered into a written contract with Georgia Peeples and Walt Peeples, under the terms of which he agreed to sell to the other parties a described tract of land for \$800, to be paid in installments. The first installment was to fall due October 15, 1910, and the last installment October 15, 1913. The contract further provided: "And it is further agreed that, in the case the said Georgia and Walt Peeples fail to pay one or either of those notes as they come due, we agree to pay 1,500 pounds of middling lint cotton rent for that year, for the use of said farm. And upon payment of all of the above notes L. B. Mann agrees to make or cause to be made a good and sufficient title to said land." The contract was signed by all three of the parties. During the year 1910 Mann

advanced to the two Peeples money and supplies necessary to make a crop. Early in the fall of 1910, and some time before October 15th, the parties to this contract agreed on a rescission of so much of it as related to the agreement to purchase the land, leaving the contract standing as one of rental only. Mann received 1,600 pounds of lint cotton which was grown on the premises in question, and, after paying for supplies which he had advanced to the persons who made the crop, he credited 880 pounds of cotton on the rent. The common-law *fi. fa.* was levied on the remainder of the crop, and Mann claims the proceeds arising from the sale under his distress warrant, which he duly foreclosed and placed in a constable's hands.

[1] In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, Perry delivered to Sims a paper of which the following is a copy: "This is to certify that I have this day bargained to Jim Sims 50 acres of land, off of the south-east corner of lot No. 20 in the Fourth district of Terrell county, Ga.; the road running from the Hayes place to Dorse Henry's being the line. I agree to make him a good title on his paying me \$500. I agree to run said amount three years, provided he pays the rent promptly." In construing this paper the Supreme Court said: "While the paper evidencing the contract in the case under consideration is informal, it might be treated as a lease of the premises for three years, with the privilege to the lessee to buy at any time for the amount stated in the contract." Following the principle of this decision, the contract involved in the present case was one of rental, with Mann as the landlord and the other persons as tenants, with an option to the tenants to purchase the land upon the terms and conditions stated in the writing.

The contention of counsel for the plaintiff in error is that Mann had no right to claim rent under the contract until October 15, 1910, or at least until that portion of the contract relating to the purchase of the property had been rescinded. This contention is sound. *Oxford v. Ford*, 67 Ga. 362. In that case it was held that the landlord had no right to distrain for rent before the date on which the first installment on the agreed purchase price was due, or at least before the date upon which the purchaser had agreed to a rescission of that part of the contract. It is argued, upon the principle of this decision, that Mann was simply an ordinary creditor as to the money and supplies which he had advanced, and, being such, he had no right to apply any portion of the cotton to this unsecured debt, so as to defeat the holder of the common-law *fi. fa.* Where a creditor holds both a secured and an unsecured claim, he cannot appro-

prorate the payment first to his unsecured claim, over the objection of another creditor holding a lien upon the property or the fund from which the payment is made. Such an appropriation by the creditor would in equity amount to a payment or extinguishment pro tanto of his lien. *Cofer v. Benson*, 92 Ga. 793, 19 S. E. 56; *Stubbs v. Waddell*, 4 Ga. App. 264, 61 S. E. 145.

[2] But we do not think this principle has any application to the present case. The contract between the owner of the land and the persons who made the crop was primarily a contract of rent with an option to buy. The relation of landlord and tenant existed between the persons, subject to be terminated by the exercise of the option to buy the land and the payment of the first installment due on the purchase price. So much of the contract as related to the purchase of the land having been rescinded by mutual agreement, the relation of landlord and tenant never became terminated, and the landlord was entitled to his lien both for supplies and for rent. His claim for both being superior to the claim of the holder of the common-law *f. fa.*, he had a right as against the holder of that *f. fa.* to appropriate the cotton which had been delivered to him, first, in satisfaction of the lien for supplies and advances, and to credit the remainder on the claim for rent. His claim for the balance of the rent being superior to that of the holder of the common-law *f. fa.*, the judge did not err in awarding the fund to the holder of the distress warrant.

Judgment affirmed.

(10 Ga. App. 679)

GROOVER v. TATTNALL SUPPLY CO.
(No. 3,745.)

(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

PLEADING (§ 248*)—AMENDMENT—CHANGE OF CAUSE OF ACTION.

An action upon a contract for the price of goods sold and delivered cannot by amendment be converted into a suit for money had and received to the plaintiff's use.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by the Tattnall Supply Company against J. C. Groover. Judgment for plaintiff, and defendant brings error. Reversed.

Way & Burkhalter, for plaintiff in error.
H. C. Beasley, for defendant in error.

POTTLE, J. Suit was brought upon an account for goods sold and delivered. Over objection of the defendant, the plaintiff was allowed to amend the petition by alleging in substance that the goods described in the

bill of particulars were sent to the defendant to be sold for the account of the plaintiff, and that the defendant had sold the goods and collected the money, and had failed and refused to pay over the same to the plaintiff. The objection to this amendment was that it set forth a new and distinct cause of action. We think that the objection was well taken, and that the amendment should not have been allowed. The original petition was framed upon the theory that the defendant had bought the goods from the plaintiff for his own use, and had failed and refused to pay for the goods. The relation thus created was that of debtor and creditor, or purchaser and seller. The amendment converted the action into one for money had and received. It sought to create the relation of principal and agent, and to count upon a breach of contract by the defendant, under the terms of which he was to sell the goods for the plaintiff and to account to the plaintiff for the proceeds thereof. In other words, the goods were shipped to the defendant on consignment, to be resold for the plaintiff. The defendant was to act as agent for the plaintiff, and to sell the goods, collect the money, and pay over the proceeds. The issues were entirely different from those arising upon the petition as originally framed, and the cause of action was completely changed by the amendment. *Chapman v. Americus Oil Co.*, 117 Ga. 881, 45 S. E. 268; *Lamar v. Lamar*, 118 Ga. 850, 45 S. E. 671.

The amendment having been erroneously allowed, the case was tried upon the wrong theory, and everything that took place after this erroneous ruling was nugatory.

Judgment reversed.

(10 Ga. App. 657)

ROGERS v. DURRENCE. (No. 3,698.)
(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

PRINCIPAL AND AGENT (§ 136*)—RIGHTS AND LIABILITIES AS TO THIRD PARTIES—RECOVERY OF MONEY PAID TO AGENT.

In a suit against an agent to recover money voluntarily paid to him by mistake in fact, the controlling question in determining his individual liability to repay the money is whether he still has the money in his possession at the time of the suit, or whether he had, before the suit was brought and before he had any notice of the mistake, paid over to his principal the money which he had received by mistake. If he still has the money in his possession at the time of the suit, or had it in his possession when he received notice of the mistake, he would be personally responsible, although payment to his principal may have been subsequently made by him. In the present case this controlling question was issuable under the evidence, and the direction of a verdict for the plaintiff was erroneous.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 476-491; Dec. Dig. § 136.*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Action by R. L. Durrence against S. A. Rogers. Judgment for plaintiff, and defendant brings error. Reversed.

Homer C. Parker, for plaintiff in error. Remer Proctor and Johnston & Cone, for defendant in error.

HILL, C. J. R. L. Durrence brought suit against S. A. Rogers, alleging that the defendant was indebted to him on an account in the sum of \$250, with interest at the rate of 7 per cent. from February 6, 1911. At the conclusion of the evidence the trial judge directed a verdict for the plaintiff for the full amount, and the defendant assigns error.

The facts in the case, substantially stated, are as follows: The defendant in the court below, S. A. Rogers, was a contractor, and had agreed to build a house for Dr. J. T. Rogers for \$1,000. Dr. Rogers made arrangements with the Statesboro Building & Loan Association to borrow \$1,000 on the property, and instructed the plaintiff, R. L. Durrence, who was secretary and treasurer of the building and loan association, to pay this money over to S. A. Rogers for the purpose of being used in the construction of the house. This was early in the year 1910. As the money was needed S. A. Rogers was to call on Durrence, secretary and treasurer of the loan company, from time to time and get from him checks drawn on this fund to be used for the principal, Dr. Rogers. These checks were all made payable to S. A. Rogers, and in the corner of each check there was this memorandum for identification: "For J. T. Rogers." While the house was being erected, Dr. Rogers asked S. A. Rogers to let him have \$250 of the money borrowed from the association on this account, promising at the time to replace it. In pursuance of this request S. A. Rogers gave Dr. Rogers \$250 of the money. The evidence does not clearly show what Dr. Rogers meant when he said he would replace the money—whether he would return it to S. A. Rogers, or to the bank, subject to the check of S. A. Rogers. After the completion of the house Durrence discovered that he had overpaid S. A. Rogers to the extent of \$250, the amount for which he sues. He claims that he made this overpayment through a mistake, and that after he discovered the mistake he called upon the defendant to reimburse him this amount, as he had settled with the loan company for his mistake, and that he was entitled to recover this amount as an individual from the defendant. The defendant admitted that he had received on account of the loan made by the loan company \$250 in excess of the amount which had been borrowed from the company by Dr. Rogers, but claims that before he discovered the mis-

take, and before any demand had been made on him for this excess, he had disbursed all the money received by him for the benefit and at the direction of his principal, and that he had none of the funds remaining in his hands; that in making the disbursements he was acting simply as the agent of Dr. Rogers, and, having paid over to him or used for his benefit all the money, including this excess, he was not individually liable for the same.

The evidence is not clear as to whether the defendant as the agent of Dr. Rogers had in fact paid the money over to his principal, or had used it for the benefit of his principal, before the mistake was discovered and his attention called to the fact. There are some circumstances from which the jury might have inferred that the defendant knew that he had been paid the \$250 in excess of the amount borrowed by Dr. Rogers from the loan company, before he paid the amount to his principal or used it for his benefit. Civil Code 1910, § 3608, provides as follows: "If money be paid to an agent by mistake, and he in good faith pays it over to his principal, he shall not thereafter be personally liable therefor. In all other cases he is liable for its repayment. If money be paid by an agent by mistake, he may recover it back in his own name." In the case of *Law v. Nunn*, 3 Ga. 90, it is held: "In actions against agents, for money voluntarily paid by mistake in fact, the true distinction is: Where the agent has paid the money over to his principal in good faith, he is not personally liable; but when he has not paid the money over, or before such payment he has notice of the mistake, and is required not to pay it, then he is personally responsible, although payment to his principal may have been made."

The overpayment made by mistake to the defendant is not disputed. The fact that the money was paid to him to be used for the benefit of his principal, Dr. Rogers, in the construction of the house, is not in dispute. While the defendant testified positively that he had paid the money over to his principal, or used it for the benefit of his principal, in good faith, before he had notice of the mistake, there are circumstances which are apparently in conflict with his testimony on this point; and under the Code section, cited supra, and the decision in the case of *Law v. Nunn*, supra, the individual liability of the defendant as the agent of Dr. Rogers to refund the \$250 paid to him by mistake by the plaintiff depends upon whether, as agent, he paid the money over to his principal, or used it for his benefit, before he knew of the mistake. We think this question was clearly issuable, and should have been submitted to the jury, and for that reason the trial judge erred in directing a verdict for the plaintiff.

Judgment reversed.

(10 Ga. App. 701)

FULLER v. CLARK. (No. 3,779.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW—REFUSAL OF CERTIORARI.

No error of law was committed, and, the evidence being sufficient to support the verdict rendered by the jury in the justice's court, this court has neither the power nor the inclination to interfere with the judgment of the judge of the superior court refusing to sustain the certiorari.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1094.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between B. F. Fuller and P. G. Clark. From the judgment before a justice, Fuller applied for certiorari. From an order refusing the same, he brings error. Affirmed.

Geo. A. Coffee, for plaintiff in error. F. A. Cantrell, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 741)

DORNBLATT v. CARLTON. (No. 3,817.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

DAMAGES (§ 123*)—MEASURE—BREACH OF CONTRACT.

Where one contracts with the owner of a house to install therein a heating plant of a certain character and quality, and the plant actually installed is inferior to that contracted for, the measure of the owner's damage is the sum required to make the plant conform to the specifications fixed by the contract. This rule is not in a particular case varied by reason of the fact that the contractor offers to make the necessary changes for a specified sum and to give bond for the faithful performance of the work.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.*]

Error from City Court of Athens; H. S. West, Judge.

Action by W. A. Carlton against Julius Dornblatt. Judgment for plaintiff, and defendant brings error. Affirmed.

B. E. Fortson and Jno. J. Strickland, for plaintiff in error. Cobb & Erwin, for defendant in error.

POTTLE, J. Carlton employed Dornblatt to install a hot water plant in his dwelling, and paid him the full amount of the purchase price, upon Dornblatt's assurance that the work would prove satisfactory, and that, if it did not, he would make it so. The work not proving satisfactory, Carlton had it overhauled at an alleged expense of \$687.67, for which he sued Dornblatt. The jury found for Carlton \$604.87 principal, and Dornblatt's

motion for a new trial was overruled. The only defense insisted upon here is that, inasmuch as Dornblatt offered to make the necessary changes for \$175 and to give bond for the satisfactory performance of the work, this sum fixed the measure of the plaintiff's damage.

We cannot assent to this view. The questions for the jury were: Was Carlton damaged? And, if so, how much? The defendant's estimate of the sum necessary to bring about a compliance with his contract was not conclusive, nor did his offer to give bond to do the work for the sum so fixed by him bind the plaintiff to intrust the repairs to him. Assuming, as the jury found, that it would cost slightly more than \$600, the plaintiff was not bound to give the defendant an opportunity to do further unsatisfactory work, merely because he offered a bond, upon which the plaintiff might sue for the ultimate damages he would sustain. The jury found that the defendant had failed to perform his contract. The plaintiff had a right to have the work done in accordance with this contract, and charge the defendant with what the repairs were reasonably worth in the market. The verdict was warranted by the evidence, and no error of law was committed.

Judgment affirmed.

(10 Ga. App. 760)

PYLE v. BOOZE. (No. 3,890.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§§ 136, 193*)—PURCHASE FROM AGENT—BREACH OF WARRANTY—DIRECTING VERDICT.

One who buys personalty from an agent of the owner, with knowledge of the agency, cannot, upon failure of the owner's title, maintain against the agent an action for damages for breach of warranty. Where, in the trial of such a case, the evidence is in conflict as to the purchaser's knowledge of the ownership and agency, it is error to direct a verdict in his favor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 476-491, 721½; Dec. Dig. §§ 136, 193.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by T. H. Booze against W. L. Pyle. Judgment for plaintiff, and defendant brings error. Reversed.

M. B. Eubanks, for plaintiff in error. Dean & Dean and J. M. Hunt, for defendant in error.

POTTLE, J. This case is the sequel to that of Booze v. Neal, 6 Ga. App. 279, 64 S. E. 1104.

After the affirmance of the judgment in that case, as a result of which Booze was com-

pelled to pay off the *fi. fa.*, he sued Pyle, the seller, for breach of warranty, and the trial judge directed a verdict in the plaintiff's favor. Pyle's defense was that he sold Booze the cotton as agent for one Payne, who was present at the sale, and that Booze knew the cotton was Payne's, and therefore took the chances, so far as he (Pyle) was concerned, of a failure of Payne's title.

The evidence showed that in 1906 Payne was a tenant on a farm bought from Coker by Pyle, who gave his joint note with Payne at the bank in order to raise money necessary to make the crop. In the fall Payne had five bales of the cotton ginned in Pyle's name and delivered to Pyle at the warehouse; the receipts being issued in Pyle's name. Pyle went with the receipts to the bank, took up the note which he and Payne had given, and gave his individual note in renewal, hypothecating the warehouse receipts as collateral security. Subsequently Coker levied a distress warrant on the cotton. Pending this levy, negotiations were opened for the purchase by Booze from Pyle of a lot of cotton. Coker, having been satisfied, dismissed his levy, and Pyle sold to Booze nine bales of cotton, including the five bales delivered to him by Payne, paid the note at the bank with a portion of the money, and delivered to Booze the five warehouse receipts. Subsequently Neal levied on the five bales in the possession of Booze, and, when the verdict finding the property subject was approved by this court, Booze paid Neal's claim. Booze sued Pyle for the amount paid by him on the Neal *fi. fa.*, but the judge directed a verdict for the amount paid Pyle for the cotton, a somewhat smaller sum than that paid Neal. Booze testified that he dealt with Pyle as the sole owner of the cotton, and did not know Payne in the transaction at all; that Pyle claimed he owned it all the time; and that after Coker's claim for rent was settled there was, so far as Booze knew, no other claim against the cotton. Pyle and Payne testified that the cotton was Payne's; and the point in the case is whether there was any evidence from which the jury could find that Booze knew this when he bought the cotton.

It is insisted for the defendant in error that Pyle, having taken the warehouse receipts in his name, is estopped to deny his title. If he sold the cotton as his own, he would, of course, be estopped, not so much because of the receipts, but upon the general principle that one who sells property to another and takes the other's money cannot be heard, as against the purchaser, to deny his title. But if Pyle sold the cotton as agent of Payne, and Booze knew this, the doctrine of estoppel has no application. We are reluctant to disturb the verdict directed, because it seems to be a manifestly just disposition of the case; but, if there is any ev-

idence to support a different result, the trial judge had no power to deny the defendant a jury trial, nor have we authority to uphold him in so doing. While in the trial of the claim case Pyle swore pointedly that the cotton was his when he sold it to Booze, having been delivered to him by Payne in settlement of a supply bill, in the present trial both he and Payne testified that the cotton was Payne's and that Booze knew it. We quote from Pyle's testimony: "I had not bought that cotton from Payne, nor never in my life told anybody I bought it from Mr. Payne; only stated it was mine by rights of mortgage, and nothing else. I said the cotton was mine by rights under the mortgage, and nothing else; never had any more claim on it. * * * I did sell that cotton in that transaction for Payne, because Payne told me to do so, then and there, and Payne was present at the time. Booze knew who that cotton belonged to at that time just as well as I did, because he would not buy it until the levy was dismissed, and I know I would not have gone on my own bond for the cotton." Payne swore: "I paid the interest and put the cotton in there in Mr. Pyle's name, so that he could put up his own note as collateral security to extend my note until he got ready to sell the cotton; did not sell that cotton to him, only just that agreement. I turned it over to Pyle to sell and apply to these notes. * * * Booze knew, at the time he bought this five bales of cotton, that it was my cotton he was buying, and that the proceeds were being applied to my debts. He knew it, and he went to Coker to find out whether Coker had anything else against the cotton before he bought it, and came back and said that Coker had a claim for rent for the year before, and he made it up in his own mind that Coker could not collect that, and he bought it anyhow." He further testified: "I never told Booze I owned it; but he knew it. He knew it was my cotton, I told him so, and he objected to buying it, because it was levied on, and he afterwards went and got that rent affair out of the way."

We think this testimony made a jury question. If Pyle was acting as Payne's agent in making the sale, and Booze knew it, he cannot look to the agent for a breach of the warranty of title. There is nothing in the evidence to demand, even if there is to authorize, a finding that Pyle knowingly concealed from Booze the existence of the judgment in favor of Neal which afterwards subjected the cotton, although such concealment would not support the action as brought. There is nothing in the point that, because Booze sued for the amount paid by him to Neal, he cannot recover his true measure of damages, to wit, the sum paid Pyle for the cotton. We feel constrained to send the case back for a trial before a jury.

Judgment reversed.

(10 Ga. App. 762)

PAYNE v. ROME COCA-COLA BOTTLING CO. (No. 3,888.)

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)***EXPLOSIVES (§ 8*)—EXPLOSION OF BOTTLE—LIABILITY OF MANUFACTURER.**

Where an action is brought to recover damages for an injury caused from the explosion of a bottle, the contents of which were manufactured, bottled, and sold by the defendant as a harmless beverage, an inference of negligence on the part of the manufacturer arises, when it is shown that all the persons through whose hands the bottle had passed were free from fault, and that the condition of the bottle and its contents had not been changed since it left the defendant's possession.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 8.*]

Error from City Court of Floyd County; John H. Reece, Judge.

Action by Sam Payne, by next friend, against the Rome Coca-Cola Bottling Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. L. Tison, W. H. Trawick, and Maddox & Doyal, for plaintiff in error. Lipscomb, Willingham & Wright, for defendant in error.

POTTLE, J. A bottle of Coca-Cola, manufactured and sold by the defendant exploded, and fragments of glass flew into the plaintiff's eye and destroyed the sight. The plaintiff alleges that the water in the bottle had been charged with carbonic acid gas, and that the explosion was due to the fact that the bottle was too highly charged with the gas by the defendant. A nonsuit was awarded and the plaintiff excepted.

The bottle of Coca-Cola was bought by the plaintiff's brother from Cook, a retail vender, who bought it from Barnett, to whom it was sold by the defendant. There was nothing in the appearance of the bottle to differentiate it from other bottles of Coca-Cola put on the market by the defendant. Neither the plaintiff nor his brother did anything to cause the explosion, nor had the bottle or its contents been changed in any way since the manufacturer sold it to Barnett. Coca-Cola, such as was contained in the bottle, was advertised and sold by the defendant as a refreshing and harmless beverage. A small cap, fastened tightly down, covered the mouth of the bottle. There was no direct evidence in reference to the manner in which the bottle was charged, nor as to the quantity of gas used.

If the plaintiff can recover at all, he can do so only upon an application of the maxim "res ipsa loquitur." The occurrence was unusual. Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negli-

gence somewhere and in somebody may arise. There is no presumption of law, but merely an inference of fact. Negligence is not necessarily to be inferred merely from the act itself; but the tribunal designated by the law to decide the issues of fact may infer negligence from the happening of an event so unusual. So much may be gathered from previous decisions. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443; *McDonnell v. Central Railway Co.*, 118 Ga. 86, 91, 44 S. E. 840; *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329; *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127; *Cochrell v. Langley Mfg. Co.*, 5 Ga. App. 317, 63 S. E. 244; *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S. E. 93; *Central Railway Co. v. Butler*, 8 Ga. App. 243, 68 S. E. 956. In the *Cochrell Case*, *supra*, the Chief Judge called attention to the fact that the doctrine expressed in the maxim "res ipsa loquitur" was the foundation for the rule stated in section 5157 of the Civil Code of 1895 (Civil Code of 1910, § 5743), which is merely a codification of previous decisions of the Supreme Court.

But it is said that, before the doctrine can be applied, the act must speak not only of negligence, but of negligence on the part of the defendant. To this, of course, all are agreed. But the argument of the able and earnest counsel for the defendant is that the principle at the foundation of the maxim cannot be applied here, because the bottle was not in the possession or control of the defendant when it exploded; that, therefore, there can arise no inference that it was negligent; and that, if negligence is to be inferred, it must be ascribed to the vender, from whom the plaintiff's brother bought the bottle, or to the brother himself. The counsel relies upon language of Mr. Justice Lamar in the *Chenall Case*, *supra*, that, "prima facie, that want of due care should be referred to him under whose management and control the instrument of injury was found." Further along in the opinion the learned Justice said: "All that the plaintiff should be required to do in the first instance is to show that the defendant owned, operated, and maintained, or controlled and was responsible for the management and maintenance of, the thing doing the damage; that the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. When he has shown this, he has cast a burden on the defendant, who may then proceed to show that the accident was occasioned by vis major, or by other causes for which he was not responsible." In the headnote the rule is stated somewhat differently, thus: "Prima facie, such negligence will be attributed to the person charged by law with the duty of maintaining and managing the thing causing the injury." In that case the court discussed

and applied the doctrine in favor of one injured by the falling of a brick arch, and did not have in mind such an occurrence as the one presented in the case now at hand.

Granting, for the sake of the argument, that, *prima facie*, inferential negligence will be imputed to the person who sold the bottle to plaintiff's brother, or to the brother himself, the inference is completely rebutted when it affirmatively appears, as it does here, that neither was at fault, that neither handled the bottle improperly, or did anything to change the condition from that in which it was when received. Since for every effect there is a cause, where negligence exists, some one must have been the responsible author. If he can be found, it is right that he should pay the penalty. The bottle exploded. Inferentially some one was negligent. It was not Cook, the last vender of the bottle, nor the plaintiff's brother, nor the plaintiff, nor yet Barnett, because they all stand exonerated by direct or circumstantial evidence of their freedom from fault. But the inference of negligence remains, and some one is *prima facie* blame. By a process of elimination we get back to the manufacturer, who set the dangerous agency in motion, and upon whom the blame ought inferentially to be fastened.

It is certainly no hardship to require at the manufacturer's hands an explanation of the occurrence, that the jury may say whether it, like the other persons who handled the bottle, has been exonerated. If a manufacturer should sell to a jobber a gun, and after passing through the hands successively of the wholesaler and retailer, it finally reaches the marksman, and explodes in his hands while being used in the ordinary and usual manner, and injury results, it is plain that there was a defect in the gun. Somebody ought to be responsible. Concede that inferentially it could be said that the marksman must have done something to the weapon to cause it to explode, if he disproves this, and the retailer, the wholesaler, and the jobber all in turn show that they kept and handled the gun in the usual way, and did nothing to change its condition, the inference of negligence would be shifted back upon the manufacturer, who put the weapon of destruction in circulation with his indorsement that, when used in the ordinary and usual manner, no harm would come to him who used it. In such a case it would be no answer, when the maxim that the thing spoke for itself is invoked, to say that, when the injury resulted, the thing was not in the possession, power, or control of the manufacturer.

Under the proven facts, the occurrence speaks of the defendant's negligence, and it alone. The inference is that it was negligent in the manner alleged in the petition.

It charged the bottle with carbonic acid gas, it put together the constituent elements of the beverage, it manufactured or procured the bottle to hold these elements, and it put the bottle in circulation, with an invitation to the public to use the contents as a harmless and refreshing beverage. The attempt to use it caused the plaintiff the loss of his eye. Somebody is responsible, and the inference is that the defendant is the guilty party. See *Blood Balm Co. v. Cooper*, 83 Ga. 461, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157; *Hudgins v. Coca-Cola Bottling Co.*, 122 Ga. 695, 699, 50 S. E. 974. In the *Monahan Case*, *supra*, Judge Russell, speaking for the court, held, that the doctrine underlying the maxim "*res ipsa loquitur*" might be applied in a case where one was injured by a falling window in the office of a tenant, and that inferentially the landlord was guilty of negligence, although the window was under the immediate control and in the actual possession of the tenant at the time.

We do not say that under the proved facts the jury must find the defendant liable, but there was enough evidence to make a *prima facie* case and to require an explanation from the defendant. We deal with the case upon the facts presented. As to whether an inference of negligence would arise against the manufacturers upon mere proof of the explosion, without more, we express no opinion.

Judgment reversed.

(10 Ga. App. 697)

WILKERSON v. PATTON SASH, DOOR & BUILDING CO. (No. 3,757.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 113*)—SUFFICIENCY OF WRITING—SALES OF GOODS.

Where one party to an alleged contract for "the sale of goods, wares, or merchandise" relies upon a written memorandum to show compliance with the statute of frauds, the memorandum must show all the terms of the contract, and that both parties thereto assented to those terms. *Borum v. Swift*, 125 Ga. 202, 53 S. E. 608; *Clark on Contracts*, 83.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 239-241; Dec. Dig. § 113.*]

2. FRAUDS, STATUTE OF (§ 103*)—SUFFICIENCY OF WRITING—ACCEPTANCE OF WRITTEN OFFER.

An acceptance of a written offer relating to a subject-matter within the statute of frauds must itself be in writing, in order to make a contract mutually binding. *Pope & Fleming v. Graniteville Mfg. Co.*, 1 Ga. App. 176, 57 S. E. 949.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 192-208; Dec. Dig. § 103.*]

3. SALES (§ 23*)—REQUISITES OF CONTRACTS—ACCEPTANCE OF OFFER.

The alleged contract on which the suit is based consists of a written proposal or offer to buy certain described personal property at a specified price, and the allegations of the petition show that this written offer was withdrawn before acceptance or part performance by the proposed seller. The offer, therefore, never became a complete contract, and the court properly dismissed the petition on demurrer. *Oak City Co. v. Kennedy Co.*, 4 Ga. App. 344, 61 S. E. 499; *Sivell v. Hogan*, 119 Ga. 187, 46 S. E. 67; 9 Cyc. 284.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

Error from City Court of Floyd County; John H. Reece, Judge.

Action between C. L. Wilkerson and the Patton Sash, Door & Building Company. From the judgment, Wilkerson brings error. Affirmed.

W. J. Nunnally, for plaintiff in error. Lipscomb, Willingham & Wright and Nathan Harris, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 653)

McDOUGALD v. CHATTANOOGA MEDICINE CO. (No. 3,571.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 162*)—REVIEW OF DECISIONS—EFFECT OF TRANSFER OF CAUSE—JURISDICTION OF JUSTICE.

Where an appeal has been entered from a judgment of a justice's court to a jury in the superior court, the former court loses all jurisdiction of the case; and if, by mistake, an appeal from the same judgment to a jury in the justice's court is subsequently entered, and a verdict is returned on the latter appeal, and a judgment entered thereon, the latter proceedings are mere nullities.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 600-605; Dec. Dig. § 162.*]

2. BANKRUPTCY (§§ 20, 435*)—EVIDENCE (§ 43*)—PENDENCY OF PROCEEDINGS—EFFECT IN STATE COURT.

In a suit in a state court, if the defendant desires a stay of the proceedings therein, because of his adjudication as a bankrupt, until the application for his discharge can be heard and decided by the bankruptcy court, or if he desires to set up his discharge as a defense to such suit, he must plead the adjudication or the discharge. After judgment has been rendered in the state court, he cannot attack the validity of the judgment therein, and move the court to set aside the judgment, or to treat such judgment as a "nullity," either because of the pendency of the bankruptcy proceedings, or because of his discharge in bankruptcy from the debt on which the judgment is based. Bankruptcy proceedings must be pleaded and proved, if relied upon. Courts, other than a bankruptcy court, will not take judicial cognizance of bankruptcy proceedings.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. §§ 20, 435.* *Evidence*, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Chattanooga Medicine Company against J. F. McDougald. Judgment for plaintiff, and defendant brings error. Affirmed.

S. C. Crane, for plaintiff in error. Walter C. Hendrix, for defendant in error.

HILL, C. J. The procedure in this case is somewhat anomalous. The plaintiff in error calls it a motion to treat the judgment of the superior court as a "nullity." In some doubt as to the character of his pleadings he asks that this motion be treated by this court as a motion for a new trial. We think it is more properly a motion to set aside a judgment rendered by the superior court on the facts stated in the motion. From a confused record we have, after some study, evolved the following to be the case:

From a judgment in favor of the plaintiff in a suit on an account in a justice's court, the defendant entered an appeal to a jury in the superior court. After the appeal papers had been transmitted to the clerk of the superior court, the defendant—presumably by inadvertence—entered an appeal from the same judgment to a jury in the justice's court, and a verdict was rendered on the latter appeal and a judgment entered thereon. Subsequently the attention of the justice was called to the fact that an appeal had previously been entered to a jury in the superior court in the same case, and he treated as nugatory the appeal to the jury in the justice's court. After verdict and judgment in favor of the plaintiff on the appeal in the superior court, the defendant, at the same term of the court, filed a motion to treat this judgment as a nullity, upon the following grounds: (1) Because the defendant, after judgment was rendered in the justice's court, filed his petition in bankruptcy in the District Court of the United States for the Northern District of Georgia, and listed in his bankruptcy schedule his debt to the plaintiff, and the judgment rendered thereon in the justice's court, as one of his provable debts. (2) That on said petition in bankruptcy the defendant was adjudged a bankrupt, "and has made his application for a final discharge, and a final discharge would be a release from [the plaintiff's] claims," and, therefore, the judgment in the superior court against him should be "vacated and treated as a nullity," and the execution issued on the judgment be stayed until the final disposition of the defendant's application for discharge by the district court. To this motion the movant offered an amendment, setting up the following additional grounds: (1) That the plaintiff was bound by the verdict and judgment in the justice's court, and had no right in law to proceed further in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

superior court in the case, until the verdict and judgment had been reversed and set aside or declared a nullity by order of the justice or of the superior court; that the verdict and judgment in the justice's court ended the case so far as the plaintiff was concerned, and there was no suit pending against the defendant and the security upon the appeal bond at the time that the papers were sent to the superior court. (2) That the act of the plaintiff in proceeding further in the case in the superior court, after the papers had been sent up by the justice of the peace, was a fraud on the court as well as on the movant, because it was the duty of the plaintiff, when the case was called for trial in the superior court, to inform the court that the defendant had filed his petition in the bankruptcy court and had listed the plaintiff's claim as one of his provable debts, and also to inform the court that the verdict and judgment had been taken in the justice's court, so that the superior court would have been informed as to the true status of the case between the parties and the court; that for these reasons the judgment should be set aside as a nullity, and a new trial be granted to the defendant, and he be allowed to file his plea of bankruptcy. This amendment was disallowed, and to this ruling the defendant excepted. The judge of the superior court denied the motion to treat the judgment as a nullity, and to this, also, the defendant excepted.

[1] After reviewing the case, we find no merit in the motion, even if the amendment had been allowed, although we frankly confess that we are not entirely clear as to what are the contentions of the plaintiff in error. He apparently objects to the conduct of the justice of the peace in treating the appeal entered to a jury in his court, and the verdict rendered by the jury thereon, as nugatory, in view of the fact that an appeal had previously been entered to a jury in the superior court from the judgment of the justice's court. He proceeds on the idea that the justice of the peace, after having rendered a judgment in the case, could not set it aside. This is true; but where a justice's court, as in the present case, renders a judgment on a verdict of a jury in that court after an appeal has been entered to a jury in the superior court, the judgment in the justice's court is entirely void, and the justice himself, as well as any other court, can legally disregard it, and treat it as a nullity, whenever and wherever it may be brought in question (*Fontaine v. Bergen*, 55 Ga. 410); and the court may proceed in such case as though such verdict and judgment had not been rendered (*Chapman v. Floyd*, 68 Ga. 455). Manifestly, after an appeal had been entered in the justice court from the judgment therein to a jury in the superior court,

the justice's court lost jurisdiction entirely of the case, and there was no case pending therein on which any further proceedings could be taken; and, consequently, the verdict rendered on the appeal from the judgment of the justice to a jury in that court, and the judgment of the justice thereon, were mere nullities.

[2] The real point insisted upon by the plaintiff in error is that the judgment in the superior court should be treated as a nullity, because, after the suit had been filed in the justice's court and an appeal entered to the superior court, he filed his petition in bankruptcy, listing the plaintiff's claim in the schedule as one of his provable debts. No plea setting up the bankruptcy proceedings was filed in the justice's court or in the superior court. It is stated, in the motion made to treat the judgment as a nullity, that counsel for the defendant had called the attention of the justice of the peace to the fact that these bankruptcy proceedings had been filed and were pending. A motion to set aside a judgment on account of bankruptcy, where bankruptcy is not pleaded, will not be sustained. *Pulliam v. Dillard*, 71 Ga. 599. If the defendant desired a stay of the proceedings until his application for discharge could be passed upon by the bankruptcy court, or if he desires to set out his discharge as a defense, he must do so by a plea in the suit and before a judgment is rendered against him. He cannot, after judgment is rendered against him, attack such judgment on either ground by affidavit of illegality or otherwise. *Finney v. Mayer*, 61 Ga. 500; *Farmers' & Traders' Bank v. University Pub. Co.*, 9 Ga. App. 128 (5), 70 S. E. 602. Certainly the trial judge could not take judicial cognizance of the pendency of bankruptcy proceedings against the defendant. *Woodward v. McDonald*, 116 Ga. 750, 42 S. E. 1030. There was no error in the judgment of the superior court, overruling the motion to treat as a nullity its judgment rendered in the case.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 699)

BIRMINGHAM FERTILIZER CO. v. JOHN A. COX & SON. (No. 3,770.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 40*) — EVIDENCE—VALUE.

"Promissory notes are evidence of their own value in an action of trover."

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 234-244; Dec. Dig. § 40.*]

2. BANKRUPTCY (§ 418*) — DISCHARGE — EFFECT.

"In an action of trover, the issue is one of title, and not of debt. Consequently neither the defendant in such an action, wherein bail is required, nor the surety on his bond, can set up as a defense the discharge of the defendant in bankruptcy pending the action. This is true, although the plaintiff elects to take a money verdict for the damages alleged to have been sustained."

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 418.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by the Birmingham Fertilizer Company against John A. Cox & Son. Judgment for defendants, and plaintiff brings error. Reversed.

R. E. Dinsmore, for plaintiff in error. Jas. H. Price, Fulwood & Murray, and J. J. Murray, for defendants in error.

POTTLE, J. The Birmingham Fertilizer Company sold fertilizer to the partnership of John A. Cox & Son and took their note for the purchase price. Cox & Son sold the fertilizer to planters, took their notes, transferred them as collateral security to the Birmingham Fertilizer Company, and retained the collateral notes for collection. Cox & Son having failed upon demand to surrender the collateral notes or account for them, the Fertilizer Company brought an action of trover and bail. At the conclusion of the evidence the court directed a verdict for the defendants, and subsequently overruled the plaintiff's motion for new trial.

[1] 1. It is contended that the verdict was demanded, because there was no proof of the value of the notes sued for. "Promissory notes are evidence of their own value in an action of trover." *Wight v. Hester*, 24 Ga. 485. As a general rule, in a trover case, the plaintiff must prove the value of the thing sued for. But, where one takes for another notes for collection, he impliedly concedes their value, and, if he converts them, they should be treated, in an action for their conversion, as being prima facie of their face value. If they are in fact valueless for any reason, such as the insolvency of the makers, this would be a matter of defense. *Citizens' Bank v. Shaw*, 132 Ga. 771, 65 S. E. 81. If the plaintiff elects to take a money verdict, his measure of damages could not exceed either the amount of his debt or the prima facie or actual value of the collaterals as shown by the evidence. There was no proof that the notes were without value, and the direction of the verdict cannot be sustained upon the theory that the notes were not shown to be of value.

[2] 2. The defendants pleaded and proved that pending the action they had been discharged in bankruptcy, and this is urged to sustain the direction of the verdict in their

favor. It is settled by the decision in *Berry v. Jackson*, 115 Ga. 196, 41 S. E. 698, 90 Am. St. Rep. 102, that the discharge in bankruptcy of the defendants in a trover case constitutes no defense to the action. "The issue is one of title, not of debt." The judge erred in directing the verdict and in admitting the record of the discharge in bankruptcy. There is no specific assignment of error upon the direction of the verdict; but as the motion for a new trial complains of the admission of the record of the discharge in bankruptcy, and as this was error, the judgment overruling the motion will be reversed, that the case may be tried anew in the light of the views herein expressed.

Judgment reversed.

(10 Ga. App. 742)

SATTERFIELD v. AYERS & CUNNINGHAM. (No. 3,818.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 31*)—IMPROPER ARGUMENT—NECESSITY OF OBJECTIONS.

Where an attorney, in the argument of a case before the jury, uses improper language, which is claimed to be prejudicial, it is the duty of the attorney for the opposite party to invoke a ruling of the trial judge thereon, either by the declaration of a mistrial, or by reprimanding the offending attorney and giving proper instructions in reference to the language so used to the jury; and where no such action is invoked, the use of the improper language cannot subsequently be made a ground of a motion for a new trial. *Lavender v. State*, 9 Ga. App. 856, 72 S. E. 437.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 46; Dec. Dig. § 31.*]

2. REVIEW.

Except as above decided, no error of law is complained of, and the verdict is supported by the evidence.

Error from City Court of Hartwell; W. L. Hodges, Judge.

Action between E. E. Satterfield and Ayers & Cunningham. From the judgment, Satterfield brings error. Affirmed.

A. A. McCurry, for plaintiff in error. Jas. H. Skelton, for defendants in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 698)

McFARLAND v. LEE. (No. 3,762.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 18*) — PRESENTATION OF QUESTIONS IN LOWER COURT—AMENDMENT.

Exception to a judgment refusing to allow an amendment to an answer cannot properly be made in a motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. ATTACHMENT (§ 352*)—LIABILITIES ON BOND—FORTHCOMING BOND.

In a suit upon a forthcoming bond, the only question to be decided is whether or not there has been a breach of the bond. No issue can properly be raised as to the title of the property involved. *Rowland v. Page*, 4 Ga. App. 269, 61 S. E. 148.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1304, 1305; Dec. Dig. § 352.*]

3. ATTACHMENT (§ 191*)—LIABILITIES ON BOND—FORTHCOMING BOND.

The evidence authorized a finding that no claim had been interposed. This being so, the bond sued upon, and which was given as the foundation of a claim, is to be treated as a voluntary obligation. A recital in the bond that the principal obligor claims the property is not evidence that a claim has actually been interposed, but only that the obligor intended to interpose a claim. *Jones v. Kendrick*, 94 Ga. 645, 21 S. E. 831.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 633-636; Dec. Dig. § 191.*]

4. SUFFICIENCY OF EVIDENCE—BREACH OF BOND.

The evidence authorized a verdict that there had been a breach of the bond by the defendant.

Error from City Court of Lumpkin; D. B. Nicholson, Judge.

Action by E. M. Lee, for use, etc., against Steve McFarland. Judgment for plaintiff, and defendant brings error. Affirmed.

T. T. James, for plaintiff in error. Tomlinson Fort, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 789)

FLOWERS v. STRICKLAND. (No. 3,816.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

PARTNERSHIP (§ 220*)—JUDGMENT AGAINST FIRM—LIABILITY OF PARTNERSHIP.

The individual assets of a member of a partnership cannot be subjected to a judgment against the partnership alone, and not against the individual partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 446-469; Dec. Dig. § 220.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by Flowers & Whilden against W. L. Strickland. Judgment for defendant. On levy of *fi. fa.* on property of W. R. Flowers, he interposed an affidavit of illegality, and on judgment holding the property liable, he brings error. Reversed.

F. Willis Dart, for plaintiff in error. W. B. Smith, for defendant in error.

RUSSELL, J. Flowers & Whilden brought suit in the city court of Tattnall county against W. L. Strickland to recover the unpaid balance of the purchase price on the alleged sale of a piano. The petition was brought in the name of Flowers & Whilden, a partnership alleged to be "composed of

Flowers and E. B. Whilden." Strickland filed a plea of set-off, and upon the trial the jury sustained his contention, and rendered a judgment in favor of the defendant against the partnership of Flowers & Whilden. The judgment was rendered March 6, 1906. On December 30, 1910, the *fi. fa.* issued upon the above judgment was levied upon a lot in the city of Douglas as the property of W. R. Flowers. He interposed an affidavit of illegality, containing two grounds: (1) That he had never been served with any process or other notice of the pendency of the suit whereupon said execution is based, nor did he waive service, nor did he appear in or defend said suit; and (2) that the execution is against Flowers & Whilden, and not against the deponent, W. R. Flowers, and for that reason could not proceed against the individual property of the deponent, which is not subject to the execution.

It will be noted that there was no judgment taken against the individuals composing the firm of Flowers & Whilden; also that in the original petition filed by Flowers & Whilden the initials of Flowers are not given. The partnership is said to consist of "Flowers and E. B. Whilden." It is needless to determine whether the defendant, when he filed his set-off, might have had the individual members of the plaintiff partnership served and thus have bound them individually for any judgment rendered in his favor. It is a matter, also, of some interest to conjecture what might have been the effect if Flowers had been present, participating in the trial, and in that event an individual judgment had been asked.

Regardless, however, of the first ground of the affidavit of illegality, we are clear that the court erred in striking the affidavit, because the second ground is meritorious. The name of W. R. Flowers does not appear anywhere in the proceedings introduced in evidence in the trial in the court below. To bind individual assets of a partner, the partner himself must be served, and must have had his day in court. The execution cannot be made broader than the judgment, nor the judgment be broader than the original proceeding upon which it is based. For this reason, we think the illegality should have been sustained.

Judgment reversed.

(10 Ga. App. 689)

McNAMARA v. GEORGIA COTTON CO.

(No. 3,732.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 116*)—OPERATION OF BAR OF STATUTE—AUTHORITY OF AGENT.

It is not necessary that an agent should have written authority to execute in behalf

of his principal a contract required by the statute of frauds to be in writing; but such authority may be conferred by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.*]

2. SALES (§ 406*)—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT—CONDITION PRECEDENT.

Where an executory contract for the sale and delivery of personal property at a specified time is entered into, and the seller fails to deliver the property at the time and place agreed on, demand for delivery is not a necessary condition precedent to the bringing of an action for damages by the purchaser for the breach of the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1156-1158; Dec. Dig. § 406.*]

3. EVIDENCE (§ 594*)—WEIGHT AND SUFFICIENCY—VALUE.

Testimony of a witness having personal knowledge as to the market value of a commodity at a given time and place is evidence of a substantive fact, and, if undisputed, will demand a finding that the commodity was of the value fixed by the witness. In such a case, the jury cannot arbitrarily disregard such testimony, and substitute their own opinion as to the market value of the commodity.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2431; Dec. Dig. § 594.*]

4. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

In the trial of an action for damages for the breach of a contract such as that referred to in the preceding headnote, memoranda sent by the plaintiff to its agent, who negotiated the contract, indicating that the cotton described in the contract had been resold by the plaintiff, are mere self-serving declarations, and as such are inadmissible in support of the plaintiff's contention that an actual delivery of the cotton was contemplated.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

5. EVIDENCE (§ 437*)—PAROL EVIDENCE AFFECTING WRITING—SHOWING INVALIDITY OF CONTRACT.

A contract apparently legal on its face may be shown to have been founded upon an illegal consideration. Where two parties enter into a contract under the terms of which one agrees to sell and deliver at a certain time and place, and the other agrees to take and pay for, cotton of a described quantity and quality, parol evidence is admissible to show that neither of the parties contemplated delivery of the cotton, but that the contract was intended as a mere speculation upon chance, to be settled upon the difference between the agreed price and the market value at the time and place fixed for delivery.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2025-2029; Dec. Dig. § 437.*]

6. DIRECTION OF VERDICT—NO ERROR.

Applying to the facts of the present case the principle stated in the last preceding headnote, the court erred in directing a verdict in favor of the plaintiff.

Error from City Court of Ashburn; R. L. Tipton, Judge.

Action by the Georgia Cotton Company against J. W. McNamara. Judgment for plaintiff, and defendant brings error. Reversed.

Haygood & Cutts, for plaintiff in error. J. T. Hill, J. H. Pate, and J. W. Dennard, for defendant in error.

POTTLE, J. The Georgia Cotton Company sued McNamara for the breach of a contract alleged to have been contained in three letters. The following is a copy of one of these letters:

"Fitzgerald, Ga., May 19, 1909.

"Mr. J. W. McNamara, Rebecca, Ga.—Dear Sir: In consideration of one dollar in hand paid, and for value received, we beg to confirm having purchased of you to-day, as follows: One hundred bales (100) of cotton, basis good middling, Savannah classification, at ten and one-quarter cents (10¼) per pound f. o. b. Rebecca, Georgia. This cotton to be delivered to us in good merchantable condition, and reweighed, during the month of November, 1909, not later than the 25th day. This cotton to average in weight between four hundred and eighty (480) and five hundred and twenty (520) pounds per bale. Ruling differences between grades at the time of delivery to apply. Please confirm. Yours very truly, [Signed] Georgia Cotton Co., Thos. Nesbitt."

At the bottom of the letter appeared the following:

"Rebecca, Ga., May, 1909.

"Dear Sirs: I confirm the above contract, and will deliver the cotton as above agreed.

"[Signed] J. W. McNamara."

At the trial the judge directed a verdict in favor of the plaintiff, for an amount representing the difference between the purchase price agreed on and the market value of the cotton at the time and place of delivery, as shown by the evidence. The defendant has sued out a direct writ of error, complaining of this ruling.

[1] 1. The contract sued on is in substantially the same form and language as that involved in *Terry v. International Cotton Co.*, 136 Ga. 187, 70 S. E. 1100. The letter addressed to the defendant contained an offer to buy from him, upon the terms stated in the letter, cotton of the character therein described. The written confirmation and acceptance by the defendant completed the contract, and it thereafter became binding on both of the parties thereto. When the contract was offered in evidence, the defendant objected to its introduction, upon the ground that it did not appear that Thomas Nesbitt, who purported to have signed the letter in behalf of the plaintiff, had written authority from the plaintiff to execute the contract. Substantially the same objection was made to the writing in the case of *Terry v. International Cotton Co.*, supra. The point in that case was raised by demurrer. The Supreme Court held that the petition was not demurrable, either on the ground that the

contract declared upon was unilateral, or that it was too vague, uncertain, or incomplete to satisfy the requirements of the statute of frauds, or that it constituted a mere option, and did not show who were the parties to it. There was no merit in this objection. "There is no statute in this state requiring the authority to make the memorandum required by the statute of frauds to be in writing, and such authority may be conferred by parol." *Brandon v. Pritchett*, 126 Ga. 286 (1), 55 S. E. 241, 7 Ann. Cas. 1093. It appeared from the testimony that Nesbitt was manager for the Georgia Cotton Company at its branch office at Cordele, Ga., that he had been representing the company for several years, that it was engaged in the business of buying and selling cotton, and that he had general authority to represent his principal in and about its business. This evidence was sufficient to have authorized the admission of the writings sued on.

[2] 2. It is contended that the evidence was not sufficient to authorize the verdict, because there was no proof of a demand for the delivery of the cotton prior to the date fixed in the contract for delivery, or prior to the bringing of the suit. The defendant answered, admitting that before the bringing of the suit the plaintiff had demanded payment of the amount of damages which it claimed to have sustained by reason of the defendant's breach of the contract, but stated that whether any demand was made for the delivery of the cotton the defendant "is unable at this time either to admit or deny." This is probably an evasive answer, and should be taken as an admission of the allegation that demand was made. The defendant states no reason why he was unable to admit or deny that demand was made upon him for the delivery of the cotton. He ought to have known whether demand was made or not, and he ought to have answered this allegation directly, or at least by assigning some reason why he was unable to admit or deny. See *Raleigh & Gaston R. Co. v. Pullman Co.*, 122 Ga. 700 (5), 50 S. E. 1008. But we do not think any demand was necessary in a case of this character. The obligation of the defendant was to deliver to the plaintiff a certain described quantity and quality of cotton by a certain date at a certain place. His failure to comply with this obligation was a breach of his contract. The suit to recover damages alleged to have accrued on account of this breach was a sufficient demand under the law. It was not necessary that the plaintiff should have, prior to the bringing of the suit, sought out the defendant and in terms demanded that he comply with his contract.

[3] 3. The plaintiff further contends that the directing of the verdict was error, because, while there was direct uncontradicted evidence as to the market value of the cotton at the time and place of delivery, nev-

ertheless, the jury were not bound by the testimony of a witness as to market value. It is contended that this was opinion evidence, and that the jury would have had a right to disregard the opinion of this expert witness, and substitute their own opinion as to the market value of the cotton. While testimony as to market value does involve the opinion of the witness as to what a particular commodity is worth, at the same time it is not such an opinion of a witness testifying as an expert as that the jury would have a right to absolutely disregard it, where it was uncontradicted. The witness in this case was engaged in the business of buying and selling cotton. He was familiar with the market price of cotton at the place of delivery fixed in the contract. This familiarity was gained by him, and this opinion was entertained by him, by reason of the fact that he was engaged in the business of buying and selling cotton, and had personal knowledge as to the market value of the commodity at the time and place of delivery stipulated in the contract. In our opinion, this was testimony of a substantive fact, and, being wholly uncontradicted, the jury would have had no right to disregard it.

The plaintiff in error relies upon the case of *Baker v. Richmond City Mill Works*, 105 Ga. 225, 31 S. E. 426, to the effect that the jury were not bound by the testimony of an attorney as an expert as to the value of the services of another attorney in a particular case. What has been said above sufficiently distinguishes this case. The case last referred to was cited with approval in *A., B. & A. Ry. Co. v. Howard*, 125 Ga. 478, 54 S. E. 530, which involved the question of the market value of certain cross-ties. The witness there testified that the market price of the cross-ties in Brunswick was about 44 cents. In commenting upon this testimony, Mr. Justice Evans said that, in the first place, it was not to be regarded as positive and unequivocal proof that the article had the exact value stated by the witness, but that it was merely an expression of an opinion on the part of the witness. He then added: "But it is a mistake to suppose that the opinion of an expert witness on the subject is absolutely binding on the jury, and it is error to direct a verdict upon any such supposition." The learned justice was evidently dealing with this witness as an expert, and not only as an expert, but as a witness who was unwilling to risk his opinion far enough to make an exact statement as to the market value of the commodity. That the Supreme Court did not intend its ruling to go to the extent claimed by the defendant in error is evidenced by the fact that in the case of *Watson v. Hazlehurst*, 127 Ga. 298, 56 S. E. 459, the court affirmed the direction of a verdict involving the market value of cotton on a particular date in the city of Savannah solely upon the testimony of a witness that it was worth a certain price. The

case last referred to involved an action for damages for the breach of a contract similar to the one under investigation in the present case.

The case differs from *Martin v. Martin*, 135 Ga. 162, 68 S. E. 1095, and *Minchew v. Nahunta Lumber Co.*, 5 Ga. App. 154, 62 S. E. 716, where it was held that the jury were not bound by the opinion of a witness as to the value of specific property directly involved in the trial. In cases of this character there may be, and usually is, proven data from which the jury might form an independent estimate as to value. But where the issue is as to the market value of a commodity at a place other than that of the trial and at a time long anterior thereto, how can it be said that the jury can arbitrarily substitute their mere speculative opinion for the positive and uncontradicted testimony of a witness who professes to know what the market value was at the time and place in question? For instance, suppose that, in a case tried in Georgia in 1912, the question of the market value of wheat in Chicago in 1900 was in issue, and a witness familiar with the Chicago market at that time testified unequivocally to the value of the wheat; would a Georgia jury, without any data whatever, be permitted to disregard this testimony and substitute its own opinion? We think not, nor do we think the authorities require a contrary ruling. See *Atlantic Coast Line R. Co. v. Harris*, 1 Ga. App. 668, 57 S. E. 1030.

[4] 4. The court admitted in evidence, over objection of the defendant, certain letters written by an officer of the plaintiff to another officer in Cordele. These letters contained memoranda which indicated that the cotton bought from the defendant had been resold by the plaintiff. Evidence of this character would be material on the question as to whether actual delivery of the cotton was contemplated by the parties, and would be a circumstance tending to show that the plaintiff did expect delivery of the cotton; but the evidence offered to prove this fact was not admissible for this purpose. The letters were merely self-serving declarations on the part of the plaintiff, and were, consequently, inadmissible to prove the fact sought to be established.

[5, 6] 5, 6. But we do think the court erred in directing a verdict in favor of the plaintiff. The defendant pleaded that the contract sued on was intended by both parties to be simply a speculation in futures, that actual delivery of the cotton was not contemplated, and that the parties expected to settle with each other upon the difference between the purchase price and the market value at the time and place of delivery. In the recent case of *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596, it was held: "Parol evidence is competent to show that a written

contract apparently relating to an actual sale of cotton was in fact entered into merely for the purpose of allowing the parties to deal in cotton futures." The defendant testified as follows: "Prior to the making of these contracts, early in the season, we agreed to do some future business. The way we agreed, he was to do one side, and me the other; one to buy, and one to sell. The writings were to be fixed up some later day. When we made such future contracts, they were to be discharged by the difference to be paid in money. What was said was that if he lost he was to pay, and if I lost I was to pay. These three letters put in evidence, dated May 19, June 30, and July 7, 1909, under which I wrote the confirmation, were in pursuance of that conversation and followed it up." It is very clear to our minds that, if the jury should credit this testimony, they would be obliged to find that both the defendant and Nesbitt, the manager of the plaintiff company, understood and agreed that no actual cotton was to be delivered, and that the contract was made in pursuance of a mere speculative venture, obnoxious to the law.

We therefore send the case back, that it may be submitted to the jury upon the issue as to whether or not actual delivery of the cotton was contemplated; in other words, whether the writings spoke the truth, or whether, notwithstanding the actual agreement to deliver expressed in the face of the writings, it was nevertheless understood and agreed by both parties, at the time the contract was entered into, that actual delivery of the cotton would not be required, but that the parties would settle simply upon the difference existing at the time of delivery between the market value of the cotton and the purchase price as fixed in the contract. See *Farmers' Oil Co. v. Rosenthal*, 73 S. E. 428. Judgment reversed.

(10 Ga. App. 696)

CENTRAL OF GEORGIA RY. CO. v. ROUNTREE. (No. 3,753.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. REQUESTS TO CHARGE—SUFFICIENCY OF GENERAL INSTRUCTIONS.

The written requests to charge, so far as applicable, are fully and clearly covered by the general instructions to the jury.

2. CONSTRUCTION OF CHARGE AS A WHOLE.

The excerpts from the charge of the court, considered in connection with the charge as a whole, contain no error.

3. COMPARATIVE NEGLIGENCE—DIMINUTION OF DAMAGES—STATUTORY PROVISIONS.

The law of comparative negligence and consequent diminution of damages, embodied in Civil Code 1910, § 2781, was correctly charged, and the size of the verdict indicates

that it was applied to the evidence by the jury favorably to the defendant.

4. SUFFICIENCY OF EVIDENCE—No ERROR.

No error appears, and the evidence fully supports the verdict.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by Lizzie Rountree against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. H. Saffold and J. J. Harris, for plaintiff in error. Goodwin & Wood, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 697)

MICHIGAN MUT. LIFE INS. CO. v. PARKER. (No. 3,756.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 593*)—HEARSAY—WEIGHT.

Hearsay evidence has no probative value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2430; Dec. Dig. § 593.*]

2. PRINCIPAL AND AGENT (§ 22*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

Agency cannot be shown by the mere declarations of the alleged agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

3. INSURANCE (§ 76*)—AGENTS—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

Where suit was brought by a life insurance company upon a promissory note given for a premium due upon a policy of insurance, and the defense was that an authorized agent of the plaintiff had accepted a return of and canceled the policy, and relieved the defendant from the obligation to pay the unearned portion of the premium, it was error to admit in evidence, over objection duly made, a letter purporting to have been written by the alleged agent from a place other than the home office of the company to a third person upon stationery of the company, to which letter the writer signed his name as "general agent" of the plaintiff. Such a letter was at most only a declaration of agency by the alleged agent. Nor did the letter have any probative value because in the heading were printed the name of the plaintiff and the name of the alleged agent, with the words "general agent" after his name, there being no proof that the plaintiff had authorized the publication and use of such stationery. Had the letter been written from the home office of the company, and shown upon its face that it was in reply to one written by the addressee to the company, the rule might be different. *Raleigh Railroad Co. v. Pullman Co.*, 122 Ga. 700, 708, 50 S. E. 1008.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 101; Dec. Dig. § 76.*]

4. INSURANCE (§ 92*)—AGENTS—EVIDENCE OF AUTHORITY.

Evidence that one is employed as "general agent" of an insurance company is not sufficient, without proof as to his duties, to show authority to release a debtor from the obligation of a note payable to the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 122; Dec. Dig. § 92.*]

5. RATIFICATION OF ACTS OF AGENT—EVIDENCE—MOTION FOR NEW TRIAL.

There was no evidence that the plaintiff had ratified the release of the defendant by accepting the return of the policy of insurance. A verdict in favor of the plaintiff for the full amount of the note was demanded, and the court erred in overruling the motion for a new trial.

Error from City Court of Tifton; R. Eve, Judge.

Action by the Michigan Mutual Life Insurance Company against C. L. Parker. Judgment for defendant, and plaintiff brings error. Reversed.

R. D. Smith, for plaintiff in error. Fulwood & Skeen, for defendant in error.

POTTLE, J. Judgment reversed.

(10 Ga. App. 753)

FOUNTAIN v. FOUNTAIN. (No. 3,869.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

CHATTEL MORTGAGES (§ 261*)—MORTGAGE ON CROP—RIGHT OF SALE.

While a cropper has a "mortgageable interest" in the crop, this interest cannot be subjected to levy and sale under the mortgage until the cropper acquires title, and this he cannot do "until there has been an actual division and settlement" with the landlord.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 261.*]

Error from City Court of Ashburn; J. W. Haygood, Judge pro hac.

Action between Charlie Fountain and Archie Fountain. From the judgment, Charlie Fountain brings error. Affirmed.

W. T. Williams, J. A. Comer, and A. S. Bussey, for plaintiff in error. J. H. Tipton, for defendant in error.

POTTLE, J. The cropper executed a mortgage upon his interest in the growing crops. To the levy of the mortgage execution the landlord filed a claim. When the case was here before (7 Ga. App. 361, 66 S. E. 1020) the court held that the mortgage was valid and enforceable, and that the landlord could not, even with the cropper's consent, defeat the mortgage by applying the mortgaged property to an indebtedness created for supplies furnished the year before. At the second trial it was admitted that at the time of the levy the crop mortgaged was ungathered in the field and no division had been made between the landlord and cropper. The plaintiff in *fi. fa.* offered to show that at the time of the levy the cropper was not indebted to the landlord for supplies or advances. The judge refused to allow this, and entered up a judgment dismissing the levy.

The exact question thus presented is whether or not the interest of the cropper is sub-

ject to levy and sale before the landlord has received his half of the crop, but after he has been paid in full for all supplies and advances furnished by him to the cropper. The title to the whole of the crop is in the landlord "until there has been an actual division and settlement." *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204; *Harley v. Davis*, 7 Ga. App. 386, 66 S. E. 1102; *Taylor v. Coney*, 101 Ga. 657, 28 S. E. 974; Civil Code 1910, § 3707. The manifest policy of the law is to give the landlord complete control over the crop until he has actually received his portion of the crop and had his lien for supplies and advances paid off in full. While the cropper has a "mortgageable interest" in the crops, such interest cannot be subjected to the mortgage debt until the cropper has acquired title, and this he cannot do before a division between himself and the landlord. The "interest" may ripen into a title, but there can be no levy before it does. See, in this connection, *Jordan v. Jones*, 110 Ga. 47, 85 S. E. 151. If the cropper owes the landlord nothing, there must be some way to protect the creditor. This court has held that garnishment is not the remedy. *Thompson v. Passmore*, 9 Ga. App. 771, 72 S. E. 185. A division must be made at some time; but if by collusion the landlord and the cropper attempt to defeat the creditor, by refusing to make a division or otherwise, undoubtedly equity would afford relief.

The case seems to have been submitted to the presiding judge to determine all issues of law and fact. If so, a judgment should have been entered finding the property not subject to the mortgage *fi. fa.*, but as the judgment entered was a final termination of the case in favor of the claimant, and he does not complain, the plaintiff in *fi. fa.* has not been hurt.

Judgment affirmed.

(10 Ga. App. 588)

BUSH v. HESSIG-ELLIS DRUG CO.

(No. 3,321.)

(Court of Appeals of Georgia. Feb. 29, 1912.)

(*Syllabus by the Court.*)

1. SALES (§ 354*)—REMEDIES OF SELLER—ACTION FOR PRICE—PLEADING.

There was no error in striking the defendant's answer. In the absence of any effort to amend it, the averments of the answer were too vague and indefinite to present a defense, either as a plea of tender or as a plea of failure of consideration.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 354.*]

2. SALES (§ 347*) — ACTION FOR PRICE—DEFENSES.

There was no error in refusing a nonsuit. The suit was upon an account for the price of a certain beverage. The plaintiff introduced in evidence, without objection, a tripartite contract, signed by the defendant, as "dispenser," and by the plaintiff as "distributor," in which the defendant agreed to purchase and dispense

a certain quantity of such beverage, manufactured by the third party to the contract. The fact that a third party was the manufacturer would not relieve the defendant from his obligation to the plaintiff under this contract.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 347.*]

3. INTOXICATING LIQUORS (§ 829*) — ACTION FOR PRICE.

The court erred in excluding testimony offered by the defendant to the effect that the beverage purchased by him was intoxicating. The contract between the plaintiff and the defendant required the plaintiff to sell and deliver to the defendant a nonintoxicating beverage. Ordinarily, where one purchases intoxicating liquor in a state in which the sale of such intoxicants is authorized by law, and the contract provides that it is to be performed in that state, he is liable for the purchase price; and the fact that under the contract the liquor is delivered to the purchaser in a state in which the sale of intoxicating liquors is unlawful would present no defense to an action brought to recover the purchase price. However, the ruling of the trial court, to the effect that, though the beverage sold might be intoxicating, that fact alone would not relieve the defendant from paying for it (though generally a correct statement of law in the abstract), was error in the present case, because the court overlooked the provisions of the contract involved, which required the delivery of nonintoxicating beverage.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 829.*]

Error from City Court of Miller County; *W. I. Geer*, Judge pro hac.

Action by the Hessig-Ellis Drug Company against E. B. Bush. Judgment for plaintiff, and defendant brings error. Reversed.

P. D. Rich, for plaintiff in error. Bush & Stapleton, for defendant in error.

RUSSELL, J. The Hessig-Ellis Drug Company sued Bush upon an account stated. The defendant pleaded that the goods shipped to him were intoxicating liquors, and that the consideration was therefore illegal. He sought also to plead tender. By amendment, which was stricken upon demurrer, he set out certain representations alleged to have been made to him by the agent of the plaintiff, in regard to the nonintoxicating quality of the beverage which was the subject-matter of the contract between the parties, and in reference to a certificate, which it was alleged was to be forwarded from some officer of the internal revenue service. In the amendment he attempted also to plead a tender to return the goods and failure of consideration. Upon the trial the court ruled out certain testimony upon the subject of tender, and also testimony of defendant to the effect that "Fan Tan," the beverage he had purchased, was intoxicating, that it was to be sold from the defendant's soda fount as a beverage, and that, as it was intoxicating, it was valueless to the defendant. In regard to the latter testimony the court certifies that he did not allow the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

testimony, because, even though the articles sold might be intoxicating, that fact itself would not relieve the defendant from paying for it. The trial resulted in a verdict in favor of the plaintiff for the amount sued for. The defendant excepts to the judgment overruling his motion for a new trial and to the ruling striking the amendment to his answer.

[1, 2] 1, 2. With the above statement of facts and rulings contained in the headnotes, no further discussion of the first two points raised in the case would be profitable. Upon another trial it may be that the defendant can file a plea of tender conforming to the legal requirements; and he may also be in possession of facts which will enable him to file a good plea of failure of consideration, for if he purchased a nonintoxicating beverage, and can establish that the liquid shipped to him was intoxicating, that would be a total failure of consideration, because the contract introduced by the plaintiff deals wholly with a nonintoxicating beverage. It is so described in the first statement in the contract.

[3] 3. According to the certificate of the trial judge, the testimony in regard to the intoxicating quality of the "Fan Taz" was excluded, because the court was of the opinion that, "even though the stuff sold might be intoxicating, that within itself would not relieve defendant from paying for same." The court's ruling upon the subject of tender was correct (if for no other reason), because there was no plea of tender after the court had stricken the amendment. We think the court erred in excluding, upon the ground stated, the testimony to the effect that the "Fan Taz" purchased was an intoxicating liquor. The defendant had the right to show, if he could, that the liquid shipped to him was intoxicating, and this would have constituted a good defense. He could, perhaps, have established this fact even under the denials of indebtedness contained in his original answer. The first words in the contract introduced by the plaintiff, and the signing of which by the defendant gave the plaintiff a cause of action, are "nonalcoholic beverages." In the absence of a plea setting out that this language was deceptive, and used merely as a subterfuge to cover a purchase of intoxicating liquors, forbidden by law, these words in the very forefront of the contract import a warranty that the "Fan Taz" thereafter mentioned was nonalcoholic; certainly that it was not sufficiently alcoholic to be intoxicating.

Under the ruling in the Roberts Case, 4 Ga. App. 207, 60 S. E. 1082, it is possible that such a contract would not be violated if the beverage contained vegetable matter which required the presence of alcohol to preserve it, and if the percentage of alcohol used for that purpose was not sufficient to produce in-

toxication. But we doubt this, because the contract dealt with a beverage, and, under the provisions of the general prohibition law, no alcoholic intoxicating beverage can lawfully be sold. It is not to be presumed that the defendant, who was buying an article by wholesale, to sell it in turn at retail, willfully intended to violate the law. Certainly, if the amount of alcohol in the "Fan Taz" was sufficient to produce intoxication, so that "Fan Taz" could properly be said to be not only alcoholic, but intoxicating as well, the sellers would have violated their obligation under the contract to furnish the purchaser what he contracted to buy, namely, a nonalcoholic beverage.

It is, of course, settled, by numerous decisions (see especially *Rose v. State*, 133 Ga. 356, 357, 358, 359, 65 S. E. 770, and citations), that one who is lawfully engaged in interstate commerce in intoxicating liquors in one state may sell such intoxicating liquors in another state, though such sales be prohibited by law within the limits of the latter state; and for this reason, among others, the plea which the defendant sought to interpose was properly stricken. The allegations of the plea (so far as it sought to set up that the contract was illegal and contrary to public policy) presented no issuable defense. If the defendant had ordered intoxicating liquors to be shipped by a dealer in Tennessee, engaged in interstate commerce in intoxicating liquors, and had received an intoxicant of the kind he ordered, and in accordance with the terms of his order, the debt would be enforceable against him, if no other reason appeared for its nonpayment than that the contract was outlawed, as contrary to good morals and the public policy of this state. The courts of this state may by comity enforce or refuse to enforce the laws of a sister state, dependent upon whether such laws, or contracts sought to be upheld under them, contravene the well-settled policy of Georgia; but the question with which we are now dealing is controlled by the constitutional right of Congress to regulate interstate commerce. Under our own state Constitution, the federal law takes precedence of ours.

The trial judge correctly stated this general abstract principle in his ruling upon the testimony, but it was not applicable to the case. He erred in excluding testimony offered by the defendant to the effect that the beverage purchased was intoxicating, because the contract between the plaintiff and the defendant required the plaintiff to sell and deliver to the defendant a nonintoxicating beverage. The question presented was, not whether the sale was outlawed because the sale of intoxicants is prohibited in Georgia, but simply a question as to whether the purchaser had received what he ordered. Ordinarily where one purchases intoxicating liquor in a state in which the sale of such intoxicants is authorized by law, and the con-

tract provides that it is to be performed in that state, he is liable for the purchase price; and the fact that under the contract the intoxicating liquor is delivered to the purchaser in a state in which the sale of intoxicating liquors is unlawful would present no defense to an action brought to recover the purchase price. However, the ruling of the trial court to the effect that, though the beverage sold might be intoxicating, that fact alone would not relieve the defendant from paying for it (though generally a correct statement of law in the abstract), was error in the present case, because the court overlooked the provisions of the contract involved, which required the delivery of a nonintoxicating beverage.

The defendant would not be permitted, under the rulings cited in the *Rose Case*, supra, to assert that the contract was void because the sale of intoxicating liquors in Georgia is prohibited, if he had purchased alcoholic and intoxicating liquors; but he should have been permitted to prove, under his answer and the amendment which was first filed, and which was not stricken, that alcoholic and intoxicating liquor was shipped him, instead of the nonalcoholic beverage which was the subject-matter of his contract of purchase. Of course, if the judge had not placed his ruling upon the ground which he expressly certifies by note, the ruling excluding the testimony might be sustained, because the answer might have been a mere conclusion of the witness, without any facts upon which to base such conclusion. The defendant would have the right to show that the "Fan Taz" he received was intoxicating; but to do this there must be definite evidence of substantive facts or experiment from which such conclusion would reasonably arise, and not a mere statement of opinion or conjecture.

Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 785)

J. S. WOOD & BRO. v. M. E. JONES & SON.
(No. 3,811.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

**1. FACTORS (§ 43*)—DUTIES AND LIABILITIES
—BREACH OF CONTRACT.**

Where a cotton factor makes with his principal an express contract to hold the cotton until instructed by his principal to sell, if the factor sells in the absence of instructions from the principal, the latter may recover whatever damages he has sustained. The measure of the damages would be the difference between the price for which the cotton was sold and the highest proven market value of the cotton at the place where it was sold at any time between the date of the sale and the date of the trial. If in such a case the factor

sues the principal for advances previously made upon the cotton, the principal may recoup whatever damages he has sustained by reason of the breach of the contract by the factor.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 45-57; Dec. Dig. § 43.*]

2. SUFFICIENCY OF EVIDENCE—NO ERROR.

There was no error of law committed, and the verdict was fully warranted by the evidence.

Error from City Court of Statesboro; J. H. Smith, Judge.

Action by J. S. Wood & Bro. against M. E. Jones & Son. Judgment for defendants, and plaintiffs bring error. Affirmed.

The suit was upon a promissory note, dated September 12, 1906, and due January 12, 1907, payment of which was secured by a deed to land. Contemporaneously with the note and the deed the defendants executed a writing in which they agreed that, in consideration of advances aggregating the principal of the note sued on, they would deliver to the plaintiffs, for sale for account of the defendants, one bale of upland cotton for every \$10 which had been or might be advanced. The instrument was not signed by the plaintiffs. The writing further provided: "All cotton I deliver for sale or remittances I may make to J. S. Wood & Bro. shall at their option be applied, first, to the credit of any open account I may owe them and to the payment of damages aforesaid, up to the time of a final settlement, and that the above note or notes shall remain in full force, until such settlement." The defendants filed an answer, setting up that the note was given to secure the plaintiffs for advances made to the defendants upon 45 bales of upland and 48 bales of Sea Island cotton which had been shipped to the plaintiffs as factors to be sold by them for the defendants' account; that when the note was executed the plaintiffs agreed to hold the cotton "until the same was ordered sold by the defendants"; that in violation of this agreement the plaintiffs sold the cotton at reduced prices, to the damage of the defendants in a named sum; that if the Sea Island cotton had been held and sold on December 12, 1906, it would have been worth 34½ cents per pound, and if the upland cotton had been held and sold "about the 2d day of December, 1906," it would have been worth 11½ cents per pound. The answer avers that the cotton was actually sold by the plaintiffs without any instructions so to do from the defendants, on a date prior to the dates above mentioned and for a less price than it was worth on those dates. The defendants base their right to recoupment upon the facts just recited. A demurrer to the answer was overruled, and the defendants prevailed at the trial. The plaintiffs assign error upon the refusal of a new trial, and also upon the refusal to strike the defendants' answer.

Brannen & Booth, for plaintiffs in error. J. J. E. Anderson, Deal & Renfro, and Hines & Jordan, for defendants in error.

POTTLER, J. (after stating the facts as above). [1] One ground of the demurrer raised the point that the defendants were not entitled in this action to recoup the damages which they claimed to have sustained by reason of the breach of contract by the plaintiffs. The defendants alleged that the consideration which moved them to execute the note sued on and the deed which was given to secure it was the express contract, then and there made with the plaintiffs, under which they agreed to hold the defendants' cotton until instructed by them to sell. "Between the parties themselves any mutual demands, existing at the time of the commencement of the suit, may be set off." Civil Code 1910, § 4340. "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract." Civil Code 1910, § 4350. "It differs from a set-off in this: The former is confined to the contract on which plaintiff sues, while the latter includes all mutual debts and liabilities." Civil Code 1910, § 4351. "Recoupment may be pleaded in all actions ex contractu, where from any reason the plaintiff under the same contract is in good conscience liable to defendant. And in all cases where, under the laws of this state, recoupment may be pleaded, if the damages of the defendant shall exceed, in amount, those of the plaintiff, the defendant shall in such cases recover of the plaintiff the amount of the excess." Civil Code 1910, § 4353; *Hatcher v. Comer*, 73 Ga. 418. Under these sections of the Code it is clear that there was no merit in this ground of the demurrer.

The further point is made that the defendants should not be permitted to set up the parol agreement with the plaintiffs, because to do so would be to add to or vary the written contract; it being claimed that, inasmuch as one of the writings comprising the contract stipulated that the defendants would deliver the cotton to the plaintiffs for sale for account of the defendants, it would be a variance from this contract to permit proof of the contract as relied on by the defendants. There is no merit in this point, because it is expressly alleged in the answer that, when the plaintiffs demanded of the defendants additional security for the advances which had been made and which were to be made in the future, the defendants consented to execute the note and the deed upon the express agreement of the plaintiffs not to sell the cotton until instructed so to do by the defendants. Under this allegation of the answer the plaintiffs' promise was a consideration for the execution of the note and the deed. The plaintiffs seek, not

only a general judgment on the note, but a special judgment against the land described in the deed, and, as the consideration of a deed may always be inquired into when the principles of justice require it (Civil Code 1910, § 4179), this ground of the demurrer was properly overruled.

The point is made by demurrer, objections to the evidence, and exceptions to the judge's charge, that the contract relied on by the defendants as the basis of the plea of recoupment was too uncertain and indefinite in its terms to be capable of enforcement, and that the defendants cannot arbitrarily select December 2d and December 12th as the dates from which they estimate the amount of damages which they had sustained; and it is further insisted that, even if the contract was sufficiently definite and certain to be otherwise capable of enforcement, under the law applicable to the case the plaintiffs had a right to sell the cotton without any instructions from the defendants for the purpose of reimbursement for advances made. The plaintiffs had an agency coupled with an interest, and as such agents had a right, in the absence of a special contract, to sell the cotton in their discretion to reimburse themselves for advances previously made. Where there is an agency coupled with an interest, unreasonable instructions detrimental to the agent's interest may be disregarded. Civil Code 1910, § 3578; *Gordon v. Cobb*, 4 Ga. App. 49, 60 S. E. 821. But where a factor and his principal have entered into an express contract fixing the price at which the goods consigned are to be sold, or the time when the sale shall be made, the parties are bound by such a contract to the same extent and in the same way that parties are ordinarily bound by their contracts. *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550. If the contract was actually made as contended by the defendants, the plaintiffs were guilty of a conversion in selling the cotton without instructions, and an action of trover could have been maintained against them for the recovery of the cotton or its value. In the case of *Whigham v. Fountain*, 132 Ga. 277, 63 S. E. 1115, this course was pursued. It appeared in that case that the plaintiff sent to factors a certain lot of cotton upon which they advanced him money, and it was expressly agreed between the plaintiff and the factors that the cotton was not to be sold to cover the advances, except by the plaintiff's consent and after due notice to him. The Supreme Court held that the parties were bound by this contract, and that the plaintiff was entitled to recover in trover the highest proved value of the cotton between the date of the conversion and the date of the trial. It necessarily follows from this decision that, where the owner of the cotton elected to wait until sued for the advances made by the factor, he would have a right to rely upon the fact that the factor

had damaged him in a sum greater than the amount sued for by selling the cotton without any instruction from him to do so and in violation of an express contract made between the parties.

In this case the defendants selected two dates, and calculated the damages which they claimed to have sustained upon the market price of cotton on those dates. One of the defendants testified that he had actually sold cotton in Savannah on those two dates, knew what the market price was at that time, and that he would have then sold the cotton which he had consigned to the plaintiffs, if he had had it. Without reference to whether the statement as to what the defendant would have done is too uncertain in an ordinary case, it has no application here, because he would have had a right to take as the basis for the estimate of damages the highest market value of the cotton on any date between the time of the conversion by the plaintiffs and the date of the trial. *Gray v. Bass*, 42 Ga. 270; 3 Am. & Eng. Ency. L. (1st Ed.) 829. It can afford the plaintiffs no ground of complaint that the defendants selected December 2d and December 12th. Especially so in view of the fact that there was evidence showing that at a later date cotton was worth more in the market in Savannah than it was on these two dates. The court did not err in overruling the ground of the demurrer to the defendants' answer hereinbefore referred to, nor was there any error in admitting evidence or in charging upon the theory that, if the defendants proved the contract which they alleged to have been made, they would be entitled to recover against plaintiffs whatever damages they could show they had sustained.

The demurrer, having been filed more than a year after the filing of the answer, cannot be considered, save in so far as it raised the question that the answer did not set forth any defense to the action. The judge's charge was sufficient on the question of the measure of damages, in the absence of a request for more specific instructions. There was enough in the charge for the jury to understand that, if they found in favor of the defendants, they were to find the amount of the difference between the sum realized by the plaintiffs for the cotton and the price they could have realized on the dates on which market value was shown, and that, if this sum exceeded the balance of advances for which the plaintiffs sued, the defendants would be entitled to recover the difference.

[2] The evidence was conflicting, but there was testimony directly substantiating the allegation in the answer with reference to the contract relied on by the defendants, and the verdict was fully supported by the evidence.

Judgment affirmed.

(10 Ga. App. 730)

COOPER v. BROWN, Governor. (No. 3,810.)
(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. BAIL (§ 79*)—CRIMINAL PROSECUTIONS—RELEASE OF SURETIES—REARREST OF PRINCIPAL.

When the principal in a criminal recognizance conditioned for his appearance to answer a specific criminal charge therein designated is thereafter arrested for an entirely distinct offense, and, being found guilty of the latter offense, is delivered into the custody of the state to serve a term upon the public works in accordance with the sentence of a court of competent jurisdiction of this state, the sureties on the bond are released. The release of the sureties from future liability arises from their inability to produce their principal to answer the charge, caused by the act of the state in assuming a custody of their principal to which they were theretofore entitled.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 350-369; Dec. Dig. § 79.*]

2. BAIL (§ 79*)—CRIMINAL PROSECUTIONS—RELEASE OF SURETIES—REARREST OF PRINCIPAL.

The case is not affected by the fact that the principal in the appearance bond escaped from the chain gang after he had entered upon the service of his sentence. When the state took him into custody to serve the sentence of the court, the obligation of the sureties was annulled, and no act of the principal or of the sureties could revive it.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 350-369; Dec. Dig. § 79.*]

Error from City Court of Houston County; C. E. Brunson, Judge.

Action by J. M. Brown, Governor, against J. P. Cooper, upon a criminal recognizance. Judgment absolute against defendant, and he brings error. Reversed.

R. N. Holtzclaw, for plaintiff in error. R. E. Brown, for defendant in error.

RUSSELL, J. [1] The single question presented by this record is whether a judgment absolute upon a criminal recognizance can properly be entered against the plaintiff in error, who signed it as security. As appears from the record and from the agreed statement of facts, Cooper signed an appearance bond as surety of Peter Searcy, conditioned for the appearance of the said Searcy to answer an indictment for a misdemeanor. The indictment and the bond were transferred to the city court of Houston county, and thereafter, the principal failing to appear, a rule nisi was granted and scire facias issued thereon on May 18, 1911. On June 13, 1911, Searcy, the principal, was arrested by the sheriff of Dooly county, and was confined in the common jail of Dooly county until June 15th, when he pleaded guilty to a misdemeanor in the city court of Vienna, and was sentenced to pay a fine of \$75 and costs, or, in default thereof, to serve 12 months on the chain gang of Dooly county. On June 15, 1911, Searcy was delivered to the warden in

charge of the chain gang of Dooly county, and was in the chain gang until July 5, 1911, when he escaped, and he has not been retaken. The warrant under which Searcy was arrested on June 13, 1911, was for a misdemeanor—cheating and swindling—committed in Dooly county, Ga. The sheriff of Dooly county had knowledge that Searcy was wanted in Houston county, to answer to the indictment for misdemeanor, before he was arrested under the warrant for cheating and swindling in Dooly county. Upon this statement of facts the judge of the city court of Houston county entered a judgment absolute against Cooper, as surety, upon the recognizance; and error is assigned upon the rendition of this judgment.

The ruling in *West v. Colquitt*, 71 Ga. 559, 51 Am. Rep. 277, is cited by counsel for both parties in this case. In that case it was held that, "where one has been arrested and given bond to answer for a criminal offense, the sureties on such recognizance are not discharged by the subsequent arrest of their principal on another charge, and the giving of a bond, with other sureties, to answer therefor. If the state should keep him in continued custody, so as to render his production easy for it, but impossible for the sureties, they would be relieved; but the mere temporary restraint prior to the giving of the second bond would not work a discharge." Really the precise question then presented to the Supreme Court, as stated by Chief Justice Jackson, was whether, after sureties had obligated themselves to produce the defendant to answer an offense, they were discharged by a second arrest, for a different offense, and the giving of bail thereon. As to this the court held that the facts would not entitle the sureties on the first bond to be discharged. In reasoning on the fundamental provisions of the Constitution of the United States and the Constitution of this state, by which the right to give bail was granted to every citizen, the learned Chief Justice discusses the question at some length, and says that, "when the bail agree to produce their principal at court, they do so in full view of the fact that the principal may commit another offense, and may give bail for that, under another arrest, and that, because they have agreed to produce his body to answer for the first offense, the state does not bargain with them not to arrest him if he sins again, and then that her highest law guarantees to him the right to give other bail to answer that. The state does an act perfectly lawful when she so arrests him for a second offense." This really concludes the ruling upon the point actually before the court. What immediately follows is an opinion as to the law under a supposable case not then before the court, and therefore in strictness is mere obiter. However, the reasoning seems to us so unanswerable that, in the light of what is said by the Supreme Court in *Buffington v. Smith*, Govern-

or, 58 Ga. 341, and *Hartley v. Colquitt*, Governor, 72 Ga. 352, we shall adopt the view of the learned Chief Justice upon the point which is now squarely presented to us. Treating of such a state of facts as those now before us, Chief Justice Jackson says: "If she [the state] should keep him [the principal] in her own custody, of course the bail in the first case would be discharged, because she could produce him, but they could not; and it would be against all reason to punish the sureties for what she did, and by so doing prevent them from keeping their bargain with her, and when all reason for the bail ceased, because she had the man in her own jail or her own penitentiary."

[2] As ruled by the Supreme Court in *Smith, Governor, v. Kitchens*, 51 Ga. 159, 21 Am. Rep. 232, Cooper, the security in the recognizance now before us, cannot be charged with the escape of Searcy from the chain gang of Dooly county. While the defendant is out on bond, he is, in contemplation of law, in the custody of his bail. *Hartley v. Colquitt*, 72 Ga. 352. When the bail signed the bail bond the law placed the principal in his custody. He could have arrested him and delivered him to the sheriff at any time. *Clark v. Gordon*, 82 Ga. 613, 9 S. E. 333. As Searcy, the principal, did not appear in conformity with his obligation, the rule nisi and scire facias thereupon properly issued, and if no action on the part of the state had intervened, and the principal failed to appear at the next term of the court, a judgment absolute would have followed necessarily. In *Dennard v. State*, 2 Ga. 187, as well as in *Roberts v. Gordon*, 86 Ga. 386, 12 S. E. 648, the court was dealing in each instance with a bond which required the defendant to answer the same charge for which he was sentenced; and in that respect these cases differ from the case at bar, in which the bond which is sought to be finally forfeited has no connection with the offense for which the principal in the bond was sentenced. But in our opinion the principle which controlled the ruling in the *Dennard* and *Roberts* Cases, *supra*, must be applied in the instant case, for the reason that Searcy, Cooper's principal, was taken as completely from his control and custody and placed as completely within the power of the state of Georgia when the sheriff of Dooly county, and later the warden of the chain gang, became his custodian, as if he had been placed in the custody of the sheriff of Houston county by Cooper's surrendering him, or by an order from the court requiring him to be rearrested. In *Roberts v. Gordon*, 86 Ga. 387, 12 S. E. 649, Chief Justice Bleckley says: "There can be no doubt that, as soon as the sentence was pronounced, the sheriff, and not the bail, was the proper custodian of the convict. The legal effect of the sentence was equivalent to a special order directing the sheriff to hold him in custody. This being so, it was not necessary to enter an exonere-

tur on the minutes of the court in order to discharge the bail. The sentence itself operated as an exoneration. Governor v. Kemp, 12 Ga. 466." In *Smith v. Kitchens*, supra, Judge McCay in holding that the lower court was right in discharging the securities in a case in which the principal on a prior appearance bond taken by a justice of the peace was arrested under a bench warrant, and remained in the custody of the sheriff until he escaped during the progress of his trial, after saying it would be a very bad public policy to treat the bond given by the defendant before a magistrate as inhibiting the judge of the superior court, even after or before indictment, from ordering the rearrest of the defendant, uses the following language: "Here, after indictment found, the judge issues a bench warrant, over his own signature and seal, ordering an arrest. That arrest was made, the party was in the custody of the sheriff, and escaped. It would, as it seems to us, be an outrage to charge the original securities with this escape. He was in the lawful custody of the sheriff. The securities could not control him."

The facts in the present case are not identical with those in *West v. Colquitt*, supra; but they are very similar to those in *Buffington v. Smith*, 58 Ga. 342, with the single exception that in *Buffington's Case* Earle, his principal, had not escaped. In that case Judge Jackson said: "We think that the court erred. The state had Earle in her own custody—in the penitentiary—just as securely confined as if she held him in jail in Hart county. She had, and now has, nothing to do but to bring him out and try him whenever she pleases to do so. If found guilty, she can sentence him for another term, to

begin when this White county sentence expires. It would be strange indeed if she forfeited a bond for his not appearing, when she had him in the jail in Hart county, and the penitentiary is her great jail, convenient to Hart as to all the rest of the state." After Searcy's sentence he was in the custody of the state in a chain gang under the control of the state. As said by Judge Jackson, the state could have brought him out any day and tried him for the Houston county case. The act of the state in resuming custody of the principal, though perfectly lawful (to use the language of Chief Justice Jackson), put it out of the power of Cooper to maintain custody of Searcy, or to arrest him for the purpose of delivering him to the sheriff of Houston county in order to relieve his bail. When the state took the custody of Searcy as a convict, she assumed the risk of Searcy's escape. Nothing in the record places upon Cooper any responsibility for the escape, and as to that point the case is similar to the case of *Smith v. Kitchens*, supra. But, regardless of the escape, and even if Cooper had been implicated in it, while in that event he would have been subject to indictment, the obligation of the bond ceased and became functus officio when Searcy, Cooper's principal, entered upon his service in the chain gang. Cooper's liability, except as to the costs of the forfeiture, ceased. No act of the principal or of the surety thereafter could revive the bond. The case would have been different if, as in the *West* and *Hartley* Cases, Searcy had given bond and paid his fine in the Dooly county case.

The judge erred in making the judgment upon the bond absolute.

Judgment reversed.

